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# Moral Harassment under Portuguese Law: One Step Behind?

Ana Cristina Ribeiro Costa \*

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## 1. Introduction

Mobbing refers to intimidating, humiliating or embarrassing, harmful or unwanted conduct occurring in the context of an employment relationship that objectively violates the fundamental rights of the worker, namely his dignity, physical and moral integrity<sup>1</sup>. Mobbing also results from systematic behaviour: not only behaviour which is repetitive and offensive, but also the combination of different acts that complement one another to achieve an intended purpose.

According to sections of either legal opinion or case law, the intention to do harm is an essential prerequisite to assess mobbing. Yet the author of this paper does not support the view that mobbing is the result of a particular purpose<sup>2</sup>.

The author's opinion is that no individual purpose exists, since the volitional criterion is "accidental and not essential"<sup>3</sup>. Therefore, mobbing

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\* Ana Cristina Ribeiro Costa is a PhD Candidate at Catholic Portuguese University – Oporto Law School, and a visiting teacher at the Masters' Degree in Labor Law at the same University. The author collaborates with the Católica Research Center for the Future of Law, is a member of the Editorial Board of the Review *Questões Laborais*, and a lawyer at Gama Lobo Xavier, Luis Teixeira e Melo e Associados, Sociedade de Advogados, R.L. [ana.ribeiro.costa@hotmail.com](mailto:ana.ribeiro.costa@hotmail.com).

<sup>1</sup> Pereira, Rita Garcia, *Mobbing ou Assédio Moral no Trabalho. Contributo para a sua Conceptualização*, Coimbra Editora, Coimbra, 2009, p. 72.

<sup>2</sup> See the "intention" requirement, *ibid.*, pp. 87 and following.

<sup>3</sup> C. Molina Navarrete, *La Tutela Judicial frente al Acoso Moral en el Trabajo: de las Normas a las Prácticas Forenses*, Editorial Bomarzo, Albacete, 2007, p. 28.

can affect workers physically and emotionally. Mobbing might also cause cognitive, psychological, psychosomatic, hormonal changes and lack of sleep; it might act on the nervous and muscular system, and ultimately lead to suicide. In this sense, there have been certified cases of depression, post-traumatic stress syndrome, chronic fatigue, allergic responses, alcohol and drug abuse, cardiac and endocrine disorders, physical injuries and psychological distress.

Thus, mobbing entails a psychosocial risk resulting from inadequate organization and management and poor health and safety conditions at work. Certain work-related circumstances exist that can affect workers in either psychological or psychopathological ways. Examples of this are the company's shaky financial situation<sup>4</sup>, a negative performance evaluation, a situation of extreme tension with colleagues or superiors, a continuing worsening of working conditions, receiving notice of termination of employment, a disciplinary sanction, an instance of verbal or physical aggression having occurred in the workplace, long periods of overwork, lack of job stability<sup>5</sup>, stress arising from restructuring, organizational changes, and the lack of resources to carry out the assigned tasks and shift work<sup>6</sup>.

Aside from mobbing, burn out<sup>7</sup>, karoshi syndrome<sup>8</sup>, post-traumatic stress<sup>9</sup>, work addiction<sup>10</sup>, technostress<sup>11</sup>, or simply work-related stress<sup>12</sup>,

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<sup>4</sup> G. García González, "Crisis Económica y Riesgos Psicosociales: el Suicidio como Accidente de Trabajo. Perspectiva Jurídico-Preventiva", *Revista de Derecho Social (RDS)*, No.º 50, 2010, pp. 134 e 135.

<sup>5</sup> Job stability has been widely investigated in this connection. See Pimpão, Céline Rosa, *A Tutela do Trabalhador em Matéria de Segurança, (Higiene) e Saúde no Trabalho*, Coimbra Editora, Maio 2011, p. 35.

<sup>6</sup> Sánchez-Anguita Muñoz, Ángel, *Psicopatologías Laborales*, Publicaciones Universidad Pontificia, Salamanca, 2008, pp. 69 e 70.

<sup>7</sup> Cfr. Pereira, Rita García, *op. cit.*, pp. 152 e 153.

<sup>8</sup> Cfr. Martínez Plaza, César Alfredo, "El Estrés Laboral como Factor de Riesgo de Suicidio (III)", *cit.*, p. 35.

<sup>9</sup> *Ibid.*, p. 35.

<sup>10</sup> Cfr. Rivas Vallejo, Pillar, *La Prevención de los Riesgos Laborales de Carácter Psicosocial*, Editorial Comares, Granada, 2009, p. 6.

<sup>11</sup> *Ibid.*, p. 6.

<sup>12</sup> Cfr. Viergol Lanzagorta, Amaya Martínez de, "La Consideración del Síndrome del "Burnout" como constitutivo de la Contingencia Profesional del Accidente de Trabajo Origen de la Declaración de Incapacidad Permanente Absoluta", *Revista del Ministerio de Trabajo y Asuntos Sociales*, Madrid, No. 59, 2005, p. 217. Vd. also Tolosa Tribiño, César, "Delimitación de las Contingencias Profesionales: Nuevos Riesgos Laborales", *Revista Información Laboral, Legislación y Convenios Colectivos*, No. 20, 2003, p. 15. Mella Méndez argues that one's personality plays a role in the emergence of work-related stress. Cfr. "El

can be relevant and justify certain forms of disability. A pioneer in the regulation of mobbing, Sweden was the first country to qualify it as an occupational risk, imposing on the employer the obligation to promote a healthy working environment.

Following on from these considerations, this paper will investigate the scope for mobbing to be considered as an occupational injury under Portuguese law. Attention will be given to the extent to which work-related accidents arising from mobbing can qualify as a disability or an occupational disease – either in a strict or a broad sense – for which compensation can be paid.

## **2. The Relation between Mobbing and the Portuguese Occupational Health System: Some Practical Aspects**

The significance of the present study may be assessed by evaluating the adequacy and effectiveness of Art. 28 of the Portuguese Labour Code (*Código do Trabalho* – hereinafter CT) assigning civil liability in the event of mobbing. From a research perspective, this aspect is noteworthy either for the national occupational health system (the “professional contingencies” system) or to raise awareness of the increasing relevance of research relating to mobbing.

It seems that the compensation system associated with work-related accidents and occupational diseases attends to different issues than those covered by civil liability schemes. In the event of non-contractual liability, compensation is paid for damage suffered by the victim and concerns one’s physical and moral integrity, honour, intimacy, personality or dignity. Conversely, contractual liability entails damage resulting from a breach of the employer contract<sup>13</sup>.

Further, the laws on occupational health are legally provided in order to compensate for the harm suffered by workers in the performance of their activities. In other words, health-related issues limiting the worker’s ability to work or make a living are indemnified.

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Acoso Moral Profesional (Harcèlement Moral Professionnel) en Francia: Análisis Crítico de sus Rasgos Configuradores”, *RDS*, No. 53, 2011, p. 113.

<sup>13</sup> Among the authors discussing the punitive nature of civil liability, see Pereira, Rita Garcia, *op. cit.*, p. 216. On this subject, Gomes, Júlio, “Uma função punitiva para a responsabilidade civil e uma função reparatória para a responsabilidade penal”, *Revista de Direito e de Economia*, ano XV, 1989, 105-144.

Cantisani argues for the need to clearly distinguish between the possible compensation resulting from mobbing and that ensured by the compensation system typical of civil liability<sup>14</sup>.

As of Portuguese legal opinion, Menezes Leitão stressed that, rather than the employer's liability, the compensation system for occupational accidents established by law is intended to adequately indemnify damage suffered by the worker<sup>15</sup>.

The occupational health system compensates for biological damage<sup>16</sup>, where human integrity is affected in relation to the ability to generate wealth, and the tasks carried out in the surrounding environment bearing economic, social, aesthetic, cultural or biological relevance, including damage to health (but not existential and moral damage).

Given the current regime, if the possibility is acknowledged to compensate for damage due to harassment in accordance with the criteria used to assess work-related accidents or occupational diseases, those workers with higher levels of resilience will not be compensated, as they will only suffer damage to their dignity and their general right of personality<sup>17</sup>. On the contrary, the regime of civil liability will indemnify patrimonial and non-patrimonial damage, based on static and dynamic aspects of the value in question (life).

Moreover, compensation might come in many forms; full compensation is provided according to civil law, whereas the compensation award paid by the occupational health system is insurance-based, being that it is legally or contractually defined<sup>18</sup>. The determination of one's civil liability results in the award of compensation in a limited number of cases, and Portuguese courts tend not to allocate significant amounts of money. Conversely, under the occupational health system, the criteria for determining

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<sup>14</sup> Cantisani, Daniela, *Mobbing e INAIL*, available in [http://dirittolavoro.altervista.org/mobbing\\_e\\_inail\\_cantisani.html](http://dirittolavoro.altervista.org/mobbing_e_inail_cantisani.html), accessed 29-11-2009.

<sup>15</sup> Leitão, Luís Manuel Teles de Menezes, «A reparação de danos emergentes de acidentes de trabalho», in *Estudos do Instituto de Direito do Trabalho – vol. I*, coord. Pedro Romano Martinez, Almedina, Coimbra, 2001, p. 566.

<sup>16</sup> Cfr. Decision of the Supreme Court of Justice of 10 July 2008, reported by Salvador da Costa, available at [www.dgsi.pt](http://www.dgsi.pt) (if not specified otherwise, all court decisions referred to in this paper are available at this website).

<sup>17</sup> Cfr. Gomes, Júlio, *Direito do Trabalho. Volume I. Relações Individuais de Trabalho*, Coimbra Editora, Coimbra, 2007, p. 438.

<sup>18</sup> As for work-related accidents, employers in Portugal are obliged to purchase a private insurance for each worker, a requirement which can only be found in the national occupational health system. When it comes to occupational diseases, compensation is ensured by the Social Security System.

compensation are based on the classification of damage<sup>19</sup>, which means it will always be limited in quantitative terms.

In reference to occupational diseases, compensation awarded is variable, and does not cover personal injury. As far as the protection granted in the event of a work-related accident is concerned, when the employer's or his representative's fault is proven (cfr. par. 1 and 3 of Art. 18 of Law No. 98/2009 regulating compensation for work-related accidents and occupational diseases, hereinafter only referred to as LAT), and although the worker and his family are fully indemnified, such compensation will be calculated pursuant to par. 4 and 5 of this provision. This means that the maximum amount of compensation will be equal to the wage earned by the injured party. Thus, it is difficult to foresee which of the foregoing schemes will ensure the victim the largest compensation award, although MenezesLeitão has argued that "social security systems (...) rarely give full reparation for damage, focusing on easing the victim's struggle", so civil liability frequently arises<sup>20</sup>.

After making a necessary distinction between these two schemes, we will list the many advantages of that concerning work-related accidents and occupational diseases. First, this system facilitates workers' access to pension or compensation through less expensive, quicker and out-of-court procedures (e.g. civil jurisdiction). Second, they provide an alternative to civil liability schemes, such as the obligation of the employer to assign suitable tasks to the injured worker (par. 8 of Art. 283 CT). LAT also provides for further advantages which would be inaccessible to the victim under civil liability schemes, such as vocational re-training, the adaptation of the workplace (Art. 44 and 154 LAT) and the provision for action taken under the professional rehabilitation sections (Art. 69 and 108 LAT). Another advantage lies in the fact that these schemes provide for the regular adjustment of compensation according to any improvement or worsening of the victim's health. Moreover, the claims made in accordance with the right to compensation established in LAT are inalienable and unquestionable and are safeguarded by the CT (see Art. 78 LAT). As such, they are seen as preferential claims, drawing another difference with the claims arising from civil liability.

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<sup>19</sup> See the National Table of Incapacities for Work-related accidents and Occupational Diseases, on the Decree Law 352/2007, 23-10.

<sup>20</sup> Our translation. Leitão, Menezes, "A reparação de danos...", cit., p. 553. See also Alegre, Carlos, *Regime Jurídico dos Acidentes de Trabalho e das Doenças Profissionais*, Almedina, Coimbra, 2000, pp. 73, 74 e 77.

Finally, considering certain situations taking account of the categories provided by the occupational health system can question the existence of mobbing, even if supported by hard evidence. In fact, the assessment of the existence of work-related injuries does not require the evaluation of their main factors, although this might be necessary at the time of evaluating the causal nexus.

In the following pages, we will analyse the determination of work-related accidents as a form of mobbing, particularly with regard to the State treasury. In this case, it is not up to this entity to compensate victims, who will then submit their request for compensation to social security, being these kinds of accidents considered as common diseases.

In the Portuguese system, if a work-related accident is identified as mobbing, it is more convenient for the party involved to be found guilty, so they will not be liable to other actions, save for when the accident affects a third party, a co-worker (Art. 17 LAT) or the employer (in the cases of Art. 18 LAT). Employers may also benefit from this legal mechanism and recourse to escheat (par. 3 of Art. 18 LAT)<sup>21</sup>.

As regards the advantages of the system of work-related accidents for workers, a presumption of irrelevance exists of their genetic predisposition, which has consequences on the determination of the causal nexus. If such predisposition is verified, compensation for damage in the event of civil liability might be rejected. In addition, the claims arising from work-related accidents are more likely to obtain compensation, and the Workers' Compensation Fund is tasked with making the payment pursuant to LAT (al. a), par. 1, Art. 1 of Decree Law No. 142/99, 30-04, and Art. 82 LAT).

Another interesting aspect is the assessment of damage in the event of mobbing which qualifies as an occupational disease. Emphasis is given to the preventive and economic aspects of this form of mobbing. More specifically, such classification will come along with lower costs for employers and society, given that these cases are unlikely to take place.

Significantly, an aspect which enormously benefits the worker is that the social security system must always be able to pay compensation<sup>22</sup>. Moreover, the civil liability regime does not usually make provisions for the damage suffered by a worker as a result of a disease. Still on this topic, for the purposes of compensating for occupational diseases, there is no

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<sup>21</sup> *Cfr.* Ramalho, Maria do Rosário Palma, *Tratado de Direito do Trabalho. Parte II. Situações Laborais Individuais*, 4 ed., Almedina, Coimbra, 2012, p. 755.

<sup>22</sup> Yet at present we can no longer affirm that the solvency of the Portuguese social security system is certain.

need to effectively prove the causal nexus. Consequently, one's civil liability in relation to occupational diseases can be evaluated through an alternative mechanism. More specifically, in the event of a work-related accident, the person liable to civil action might be identified, irrespective of whether the perpetrator is the employer, the co-worker or a third party. In addition, the harasser might be liable to criminal action in the event of unlawful acts as those provided by the law.

In general terms, the author of this paper questions the view that in the event of work-related injuries, the employer will have to face charges as the harasser (civil liability) and as the entity which has to pay for compensation, if the work-related accident scheme is considered. This is because the employer's misbehaviour may be the result of either criminal offences or misdemeanours (as laid down in par. 2 of Art. 18 LAT)<sup>23</sup>. It may be argued that when victims opt for determining the perpetrator's liability according to civil law and the occupational health system, such action must be coordinated to avoid the simultaneous and unjust award of different forms of compensation.

Those diverging from this view are of the opinion that the determination of civil liability in the event of mobbing, under par. 3 of Art. 29 CT, excludes the possibility of referring to the occupational health system, the latter being a special form of liability itself.

There is another argument which runs counter to the hypothesis put forward in this paper: even though the victim is compensated, the occupational health system fails to ensure that the sanction is effectively paid by the harasser, an aspect that would have a positive effect on the injured party<sup>24</sup>. However, this issue arises only when we consider these schemes separately. Indeed, if applied in combination with the civil liability regime, the legal vacuum discussed above will not arise.

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<sup>23</sup> However, as pointed out by Anne-Marie Laflamme “*ce difficile arrimage entre le droit du travail contemporain, fortement imprégné par la protection des droits fondamentaux, et le régime de la responsabilité civile, invite à la recherche de solutions nouvelles*”. *Le Droit à la Protection de la Santé Mentale au Travail*, Éditions Yvon Blais, Canada, 2008, 63.

<sup>24</sup> Concerning the employer's liability, whether or not he is the mobber, see P. Ravisy, *Le Harcèlement Moral au Travail*, Delmas Express, Paris, 2000, p. 165.

### 3. Mobbing as a Work-related Accident

In this section, the concept of “work-related accident” in the Portuguese legal system will be considered in order to assess whether or not certain conduct at the workplace can qualify as mobbing.

As rightly pointed out by Domingos, a distinction should be drawn between “accident” and “injury”: what is legally compensated is the consequence of work-related accidents or any resulting injury<sup>25</sup>. Alternatively, the notion of “work-related accident” can be legally defined taking account of the damage suffered. Reference should also be made to the fact that in many cases occupational accidents have an emotional rather than physical component.

Legal opinion has clarified that at the time of defining a work-related accident and distinguishing it from an occupational disease, suddenness is usually taken into consideration<sup>26</sup>. As such, the work-related accident should be datable, determinable in time or at least “of short and limited duration”<sup>27</sup>. Therefore, to some legal opinion and case law, this requirement will be a strong deterrent to the consideration of mobbing as a work-related accident. Nevertheless, either most recent case law or legal opinion has questioned this feature. In fact:

(...) grey areas exist where suddenness is difficult to establish. An example of this is the continuous action of a working tool or the worsening of an existing predisposition or a disease originated from the work performed<sup>28</sup>.

In fact, there are several instances in national case law that confirm the mitigation of the requirement of suddenness. These findings emphasize the blurring boundaries between work-related accidents and occupational diseases, although the Supreme Court has ruled that a work-related accident exists when the cause of the injury is not immediate, but is

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<sup>25</sup> M. Adelaide Domingos, *Algumas Questões Relacionadas com o Conceito de Acidente de Trabalho*, in *Prontuário de Direito do Trabalho*, No. 76-78, 2007, p. 38, and R. Garcia Pereira, *op. cit.*, p. 63.

<sup>26</sup> Cfr. M. Adelaide Domingos, *op. cit.*, p. 41 e 42. See also the decision from the second instance Court of Lisbon, from 10-11-2005, reported by Manuel Gonçalves.

<sup>27</sup> Sachet, Adrien, *Tratado Teórico e Prático da Legislação sobre Acidentes de Trabalho e Doenças Profissionais, em comentário à Lei Francesa de 1898*, vol. I, p. 261, in Franco, João Augusto Pacheco e Melo *Acidentes de Trabalho e Doenças Profissionais, Direito do Trabalho, Boletim do Ministério da Justiça, Suplemento*, Lisboa, 1979, p. 62.

<sup>28</sup> Our translation. Cfr. Alegre, Carlos, *op. cit.*, p. 37, and P. Ravisy, *op. cit.*, p. 81.

limited to a short and determined period of time, even though the effects gradually evolve<sup>29</sup>.

Domingos focuses on the possible suddenness of the action, breaking down the elements of that concept: its unpredictability and limitation in time. The author also states that the “grey areas” arise from circumstances in which action is variable, albeit continued, and does not feature the elements characterizing the existence of an occupational disease (e.g. a particularly dangerous work environment or products). Moreover, the law does not define the events determining a work-related accident, so suddenness is not viewed as a legal requirement. Significantly, neighbouring Spain has considered merging the two concepts<sup>30</sup>. A part of legal opinion has argued that the notion of “occupational disease” should be widened so as to include progressive diseases, also in consideration of the risks that have recently emerged.

As for “reiteration”, that is one of the criteria to assess mobbing, a part of the academic community has argued that isolated incidents should also be regarded as mobbing when they result in serious consequences for the worker. Moreover, national legislation does not seem to require reiteration in referring to harassment resulting from isolated acts or “unwanted behaviour” (Art. 29, par. 1, CT).

Further, Domingos agrees with the view that overwork causing the worker’s injury can be considered as a work-related accident<sup>31</sup>. In keeping with this view, the author welcomes the theory that a once-off and expected incident can be considered as a work-related incident if affecting the victim’s health. As such, for some authors, a range of behaviours that can be grouped producing the same incident amount to mobbing since it fits the requirement of suddenness used to define a work-related accident. Accordingly, the argument that the Portuguese occupational health system prevents the qualification of mobbing as a work-related accident – the latter being based on unpredictability – is untenable.

In the author’s view, it is the resulting injury or disability that qualifies mobbing as an occupational accident.

This classification can take place in two ways: by extending the concept of “work-related accident”, or by conceiving mobbing as a once-off incident.

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<sup>29</sup> Cfr., for instance, Decision of the Supreme Court of Justice of 21 November 2001, reported by M. Torres. Cfr. also M. Jourdan, *L'Accident (sur le Chemin) du Travail: Notion et Preuve*, Études Pratiques de Droit Social, Waterloo, Kluwer, 2006, p. 29.

<sup>30</sup> Cfr. C. Tolosa Tribiño, *op. cit.*, p. 4.

<sup>31</sup> M. Adelaide Domingos, *op. cit.*, p. 44.

The first interpretation is not striking, at least in conceptual terms, given the different situations provided by the law. Take the safeguards provided in the event of work-related accidents; they do not cover all the possible events that can take place at the workplace, among others jobseekers sitting an interview in a company. The latter reasoning proves to be unsuccessful, as mobbing consists of a range of behaviours rather than an isolated event – even when it causes great damage – being that seriousness is not a defining characteristic. Even when treating it as a single event causing damage, mobbing will never have the characteristics of suddenness and certainty featuring work-related accidents.

#### 4. Mobbing as an Occupational Disease

Occupational diseases are caused by harmful agents to which workers are habitually or continuously exposed to at their place of work. Moreover, these diseases are scientifically tested and can be recognized in advance according to a list issued by the legislator, so that the causal nexus with the work performed is usually acknowledged.

This is usually done by means of a table which is regularly reviewed (Decree nr. 6/2001, 05-05, republished by Decree No. 76/2007, 17-07), and contains traditional work-related diseases and the occupations causing them. Those not listed are usually seen as atypical diseases.

In determining the list of occupational diseases, many European countries did not make mention of mobbing. Accordingly, mental disorders caused by mobbing at the workplace are not seen as a work-related accident, while the opposite is true for physical illnesses.

Consequently, in Garcia Pereira's words, "reactive depression or heart problems" are listed in that table and are compensated as occupational diseases even though arising from mobbing<sup>32</sup>. Yet this interpretation is made more difficult by the legal relationship between the elements of the occupational disease and the ensuing risks.

Mago Pacheco argues for the need for a "reformulation of the concept of occupational disease" to include any injury arising from mobbing<sup>33</sup>. Nevertheless, the author of the present paper disagrees with this view, as possible amendments should not involve the notion of occupational

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<sup>32</sup> R. Garcia Pereira, *op. cit.*, p. 210.

<sup>33</sup> Pacheco, Mago, *Assédio Moral em Portugal. "O Elo mais Fraco"*, Almedina, Coimbra, 2007, p. 249.

disease in a strict sense but the foregoing table so as to extend to certain physical and mental illnesses. This is not to advocate the qualification of injuries arising from mobbing as an occupational disease, because the worker must always prove the existence of a causal nexus between the incident and the damage suffered.

Moreover, national law already compensates for damage resulting from work-related or atypical occupational diseases, as laid down in par. 2, Art. 94 of LAT and par. 3 of Art. 283 of the CT. They are treated as a halfway measure between work-related accidents and occupational diseases, due to their unpredictability. In fact, this provision sets a special rule for determining the causal nexus, to the extent that it is necessary to demonstrate the relationship between the work performed and the functional disorder, proving that this is not caused by normal wear and tear. While in traditional occupational diseases the characteristic element is the pathological process, in atypical ones the essential element is the origin of the whole process. Work shall be the triggering factor and the sole cause of the disease.

Considering mobbing as an atypical occupational disease is feasible, although Redinha believes that this is not possible, because of the narrow limits of the residual definition of this notion. Conversely, the author of this paper is of the opinion that the law requires a causal nexus between the disease and the activity concerned, and that when mobbing arises, the disease is not caused by the task itself, but by the “deliberately painful performance of it”<sup>34</sup>. Thus, Redinha seems to argue that mobbing, not being classified in traditional labour relations<sup>35</sup>, cannot be considered as originating from the performance of an ordinary task. However, the connection between the disease to the working activity is realised by the mere exercise of the activity. In other words, it is sufficient that this state of affairs is the consequence of the worker’s willingness to work, irrespective of the way such work is performed<sup>36</sup>. Otherwise, the injuries suffered by the worker due to the employer’s fault and resulting for instance from an infringement of health and safety rules will not be compensated under this provision. Therefore, it is submitted that any

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<sup>34</sup> Redinha, Maria Regina Gomes, *Assédio Moral ou Mobbing no Trabalho*, in AAVV, *Estudos em Homenagem ao Professor Doutor Raúl Ventura*, vol. II, Coimbra Editora, Coimbra, 2003, p. 846.

<sup>35</sup> Statement by Álvarez Sacristán, D. Isidoro, “Tratamiento jurídico de los daños morales causados por los accidentes de trabajo”, *Actualidad Jurídica Aranzadi*, ano XIII, No. 567, 2003, p. 4.

<sup>36</sup> Redinha, Regina, *op. cit.*, p. 846.

injury, functional disorder or disease suffered by the worker and stemming from mobbing is caused by the working activity. If not the result of wear and tear, these circumstances should correspond to a particular occupational disease. Finally, the law provides that the disease should be the direct consequence and the only cause of the activity carried out at work.

## 5. Conclusion

At a time when the economic component is widely debated, it should be noted that job dissatisfaction and the ensuing costs impact on workers – directly (on their health) and indirectly (on their productivity and the well-being of colleagues and family<sup>37</sup>) – and on employers. Example of this are the high rates of absenteeism<sup>38</sup>, demands for changing current working conditions, early retirement<sup>39</sup>, lower levels of productivity and performance, deterioration and greater hostility at the workplace and negative behaviour towards health and safety issues, all factors contributing to higher accident rates and higher costs for the health and safety management system<sup>40</sup>. Evidently, this state of affairs favours a

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<sup>37</sup> *On the Consequences of workers' suicide*, see Valdés Alonso, Alberto, "Informe sobre la Valoración de los Comportamientos Autolesivos y el Suicidio como Accidente de Trabajo", Gabinete Jurídico de UGT, Convenio de asesoramiento entre la Confederación de la UGT y la UCM, Janeiro 2008, p. 2, available in [http://www.ugtcantabria.org/saludlaboral/informe\\_comportamiento.pdf](http://www.ugtcantabria.org/saludlaboral/informe_comportamiento.pdf), accessed 31-10-2010. The cost for the relatives may be called as "préjudice par ricochet", cf. Ginon, Anne-Sophie and Guimard, Frédéric, *Le Suicide peut-il constituer un Risque Professionnel?*, Le Droit Ouvrier, Julio 2008, p. 367.

<sup>38</sup> According to the Portuguese Public Institution for the Working Conditions (Autoridade para as Condições do Trabalho - ACT), psychosocial risks will be the main cause for absenteeism in 2014. Cfr. [http://www.ionline.pt/portugal/stress-violencia-assedio-serao-principais-fatores-absentismo-laboral-partir-2014?quicktabs\\_sidebar\\_tabs=1](http://www.ionline.pt/portugal/stress-violencia-assedio-serao-principais-fatores-absentismo-laboral-partir-2014?quicktabs_sidebar_tabs=1), accessed 12-03-2012.

<sup>39</sup> A study concluded in Portugal in 2004 in the banking sector found that the main consequences of mobbing on workers were: long-term illnesses(11,8%), early retirement(17,6%), disability pensions(5,9%), change of company(23,5%) and work-related stress (5,9 %). Almeida, Paulo Pereira de, "Assédio Moral no Trabalho. Resultados de um Estudo", *Dirigir*, No. 98, Abril, Maio e Junho 2007, Lisboa, p. 45.

<sup>40</sup> Díaz Descalzo, M. Carmen, *Los Riesgos Psicosociales en el Trabajo: el Estrés Laboral, el Síndrome del Quemado y el Acoso Laboral. Su Consideración como Accidente de Trabajo*, in RDS, No. 17, 2002, p. 184. The World Health Organization estimates that by 2020, depression will be the main cause of disability at work. García Viña, *El Mobbing [sic] en las Relaciones*

higher number of disputes arising from work-related accidents, concurrently heightening the risk of seeking compensation for injuries that were not actually suffered. Therefore, the National Mental Health Plan (2007-2016) envisages the need for coordination between different institutions on prevention and promotion initiatives, chiefly “employment policies and the promotion of mental health care in the workplace, in order to reduce and manage the stressors related to work and unemployment, and leave due to psychological illnesses”, increasing “awareness and information in various areas, such as [...] the workplace”<sup>41</sup>. At times, case law has acknowledged some disabilities as deriving from psychosocial risks, as confirmed by Supreme Court Decision of 30 May 2012<sup>42</sup>. On that occasion, the courts ruled that the disrupting behaviour on the part of a passenger towards a hostess causing her stress, depression, disturbed sleep, and emotional instability amounted to a work-related accident and resulted in a work-related disability.

In the author’s opinion, the Portuguese legal system has adequate instruments to align itself to other EU countries and compensate for the consequences of mobbing through the occupational health system. However, an examination of case law shows that some resistance still exists in this connection, making Portugal struggle to keep up with the rest of Europe.

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*Laborales en España*, in *Tribuna Social – Revista de Seguridad Social y Laboral*, No. 223, 2009, p. 15.

<sup>41</sup> Resolution of the Ministers Counsel No. 49/2008, published on the *Diário da República*, 1<sup>st</sup> series, No. 47, from 06-03.

<sup>42</sup> Reported by Gonçalves Rocha, in *Colectânea de Jurisprudência*, No. 248, tomo II, 2012.

# Mobbing and Harassment Regulation in Russia: Problems and Prospects

Daria V. Chernyaeva \*

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## 1. Introduction

Workplace mobbing and harassment in Russia started to receive scholarly attention in the 2000s. This is relatively late in comparison with the majority of developed countries<sup>1</sup>. Today, research on this topic is still limited<sup>2</sup> and mostly addresses specific aspects (sexual harassment against women, correlation between harassment and Human Resource Management (HRM) policies, the mobber's psychological portrait, etc)<sup>3</sup>.

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\* Daria V. Chernyaeva is Associate Professor, LL.M, PhD, Labor Law Department, Law Faculty, National Research University Higher School of Economics (Russia). Comments and criticisms are welcome at the following e-mail addresses: [dchernyaeva@hse.ru](mailto:dchernyaeva@hse.ru) or [empflan@gmail.com](mailto:empflan@gmail.com). This paper was presented at the international conference *Violence, Health and Work at the Time of Crisis* (Congreso internacional *Violencia, Salud y Trabajo en Tiempo de Crisis: Violencia de Género, Psicológica y Sexual en el Derecho del Trabajo*) held on July 15-17, 2013 at the University of Santiago de Compostela (Spain).

<sup>1</sup> For instance, more or less consistent case law on sexual harassment emerged in the USA as early as in the XIX century, while relevant legislation was developed in 1970s. Research on mobbing as a psychological phenomenon dates back to H. Leymann's works published in 1980's. See also R.B. Siegel, *A short history of sexual harassment*, in C.A. MacKinnon, R.B. Siegel (eds.), *Directions in sexual harassment law*, Yale University Press, 2003, 1-39, and H. Leymann, *Mobbing and psychological terror at workplaces*, in *Violence and Victims*, 1990, vol. 5, 119-126 (where reference is made to the first studies on this topic).

<sup>2</sup> O.I. Osipova, *Vzaimosvyaz organizatsionnoi kultury i fenomena harassmenta (Interrelation between organizational culture and the harassment phenomenon)*, in *Chelovecheskiy kapital (Human capital)*, 2012, no. 12(48), 28-30, [www.imtp.ru/upload/medialibrary/1d0/1d001c5446d6033dead95e79694a8c44.pdf](http://www.imtp.ru/upload/medialibrary/1d0/1d001c5446d6033dead95e79694a8c44.pdf) (accessed May 05, 2013).

<sup>3</sup> Based on the analysis of the papers published in Russian since 1990 (and collected in the Russian State Library databases: [www.rsl.ru/ru/s97/s977242/](http://www.rsl.ru/ru/s97/s977242/), on the Federal Legal

Some data on harassment have been collected while investigating more general topics – for example gender discrimination and human trafficking. Such studies show the peculiarities of this phenomenon in Russia and the public attitude towards it.

One of the most recent and comprehensive surveys on harassment jointly conducted by US and Russian scholars<sup>4</sup> demonstrates a mixed attitude towards mobbing and harassment, at least when they involve women. About 25% of respondents are inclined to take an escapist approach, saying that there is nothing particularly wrong with the harasser's behaviour. This assumption is supported by the fact that as many as 43% of respondents are of the opinion that the harasser should not be punished and 26% put the blame on victims. As many as 24% of interviewees would advise the victim to avoid conflict and defuse the situation with humour, while 22% of them would advise the victim to resign. The number of those who suggest taking more reasonable steps – seeking help from their principal or a lawyer – falls below 20%. The authors of the study observe that by and large Russian people do not believe that harassment and mobbing deserve serious consideration.

At the national level, sociological research on harassment reveals a widespread tendency to assume that it is the victim who provokes the harasser (by means of certain behaviour, make-up, clothing, etc.) and that harassment and even violence is either a logical outcome of or a fair punishment for this<sup>5</sup>.

Some differences have been found in the general attitude towards this issue when it comes to the harasser's gender. A male harasser is treated with sympathy and considered just slightly too "passionate" or too playful, while a female would be accused of acting with impudence. This aspect

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Portal *Jurudicheskaya Rissiya* (Juridical Russia): [www.law.edu.ru/search/search.asp?docType=0](http://www.law.edu.ru/search/search.asp?docType=0) and in the Russian Index of Scientific Citation (RINT'Z): [http://elibrary.ru/project\\_risc.asp](http://elibrary.ru/project_risc.asp)). The analysis took into account the variations in the Russian terminology used in different contexts and branches of science.

<sup>4</sup> See: O. Stuchevskaya, *Harassment i rossiyskie jenshiny* (Harassment and Russian women), in *Vestnik obshchestvennogo mneniya* (Public opinion bulletin), 2008, No. 4(96), 43-49, <http://ecsocman.hse.ru/text/33513026/> (in Russian, accessed April 28, 2013). This Bulletin is published by "Levada-Center", a major Russian nongovernmental center of sociological and marketing research: <http://www.levada.ru/>. A presentation of the statistical outcomes of the same joint research project is available in English at the CSIS website: [http://csis.org/files/media/csis/events/081208\\_csis\\_gender\\_presentation.pdf](http://csis.org/files/media/csis/events/081208_csis_gender_presentation.pdf). In this paper, I use the findings of this almost unique research project as one of the major statistical and sociological sources.

<sup>5</sup> O. Stuchevskaya, *op.cit.*

shows that the traditional perception of women as “the root of all evil”<sup>6</sup> is still widespread in Russia despite all the political, economic and social changes that took place in the last century.

In today’s Russia, the victim’s reaction to harassment is usually a passive one. People prefer to keep this embarrassing experience to themselves or to resign if things go too far. An intention to resist, to protect the victim’s rights and/or to sue the harasser is often perceived as a strange and disproportionate reaction to a minor issue<sup>7</sup>.

It would have been interesting to compare these results with those concerning harassment against men. It would have been likewise interesting to investigate the relations (if any) between the statistics on harassment and mobbing, both considered as two different forms of workplace violence. Unfortunately, no comparable studies have been found and there are reasons to believe that they do not exist at all. Apart from some scattered research projects<sup>8</sup>, the data on mobbing and harassment come primarily from the press. A newspaper article is published from time to time considering a particular group that has become the target of male harassment (taxi drivers, chauffeurs, accountants, bodyguards, mid-level managers)<sup>9</sup> or describing a case of mobbing occurred in a particular sector (the army, the office, and so

<sup>6</sup> See f.i.: Ph. Vivian, *The churches and the modern thought*, London, Watts, 1911, 277-286 (in particularly, citations on 284).

<sup>7</sup> See: *Rossiyskie mujchiny sokrushayutsya, chto harassment obhodit ih storonoy* (Russian men grieve that harassment passes them over). A sociological research conducted by the Research center of the SuperJob.ru website, 08.09.2008, [www.superjob.ru/community/kollektiv/18364/](http://www.superjob.ru/community/kollektiv/18364/) (in Russian, accessed May 02, 2013).

<sup>8</sup> O. Stuchevskaya, *op.cit.*; S.S. Balabanov, Z.H.-M. Saraliev, *Seksnalnye domogatelstva na rabote v Rossii* (Sexual harassment at work in Russia), in *Vestnik Nijegorodskogo Universiteta* (Bulletin of the Nijniy Novgorod University), 2010, vol. 1, 7-12, <http://82.179.249.32:2139/item.asp?id=15142471> (in Russian, accessed May 02, 2013); Ya.I. Alferova, *Sravnitelnyy analiz socialno-psihologicheskikh harakteristik sotrudnikov, podvergayuschih mobbing v organizatsiyah* (Comparative analysis of socio-psychological characteristics of staff members exposed to mobbing in organizations), in *Sovremennye issledovaniya socialnykh problem* (Modern Research in Social Problems), 2012, vol. 11(19), 42-50, <http://elibrary.ru/item.asp?id=18763977> or <http://cyberleninka.ru/article/n/sravnitelnyy-analiz-sotsialno-psihologicheskikh-harakteristik-sotrudnikov-podvergayuschih-mobbingu-v-organizatsiyah> (in Russian, accessed April 29, 2013).

<sup>9</sup> See: D. Prihodko, “Shef, trogay!” *Taksisty prosyat zaschitit ih ot seksualnykh domogatelstv passajirok* (“Chef, get going!” Taxi drivers demand a protection from being sexually harassed by female passengers), in *AiF St Petersburg newspaper*, 26.03.2013, [www.spb.aif.ru/society/article/56070](http://www.spb.aif.ru/society/article/56070) (in Russian, accessed April 28, 2013). See also: Z.A. Hotkina, *Mujchiny – jertyy seksualnykh domogatelstv* (Male sexual harassment victims), Center for Social and Labor Rights (CSLP), <http://trudprava.ru/index.php?id=1534> (in Russian, accessed April 29, 2013).

forth)<sup>10</sup>. Newspaper articles usually contain an overview of the opinions on the problem from various stakeholders, which vary from legislative initiatives to amend the Criminal Code—which still lacks some necessary provisions, for instance those protecting men from being raped – to sceptical comments reflecting the widespread belief that the problem has been greatly and groundlessly exaggerated<sup>11</sup>.

## 2. Terminology Issues

There are two main sources, which have traditionally been used for naming and interpreting the discussed phenomena. On the one hand, international scholarly work provides the terminology, which can be borrowed as it is, possibly after a slight adaptation to another language if necessary. On the other hand, national research data can reveal the most appropriate or at least the most widespread terms, which can be further, promoted and supported by relevant authorities and legislative provisions. On this score, mobbing and harassment are unfortunate terms. In Russian, they are barely understood in their original pronunciation without a special clarification and explanation, and their understanding is limited to English speakers who are familiar with the phenomena as such. Additionally, each of them has more than one option when translated from English, thus posing objective obstacles to uniform terminology.

Despite this, Russian scholars use both approaches, at times employing the original terms to name these phenomena, i.e. transliterating them into Cyrillic, and at times resorting to their official translations. Russian possesses terms that can – and have recently begun to – be applied to each of the concepts<sup>12</sup>. However, the Russian terminology in this field is

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<sup>10</sup> G. Bryntzeva, *Mobbing dik*, in *Rossiiskaya gazeta. Federalniy vypusk (Russian Newspaper. Federal Issue)*, 2010, no. 5139(60), [www.rg.ru/2010/03/24/mobbing.html](http://www.rg.ru/2010/03/24/mobbing.html) (in Russian, accessed April 29, 2013). The article presents an interview with a director of the Clinical psychology department of the Scientific Center of Mental Health of the Russian Academy of Medical Sciences.

<sup>11</sup> D. Prihodko, *op.cit.*

<sup>12</sup> For those who know Russian it might be interesting to learn that harassment is more and more often called «ДОМОГАТЕЛЬСТВО» ('domogatelstvo', i.e. importunity) or «ПРИСТАВАНИЕ» ('pristavanie', i.e. pestering), while mobbing has been identified with «ТРАВЛЯ» ('travlya', i.e. persecution), «ГРУППОВИЩИНА» ('gruppovshchina', i.e. "grouping for a definitely ill purpose") or «ДЕДОВЩИНА» ('dedovshchina', a hardly translatable term initially used to describe violence against younger conscripts in the Russian army).

currently at the very beginning of its development and as of yet demonstrates neither consistency, nor uniformity, nor common recognition. The Russian lawmaking system is not inclined to work on a consistent regulative approach without receiving a clear message from stakeholders on the preferable terminology and its uniform understanding. Unfortunately, no stakeholder has yet shown interest in this field in modern Russian society. This results in the scarcity of scholarly work and in the reluctance to regulate these aspects on the part of the relevant authorities. Thus the prospects for establishing consistent terminology in the field will remain bleak, unless some kind of force will prompt action in any particular, reasonable and substantial direction.

### 3. The Regulatory Framework

#### *Statutory Norms*

Case law and legislation have not addressed mobbing and harassment in a consistent manner. Russian laws do not acknowledge harassment or mobbing *per se*. However, there are several legal concepts that can be applied to cases of mobbing, sexually tinted harassment or both:

- sexual harassment can fall under: (1) the Criminal Code provisions on sexual abuses that entail criminal fines, mandatory or corrective works and imprisonment; or (2) the Labour Code provisions on “immoral behaviour” of those employees with an educational function (mostly school and kindergarten teachers, but also staff performing such function as specified in their job description), which may entail their dismissal without compensation<sup>13</sup>.

- mobbing can constitute grounds for “grouping” (i.e. when a group of people commits a crime), which aggravates one’s criminal liability<sup>14</sup>,

- both phenomena can also have elements that cause them fall under a number of other provisions:

- (1) if the case contains elements of workplace discrimination, the general prohibition of discrimination in employment<sup>15</sup> may apply, which might result in (1) criminal liability for discrimination in

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<sup>13</sup> Part 1(7) of the article 81 of the Labor Code of the Russian Federation.

<sup>14</sup> Article 35 of the Criminal Code of the Russian Federation.

<sup>15</sup> Article 3 of the Labor Code of the Russian Federation.

general<sup>16</sup>; (2) administrative liability, related to discriminatory practices violating employment law<sup>17</sup>; (3) liability to disciplinary action provided in the enterprise internal regulations and applicable to the same practices<sup>18</sup>. In such cases, a plaintiff is also allowed to submit a complaint directly to a court without complaining to the bilateral labour disputes commission, which represents the first instance for labour dispute consideration in many other cases<sup>19</sup>. The plaintiff can also apply to a public prosecutor, who is authorized to issue an order to stop the violation and to initiate administrative proceedings, or to inform the relevant administrative authorities in the event of an administrative offence. In the most serious cases, the public prosecutor may also seek grounds for assessing criminal liability<sup>20</sup>.

(2) If the case contains elements of “minor disorderly conduct” (i.e. “public order disturbance which is clearly disrespectful of society” accompanied by “insulting importunity to citizens”), it entails administrative liability<sup>21</sup>. Yet at present, neither legal cases nor court rulings have been reported employing such an interpretation of the norm.

In Russian labour legislation, the concept of “constructive dismissal” and the more general idea of *being (directly or indirectly) driven to terminate one’s employment contract* are unknown. Therefore, it is almost<sup>22</sup> impossible for the

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<sup>16</sup> Article 136 of the Criminal Code of the Russian Federation. The Code provides for criminal sanctions, revocation of the right to hold specific positions or perform specific activities, imprisonment, mandatory or correctional works (these are two types of criminal sanctions according to which convicts are required either to work without being paid for some 60-480 hours for the benefit of a community/society – mandatory works, article 49 of the Code – or to work in their regular workplace for a period from 2 months to 2 years while the state deducts some 5-20% of their remuneration to the state budget (correctional works, article 50 of the Code).

<sup>17</sup> Article 5.27 of the Code of Administrative Infractions of the Russian Federation. The norm provides for administrative fines for employers or disqualification of the employee in case of a repeated violation.

<sup>18</sup> Article 192 of the Labor Code of the Russian Federation. Generally the Code provided for three types of liability to disciplinary action: rebuke, reprimand and dismissal.

<sup>19</sup> Articles 3(4), 391(3) of the Labor Code of the Russian Federation.

<sup>20</sup> Articles 27 and 28 of the federal Act No. 2202-1 of 17.01.1992 *On the Public Prosecutor’s Office of the Russian Federation*.

<sup>21</sup> An administrative fine of 500-1000 rubles (\$15-30) or imprisonment for up to 15 nights.

<sup>22</sup> We will address the exceptions to this rule when analyzing relevant case law.

employee to prove that (s)he has been forced to resign – whether directly or indirectly – by an employer’s or a fellow employee’s attitude, unreasonable requirements, unfair working conditions, a hostile working environment, verbal or physical violence, etc. There is no general idea of driving somebody to do something but only its branch-specific interpretations, which entail various forms of liability (fines, disqualification, or even imprisonment). Thus, Russian criminal law contains provisions for a person who might be “driven to suicide” or “to attempt suicide”<sup>23</sup>, and Russian bankruptcy law operates with the concept of “driving to bankruptcy”<sup>24</sup>. Employment legislation does not regulate this aspect, which is only dealt with in a rather general instruction issued by the Plenum of the Supreme Court<sup>25</sup>. There is no legal definition and comprehensive guidelines in relation to this concept, nor are there norms outlining its legal consequences.

International law<sup>26</sup> could have served as a driving force in the development of this field, but Russian lawmakers have not yet given it a chance. Among the many international agreements, which Russia has signed and/or ratified, only the European Social Charter contains explicit provisions concerning mobbing and harassment and provides specific guidelines for national governments. However, the essence of these provisions, set forth in Art. 26 of Part II of the Charter, has been overlooked during the 2009 ratification of the Charter.

As a result, the only provision on workplace violence laid down in the Charter that is now applicable in Russia is par. 26 of Part I, establishing a general right of all workers to have dignity at work. Unfortunately, this wording is too vague to ensure its enforceability in the Russian legal

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<sup>23</sup> Article 110 of the Criminal Code of the Russian Federation. Punishment includes custodial restraint for 1-3 years, or mandatory works (see above, the footnote 16) or imprisonment for up to 5 years.

<sup>24</sup> Articles 14.12(2) of the Code of Administrative Infractions of the Russian Federation; Article 169 of the Criminal Code of the Russian Federation; Article 399 of the Civil Code of the Russian Federation; Article 14 of the Federal Act No. 40-FZ of 25.02.1999 “On the insolvency (bankruptcy) of credit institutions”. Penalties include criminal and administrative fines, disqualification, prohibition to work on certain positions or in certain fields, and mandatory work.

<sup>25</sup> We detail this issue below when analyzing case law. However, the Plenum of the Supreme Court of the Russian Federation does not consider any disputes itself but is authorized to issue rulings clarifying and interpreting statutory norms to ensure their unified application by courts.

<sup>26</sup> According to Article 15(4) of the Constitution of the Russian Federation, generally recognized principles and norms of international law are considered as being part of the legal system of the Russian Federation.

system. The non-ratified Art. 26 of Part II of the Charter – remaining inapplicable and unenforceable – has nevertheless the indirect effect to disseminate an official European interpretation of the “dignity at work” concept that can be invoked in court. However, this avenue has not been pursued so far, because of the little support and promotion on the part of the government.

### *Regulations at Sectoral and Company Level*

Laying down anti-harassment or anti-violence clauses has become fashionable among large corporations and, surprisingly in public institutions. Unfortunately being “fashionable” does not immediately impart a proper scope to such clauses and/or make them mandatory and enforceable. They usually find a place in “codes of ethical norms”<sup>27</sup> which generally are not considered enforceable by default according to Russian law and do not fall under the general Labour Code provision obliging an employer to familiarize employees with the relevant company regulations<sup>28</sup>.

The very idea of these codes is relatively new for the Russian regulatory framework. Consequently, employees have no reasons to expect their employer to adopt such instruments, let alone to make use of them. If an employer cares to adopt an ethical code in a form of a “local normative act” (i.e. normative act of a company level, a regulation issued by the employer), it becomes legally binding and imposes legal liability for its non-compliance. However, employers not accustomed to this option as

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<sup>27</sup> See for instance Article 17 of the Code of Professional Ethics of the workers of the interior bodies of the Russian Federation, approved by the Order of the Ministry of Interior No. 1138 of 24.12.2008 which contains both a direct reference to sexual harassment (which can also be accompanied by bullying) in the list of gross violations of professional ethical standards and a reminiscence of prohibition of bullying in the provision concerning the moral rights of superiors in this sphere: it explicitly states that a superior has «no moral right [...] to manifest formalism, conceit, rudeness, use battery towards the subordinates» (Article 16(8) of the Code). The term ‘interior bodies’ embraces police forces, internal military forces, investigation department, etc. More information can be obtained from the official website of the Ministry of Interior: <http://eng.mndrf.ru/> (in English). Other examples can be found in the Standard on quality control of public social services (see Preamble of the GOST (State All-Russian Standard) P 53062-2008, approved by the Order of the Federal Agency for Technical Regulation and Metrology No. 439-st of 18.12.2008); Standard on public social services provided for women (see Preamble of the GOST P 52886-2007, approved by the Order of the Federal Agency for Technical Regulation and Metrology No. 564-st of 27.12.2007), etc.

<sup>28</sup> Article 22(2) of the Labor Code of the Russian Federation.

yet and rarely undertake to implement the necessary procedure, thus leaving their impressive ethical standards hollow and unenforceable in the Russian legal system<sup>29</sup>.

Recently, a step has been made to popularize ethical codes. In May 2012, the Russian President ordained the government to draft bills concerning the development of institutions of self-government and the adoption of codes of professional ethics<sup>30</sup>. This initiative could be used for efficiently tackling workplace violence, all the more so that it has been announced as a step to increase employee involvement in enterprise management.

Unfortunately, the Presidential Decree did not provide explanations of the status of such codes. It also gave no specific instruction to incorporate any particular anti-harassment, anti-mobbing or other anti-violence provisions into the codes. It has become evident that the authors of the code samples did not plan to address harassment and mobbing as such when in September 2012 the government adopted the Complex of Measures aimed at the implementation of this initiative in the field of social services (i.e. in educational, research, health, cultural services and in the field of social protection)<sup>31</sup> and several draft codes had already been published online. What code samples do mostly contain are general anti-discrimination provisions and clauses imposing politeness and abstention from using rude language when communicating with clients and colleagues, but nothing more. Therefore, another chance to introduce the concept of a violence-free workplace seems to have been lost.

Nowadays in Russia neither ethical codes nor more traditional regulations implemented at the company and sectoral level perform a serious protective function. Regulations usually do not address the workplace

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<sup>29</sup> For instance, Article 3(1) of the Code of Professional Ethics establishes a form of 'moral liability' for those committing violations against humanity, the work team and the conscience as a measure supposed to ensure compliance with the Code's provisions; similarly, article 3(4) of the Code establishes liability in the form of 'public warning' or 'public censure' for the violations of the Code. Liability to disciplinary action (that may serve as a ground for dismissal according to par. 1(5), Article 81 of the Labor Code) is assigned only in cases where a legal offence or a breach of the disciplinary provision is committed in connection with the violation of the provisions laid down by the Code.

<sup>30</sup> Par. 1'z' of the Decree of the President of the Russian Federation No. 597 of 07.05.2012 (hereinafter – Social Policy Decree).

<sup>31</sup> Complex for institutions of self-government development and codes of professional ethics adoption for social services employees No. 5324 p-P12 of 08.09.2012. According to this Complex, code samples and code drafting manuals shall have been made available by July 2013 to be submitted for public debate in October 2013.

violence problem while ethical codes remain vague and employees are reported to be hardly aware of their existence.

At times enterprises that belong to large transnational organisations benefit from having access to model company regulations drafted by their headquarters or just use their direct translations<sup>32</sup>. Such regulations are usually well laid-out acts that outline not only company values and approaches to doing business but also corporate strategies, policies and procedures to promote proper conduct and approaches and tackle improper ones. They usually contain examples explaining all these aspects in a graphic manner and in understandable language. Such companies have particular procedures of familiarizing their employees with the regulations and they do take this task seriously. As a result, most of their employees know from their first day in the company what is tolerated and what is not, when and where to complain, what help can be obtained, what measures ensure compliance with the regulations, etc. However, if such company regulations are not enacted as a “local normative act” in full compliance with the Labour Code procedures, they remain just a company’s “wish list” and risk having little to no effect on the workplace relations and environment.

Small and medium-sized companies are reported to have a small number of brief and simple regulations that use standard wording borrowed from various legal databases. Unfortunately, the drafters of such standard regulation samples seldom include anti-harassment and anti-mobbing provisions in their products, and when they do, companies that use these samples usually remove all such provisions as strange and “alien”.

### *Collective Agreements*

Collective agreements rarely include anti-mobbing and anti-harassment provisions, and when they do, they hardly go beyond the enterprise level. Their initial sources are either model agreements of international trade unions, or agreements in force at parent or affiliated foreign companies.

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<sup>32</sup> Thus, for instance Thomson Reuters has single Code of Business Conduct and Ethics with particular anti-harassment (20-21) and anti-violence (22) provisions. This Code has been translated into 20 languages (according to the countries in which the company conducts its business) without any changes or amendments or drafting separate versions for every country. The Code preamble says that it «[...] applies to all directors, officers and employees of Thomson Reuters and its subsidiaries». Available online: <http://ir.thomsonreuters.com/pboenix.zhtml?c=76540&p=irol-govConduct>.

Recently, the government has also taken a step in this direction. Pursuant to the Social Policy Decree<sup>33</sup>, collective agreements at both the sectoral and company level should include clauses concerning “professional ethics”. By now, several measures have been taken to implement this Decree:

- in 2013 the Sectoral agreement between the Ministry of Culture of the Russian Federation and the Russian Culture, Art and Entertainment Industries Trade Union for 2012-2014 was amended<sup>34</sup> to include a provision on the parties’ participation in the drafting, discussion and promotion of the adoption and compliance with the “model codes of professional ethics for the most widespread professions in the field of culture, art and cinematography”; about two months earlier the Moscow Tripartite Commission for the Regulation of Social and Labour Relations issued a similar decision<sup>35</sup> aimed at employees of the Moscow social services sector;

- in 2014 the Ministry of Education and Science of the Russian Federation issued an official letter<sup>36</sup> with Recommendations on organization of actions aimed at drafting, adoption and application of the Code of Professional Ethics by the pedagogical community.

However, the codes of professional ethics do not necessarily contain anti-violence provisions, and even when they do, such provisions are rarely implemented. Further, when industry is represented by powerful trade union federations or confederations at the international or supra-national level, the relevant collective agreements may resemble the samples promoted by them<sup>37</sup>. Such clauses can be applied effectively when the

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<sup>33</sup> Par. 5 of the Complex of measures for institutions of self-government development and codes of professional ethics adoption for social services employees No. 5324p-P12 of 08.09.2012.

<sup>34</sup> Amendments to the Sectoral Agreement between the Ministry of Culture of the Russian Federation and the Russian Trade Union of Art Workers for 2012-2014, approved by the Ministry and the Trade Union on June 07, 2013.

<sup>35</sup> Decision the Moscow Tripartite Commission for the Regulation of Social and Labor Relations of April 25, 2013.

<sup>36</sup> Letter of the Ministry of Education and Science of the Russian Federation of February 06, 2014 No. 09-148.

<sup>37</sup> Thus, the Seafarers Union of Russia (SUR), an affiliated member of the International Transport Workers Union (ITF), endorses the ITF Standard Collective Agreement as a sample of a collective agreement concluded between seafarers and their employers. Article 28 of this agreement sample explicitly prohibits harassment (and even bullying) which is devoted to equality: «[...] Each Seafarer shall be entitled to work, train and live in an environment free from harassment and bullying whether sexually, racially or

whole framework has also been borrowed (in terms of interpretation, institutions, procedures, and so forth) and comply with national legislation. However, such “comprehensive” borrowing is a rare occurrence in Russia and its application is even rarer.

In the Russian Federation, the absence or ineffectiveness of the anti-mobbing and anti-harassment clauses laid down in collective agreements can be attributed to a number of reasons.

First, most of them are introduced through general wording: for instance, a “proper workplace environment” is referred to as «[...] *conditions which do not disparage human dignity [...]*»<sup>38</sup>; «[...] *healthy moral and psychological climate in the organization [...]*»<sup>39</sup>, etc. Such wording neither explains what exactly they are supposed to mean, nor does it give any reference to relevant international treaties or doctrinal definitions and typologies. The lack of explicitness makes these provisions as inapplicable and unenforceable as the European Social Charter mentioned above, proving useless and irrelevant to the noble cause of workers’ protection. Such clauses are seldom applied, mostly for form’s sake<sup>40</sup>.

Secondly and logically, no collective agreement has been found that contains— or obliges the parties to develop and implement — particular provisions to combat workplace violence or preventive measures to safeguard victims. Collective agreements make no explicit reference to the employer’s obligation to take particular steps — even the simplest ones (e.g. poster placement and booklets distributions) — to raise employees’ awareness of established instruments and channels.

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otherwise motivated, in accordance with ITF policy guidelines». Available at the SUR official website: [www.sur.ru/sailor/cont/8/2012ItfStandardAgreement.pdf](http://www.sur.ru/sailor/cont/8/2012ItfStandardAgreement.pdf).

<sup>38</sup> Resolution of the VII Congress of the Federation of Independent Unions of Russia.

<sup>39</sup> Sectoral tariff agreement of organizations of oil-processing industry and the system of provision of oil products of the Russian Federation for the years 2012-2014.

<sup>40</sup> The comprehensive review of this problem appears in a popular magazine *Sekret firmy* (“Secret of the Firm”) yet in the year 2005: Yu. Fukolova, *Korporativnye izgoi* (Corporate pariahs), in *Sekret firmy* (Secret of the Firm), 2005, No. 13(100), [www.a-training.ru/sources/mobbing/](http://www.a-training.ru/sources/mobbing/) (in Russian, accessed April 29, 2013). But there are plenty of other publications on websites, newspapers, magazines, and even in scholarly journals. See also: S.S. Balabanov, Z.H. M. Saraliev, *op.cit.*; R. Yuldashev, I. Kornilova, *Vlast and seks na rabochem meste* (Power and sex in the workplace), in *Kadrovik. Kadrovyy menedgment* (HR Manager. HRM), 2007, No. 8, 30-42; F.G. Maylenova, *Mobbing: nasilie i apparat vlasti v office* (Mobbing: coercion and instrument of power in the office), in *Filosofskie nauki* (Philosophic Sciences), 2008, No. 6, 63-68; E.V. Sychenko, *Problema mobbinga v oblasti pravovogo regulirovaniya truda* (Problem of mobbing in the sphere of legal regulation of labor), in *Jurnal pravovykh i ekonomicheskikh issledovaniy* (Journal of Legal and Economic Research), 2011, no. 1, 65-69, <http://82.179.249.32:2139/item.asp?id=16398705> (in Russian, accessed May 03, 2013).

This can be attributed partly to a lack of awareness of the parties that the problem can and should be addressed in collective bargaining, and partly to the well-known weakness of the majority of Russian trade unions that results in their inability to efficiently push employers to take measures for workers' protection, even when they succeed in having new concepts introduced in the agreements.

### *The Employment Contract as a Last Resort*

Theoretically, nothing prevents parties from incorporating anti-harassment and/or anti-mobbing clauses in an employment contract. The Labour Code allows for stipulation of terms and conditions other than those directly named in the Code, if these terms and conditions "...do not worsen the employee's conditions in comparison with what is provided in employment legislation, other legal regulations containing employment law norms, collective contract, agreements and local normative acts"<sup>41</sup>. However, there is no evidence whether such practice exists even in relation to employment contracts of management.

## **4. Case Law and Court Hearings**

Most workplace violence cases are not brought before the court because both lawyers and police investigators are reluctant to help victims, and because the latter prefer to endure this situation or resign instead of fighting, filing claims and making the case public. The number of court cases dealing with these issues is few and far between and are mostly the consequence of the increasingly widespread implementation of the "Western" model of human resource management and workplace relations.

The hearings discussing these issues relate to either discrimination, unfair dismissal, or both, but do not aim at tackling harassment or mobbing *per se*. If ever mentioned, harassment and/or mobbing are named as secondary grounds of claims. Since Russian legislation does not directly recognize the "constructive dismissal" concept, employees that have been forced to resign and have little chance to have their cases considered.

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<sup>41</sup> Article 57(4) of the Labor Code of the Russian Federation.

Another opportunity to make the court consider a case of workplace violence is to provide evidence of its criminal nature. It might be the case in which threats, cruel treatment or one's systematic humiliation have led the victim very close to death. Criminal Code provisions are clear enough to be efficiently applied, and Russian courts are experienced in their application. They are not afraid of accepting such claims as much as new and embarrassing harassment and mobbing cases which are not statutorily regulated.

Aware of this problem, the Supreme Court of the Russian Federation made a step to address cases of constructive dismissal (though without specifically naming it). For ten years now, a plaintiff that claims to be obliged by the employer to file a letter of resignation has been required to prove the circumstances (s)he refers to, whereas the court has been required to examine these circumstances<sup>42</sup>. Unfortunately, little progress has been made on this aspect, whether in conceptual or procedural terms.

Evidence and witnessing are also serious problems which stem from some legal shortcomings. Audio and video recordings have been recognized as legitimate tools of evidence in civil disputes only in 2003<sup>43</sup>, and can be used provided that the plaintiff specifies "...when, by whom and under which circumstances the record was performed"<sup>44</sup>. Apart from the difficulty of obtaining audio and video tape recordings (which is possible mostly for recurrent and somewhat predictable acts), the recourse to this evidentiary tool in civil cases (including those on workplace violence) is still limited and made with reluctance.

Russian legislation provides neither adequate protection for whistleblowers nor effective procedures for ensuring the presence of the witness<sup>45</sup>, nor serious legal consequences for not showing up at hearing,

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<sup>42</sup> Par. 22(a) of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 2 of 17.03.2004.

<sup>43</sup> Art. 55(1) of the Code of Civil Judicial Procedure of the Russian Federation: «[...] Evidentiary documents are legally obtained information on facts, thanks to which a court ascertains the existence or nonexistence of the circumstances which substantiate claims and objections of the parties, as well as other significant circumstance for the correct investigation and adjudication of the case. This information can be obtained out of explanations of the parties and the third parties, witnesses' evidence, written and material evidence, audio and video records, and expert opinions».

<sup>44</sup> Art. 77 of the Code of Civil Judicial Procedure of the Russian Federation.

<sup>45</sup> According to Art. 168(2) of the Code of Civil Judicial Procedure of the Russian Federation, the witnesses failing to appear at the trial after being exacted shall be fined (up to 1000 rubles, which is equal approximately \$30) if the court finds their justification unreasonable. If the witness fails to show up for the second time the court *may* issue an order for his/her compulsory attendance. Yet these provisions are obviously not

false evidence provision or the refusal to testify. Some provisions do exist for the protection of witnesses in criminal cases<sup>46</sup>, but civil proceedings contain nothing of the sort.

Case law suggests that these practices are so widespread that they also involve public officials. In 2007, there was a case in which a constantly harassing behaviour on the part of a judge had come to light only in the period prior to the end of his term. His subordinates had complained to the Qualification Board of Judges but decided not to sue him for criminal liability because they thought they would never be able to provide evidence, being that the alleged sexual offences always took place in private<sup>47</sup>.

However, the number of cases that come to light and result in disputes on workplace violence is slowly increasing. Without specific statutory anti-mobbing and anti-harassment provisions, plaintiffs and courts base their reasoning on much more traditional Labour Code and Plenum provisions on unlawful dismissal, compulsion to resign (i.e. constructive dismissal), health and moral damage and wage arrears.

Unfortunately, the judiciary usually rules against the plaintiff<sup>48</sup> and case reports reveal poor judicial technique and no willingness to examine the facts carefully, somehow defying the ruling of the Plenum of the Supreme Court of the Russian Federation<sup>49</sup>. There is also a significant difference in the awards made by the courts. While in Europe compensation awarded to a harassed or mobbed employee may amount to tens<sup>50</sup> or even

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practicable and are almost never used by courts since it is impossible to clarify the reasons and justification of an absent person and civil courts demonstrate no interest in searching and waiting for their absence and no liability for not making efforts for conveying the absent witness to the hearing.

<sup>46</sup> See Federal Act No. 119-FZ of 20.08.2004 *On the governmental protection of complainants, witnesses and other participants of criminal court proceeding.*

<sup>47</sup> Decision of the Supreme Court of the Russian Federation No. KAS07-25 of 03.04.2007.

<sup>48</sup> *V Rossiyn prisbel mobbing (Mobbing has come to Russia)*, in *Profsoyuzy segodnya (Trade Unions Today)*, 16.05.2008., [www.unionstoday.ru/news/analytits/2008/05/16/7128](http://www.unionstoday.ru/news/analytits/2008/05/16/7128) (in Russian, accessed May 03, 2013).

<sup>49</sup> Par. 22(a) of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 2 of 17.03.2004

<sup>50</sup> See *Case Law and Out-of-court Settlements at the BullyOnline.org*, the UK National Workplace Bullying Advice Line website: [www.bullyonline.org/action/caselaw.htm](http://www.bullyonline.org/action/caselaw.htm) (accessed May 03, 2013). Besides the Bullyonline.org website reports many examples when cases are settled out of court with 2-3 times higher compensations.

hundreds of thousands of US dollars<sup>51</sup>, in Russia courts dismiss the claim in which the plaintiff asks for compensation amounting to as little as \$600 corresponding to his certified medical expenses, without even taking into account compensation for wages and moral damage<sup>52</sup>.

## 5. Conclusion

Russian legislation does have norms, which can be used to safeguard employees experiencing mobbing and harassment. Yet they lack efficient implementing procedures.

Without a consistent legislative approach and no direct instructions from both the President and the Parliament, government authorities do not address this issue at all. The same can be said of the judiciary, which shows reluctance in addressing the problem and does not endeavour to carefully examine such cases, unless prompted by clear Supreme Court instructions. This leaves little hope for an employee to win the case and obtain at least modest compensation. As a result, the judicial recourse to mobbing and harassment in Russia reported little increase with time.

Trade unions show no particular interest in tackling workplace violence. Employers lack the necessary rule-making culture and experience in this field to introduce special procedures to deal with the problem. They often prefer to have professional in-house psychologists to solve the problems without making them public or bothering to develop special regulations relating to the matter<sup>53</sup>.

With no efficient ways to resist or tackle workplace violence, Russian employees have limited choice: to suffer or to quit. All over the world the main reasons for employees to put up with adverse workplace practices

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<sup>51</sup> *See*: Decision of the European Court of Human Rights No. N 301/04; EAT WT331/2006, UD1062/2006; Cassazione civile, sez. lavoro, sentenza 20.03.2009 No. 6907, [www.altalex.com/index.php?idnot=45614](http://www.altalex.com/index.php?idnot=45614) (in Italian, accessed May 03, 2013). The description of this case (in English) is available here: A.N. Stanchi, *Can Constructive Dismissal Amount to "Mobbing"?*, in *International Law Office*, 20.05.2009, [www.internationallawoffice.com/newsletters/Detail.aspx?g=35609c44-0ff0-4775-bc1a-742eb451e038](http://www.internationallawoffice.com/newsletters/Detail.aspx?g=35609c44-0ff0-4775-bc1a-742eb451e038) (accessed May 03, 2013).

<sup>52</sup> Decision on the case No. 33-4995 of 23.05.2011 of the Perm Regional Court of Cassation.

<sup>53</sup> *V Rossiju prishel mobbing (Mobbing has come to Russia)*, *op. cit.* Among other evidence, the paper says that the Moscow HR agencies are overloaded with employers' inquiries for 'relationship professionals' that could «[...] stop this nightmare».

are economic instability, inadequate professional skills and personal psychological problems. The more secure the employee's financial situation, the higher their qualification, the lower is their vulnerability to any hostile workplace environment irrespective of the country and region (s)he works and lives in.

At the same time, I would also suggest the understanding that in Russia some specific historical reasons exist, which may add to the state or feeling of vulnerability. First, the Soviet tradition (especially during Stalin's era) had been cultivating intolerance to diversity, thus implicitly providing fertile ground for mobbing and harassment despite the official anti-discrimination rhetoric. It was mostly a governmentally induced and supported climate of intolerance, which had been suppressing the individual's courage to fight for equality and other rights.

Additionally, for some reason Russian history is characterized by regular episodes of social destabilization<sup>54</sup>. The lack of stability posed serious problems for people, especially women<sup>55</sup>, to obtain stable economic and social status: to own a house, to find a job and a partner, to satisfy children's basic needs, etc. It is hardly possible to find a century in the country's history without revolts, revolutions, wars or all of them at once. This has created an atmosphere of constant insecurity in terms of welfare, the fear for losing the ability or the opportunity to earn a living, and rivalry for men's attention (especially after wars). Having somebody to rely on and being an integral part of some group were much more useful strategies than fighting for independence and individual freedoms.

Another reason may lie in the traditional organizational of the Russian workplace. During the first few years of the Soviet period, most workplaces had military-like discipline requirements with similar levels of subordination and control. Self-denial and self-sacrifice were considered heroic deeds. Individualization and reluctance to collective life were considered contrary to communist ideals. The "Labour (battle)front" was

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<sup>54</sup> For instance, 2 revolts and 3 wars in XVII century, 3 revolts and 4 wars in XVIII century, again 3 revolts and 4 wars in XIX century, and in XX century there were 3 revolutions (in 1905, and then in February and October of 1917) and again 4 wars (two world wars, the First and the Second, a Civil War which partly coincided with the First World War, and a so called 'Japanese War'). More detailed information on this subject may be obtained online, e.g. on the "History of Russia" website: [www.historbook.ru/voiny.html](http://www.historbook.ru/voiny.html) and the "Agitmusei" (Agitation museum) website: [www.agitclub.ru/museum/revolution1/revolution1.htm](http://www.agitclub.ru/museum/revolution1/revolution1.htm).

<sup>55</sup> Because every war, especially the last two, took lives of the youngest men of a childbearing age and left behind lots of widows, orphans and unmarried women with little hope to find a spouse.

a commonly used periphrasis for “work”, and “labour (heroic) deed” was used to describe special forms of self-sacrifice in the interest of the employer, state and/or society. There is a famous Stalin’s saying “We do not have irreplaceable people!” which communicated an idea of insignificance of individuals for the success of the state and society. It was a common belief that the feelings of an individual were not important at work and that an employer should not care about an employee’s individual problems, but only of production efficiency and compliance with the communist moral requirements.

Such is the historical background of which Russian people are to overcome for a more stable, decent and harmonious society. From what has been said above, it is obvious that the task has not been completed. However, we do observe clear signs of ongoing change and improvement. New norms are being introduced, old acts and procedures are being replaced or amended, international norms are being ratified and becoming part of the Russian legal system. These changes are more evident in the younger generations, who seem to be leaving the old-fashioned and ineffective practices behind in both professional and interpersonal communication, providing hope that harassment and mobbing will soon be eradicated in Russia.



# The ILO, EU and British Laws and Policies on Violence at Work

Jo Carby-Hall \*

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## 1. Introductory Remarks

The International Labour Organisation put it aptly when it stated that:

Long ignored, denied or considered to be a harsh reality which just has to be accepted as part of life, it is only recently that violence at work has started to receive the attention that it deserves as a serious safety and health hazard which has a high cost for victims and enterprise performance alike. While many people were of course aware of the existence of violence at work, few voiced their concern or considered it a specific workplace issue<sup>1</sup>

Thanks to this instigation, the violence at work phenomenon has received global attention and awareness in recent years. Violence at work has enormous cost implications on establishments, on individuals and on local and national economies.

It is disturbing to note that workplace violence is on the increase globally and has reached epidemic proportions in some countries. The ILO's publication entitled "Violence at work"<sup>2</sup> makes for some disturbing reading. The authors talk of "Bullying, harassment, mobbing and allied behaviors (*sic*)" being "as damaging as outright physical violence." They go on to say "Today, the instability of many types of jobs places huge pressures on workplaces, and we are seeing more of these forms of violence." Terrorism, according to the authors, has an important role to

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\* University of Hull.

<sup>1</sup> ILO "Prevention of violence at work" 15 June 2009, [www.ilo.org/safework/info/WCMS\\_108511/lang-en/index.htm](http://www.ilo.org/safework/info/WCMS_108511/lang-en/index.htm) (accessed 12 February 2013)

See the ILO's first edition of its Report entitled *Violence at Work*, of 1998.

<sup>2</sup> 3<sup>rd</sup>. Edition 2006 authored by V. Di Martino and D. Chappell.

play in this field describing it as “one of the new faces of workplace violence contributing to the volatile mix of aggressive acts taking place on the job.” Furthermore, professions once regarded in both developed and under-developed countries<sup>3</sup> as safeguarded from violence at work are now exposed to such violence.

This workplace violence is much broader than physical violence. It includes any act in which a person is abused, threatened, assaulted or intimidated in his/her employment. It includes harassment<sup>4</sup>, physical attacks<sup>5</sup>, threatening behaviour<sup>6</sup>, verbal and written threats<sup>7</sup> and verbal abuse<sup>8</sup>. Other examples of workplace violence could include vandalism, damage to property, physical assault, creating rumours, pranks, arguments, sabotage, psychological trauma, anger-related incidents, arson, rape, manslaughter and murder.

Workplace violence is not limited to the workplace *per se*. Work-related violence may occur at functions held outside the workplace as, for example office dinners or lunches, exhibition sites, trade shows and conferences held away from the workplace; social functions, such as Christmas or birthday dinners or in customers’ private residences resulting from work.

Also accentuated is gender-based violence at work. On the occasion of the International Women’s Day 2013 event<sup>9</sup>, the ILO Director-General maintained that:

Violence at the world of work is deeply injurious to women and men and there are obvious consequences for their families and societies and communities. This is a human rights issue, as well as a health, education, legal and socio-economic problem. Women are often particularly vulnerable to violence-whether because of the nature of their jobs or their overall status in society [...] we are all united by the compelling moral imperative to put an end to gender-based violence. But there is also a strong business case for eliminating workplace violence. The costs to enterprises include absenteeism, increased turnover, lower job performance

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<sup>3</sup> For example, health services, teaching in schools, local and central government social services, library services, care homes, sporting events social security and welfare offices and so on.

<sup>4</sup> Including behaviour which humiliates, embarrasses, demeans, annoys, alarms, verbally abuses a person, and is, or expected to be, unwelcome. It includes also gestures, offending words, bullying, intimidation and many other inappropriate activities.

<sup>5</sup> Kicking, shoving, pushing, and similar acts.

<sup>6</sup> Spitting, damaging or destroying property, shaking fists, rude gestures, throwing objects and so on.

<sup>7</sup> Any gesture or expression of an intent to inflict harm, damage, etc.

<sup>8</sup> Insults, swearing, or condescending language.

<sup>9</sup> Gender-based violence *STOP violence at work* held in Geneva on 8 March, 2013.

and productivity, negative public image, legal/litigation fees and related costs and rising insurance premiums. For workers, obviously such situations can lead to heightened stress, loss of motivation, increased accidents and disability, and even death. Integrated, gender-responsive occupational safety and health policies and a preventive culture make a positive difference and we must move forward on that basis”<sup>10</sup>

Gender-based violence, it should be carefully noticed, is clearly at odds with the concept of decent work. As a consequence of the global increase of violence at work, the ILO has adopted a number of measures on worker protection and dignity at work. One of these is the ILO Code of Practice on workplace violence in service sectors and measures to combat this phenomenon<sup>11</sup>. This Code addresses the extent and severity of violence at the workplace in the services industries. Furthermore, in partnership with the World Health Organisation, the International Council of Nurses and Public Services International, the ILO has published framework guidelines to combat violence at the workplace in the health services.

On the basis of these considerations, the present paper sets out to deal with a number of important issues which relate to the foregoing topics. First, it is proposed to define and analyse what the term “violence at work” means on the international, European and national stages. Secondly, the pattern of laws - both soft and hard laws - on violence, harassment, *etc* at the international, European and national levels will be analysed and evaluated. Thirdly, an evaluation will take place on occupational groups most exposed to violence including work-related factors which increase the risk of violence. Fourthly, some brief statistics relating to violence on the international, European and national platforms

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<sup>10</sup> ILO Conventions and Recommendations which relate to violence at work include the Convention on Equality in Employment and Occupation No. 111 as a tool to improve law and practice on sexual harassment; the Convention on Indigenous and Tribal Peoples No. 169 which treats special measures to ensure that indigenous/tribal people are protected from sexual harassment; the Domestic Workers Convention No. 189 which bans all forms of abuse, harassment and violence with regard to highly vulnerable and highly feminized group of workers and the HIV and AIDS Recommendation No. 200 which requires workplace measures to reduce the transmission of those diseases and alleviate its impact by actions to prevent and prohibit violence and harassment.

<sup>11</sup> Of 15 October, 2003. Published originally in 2004, the 3 edition was published in 2006. Its contents treat 1. Understanding violence at work; 2. Responding to violence at work; and 3. Future action. Therein will be found a range of aggressive acts such as homicide, a variety of assault types including sexual harassment, mobbing and bullying, verbal and other types of threats and a variety of abusive practices. Something on terrorism and mass murders will also be found in that publication.

will feature. Fifthly, an examination will be made of vulnerable people prone to violence and harassment, such as women. Finally, some concluding thoughts will follow.

## 2. Definition

Although organisations<sup>12</sup> and researchers<sup>13</sup> have made attempts at defining the term “violence at work” in *discreet* aspects of violence, there exists, so far, no single official definition which covers *adequately* and *universally* this expression. The reason for this phenomenon is that the expression itself, being generic in character<sup>14</sup>, is virtually impossible to define adequately and universally. This being the case, instead of attempting a universal definition which would, of necessity, prove inadequate, it is proposed to analyse the circumstances which fall within the realm of this expression. Such examination would give the reader a taste of the breadth of the term “violence at the workplace”<sup>15</sup>.

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<sup>12</sup> See for example, the ILO’s, the World Health Organisation’s (WHO) and International Council of Nurses’ (ICN) Framework Guidelines for addressing workplace violence in the health sector” 1 January 2005. Source: [www.ilo.org/safework/info/instr/WCMS\\_108542/lang-en/index.htm](http://www.ilo.org/safework/info/instr/WCMS_108542/lang-en/index.htm) (Accessed on 15 February, 2013). At the European level, see also *Workplace Violence and Harassment: A European Picture*, Luxembourg Publication Office of the EU, 2010, par. 1.3 *Definitions for violence and Harassment at Work*, at 16 to 22.

<sup>13</sup> See, for example, Carol Brodsky in her book on harassment at work which defines harassment as «repeated and persistent attempts by one person to torment, wear down, frustrate, or get a reaction from another. It is treatment which persistently provokes pressures, frightens, intimidates, or otherwise discomforts other people». C. Brodsky, *The Harassed Worker*, Lexington Books, D.C. Health, Toronto, Ontario, Canada, 1976.

<sup>14</sup> Violence at work covers a wide range and rich variety of violent behaviour ranging from homicide to physical and psychological violence, sexual and other kinds of harassment, bullying, mobbing and other workplace and work related acts away from the workplace.

<sup>15</sup> The reader should bear in mind the different modern meanings of the word “workplace.” Many workers are piece workers, home workers, teleworkers, peripatetic workers or workers working abroad for a British based company. The word “workplace” is thus endowed with a wide variety of sites at which violence, etc. could occur. Furthermore, such violence needs not occur at the workplace itself. It can be work-related and cover incidents which *relate to one’s work* and which could be committed away from the workplace. An example could include a grudge by an employee against the employer for not promoting him which manifests itself by an attack on the employer’s residence or when the employer is travelling to work or elsewhere.

*The International Stage*

On the international stage, the International Labour Organisation (ILO) considers that violence at work has many facets. It may include violence which is physical and /or psychological as well as repetitive actions<sup>16</sup>.

According to the ILO, mobbing and bullying belong to the same family of displeasing and unwanted behaviour<sup>17</sup> except that mobbing is perpetuated by a group against an employee whereas bullying is perpetuated by a single individual against an employee or a group of employees.

The ILO's Code of Practice<sup>18</sup> on workplace violence in the service sectors and measures to combat this phenomenon distinguishes between external and internal violence, classified them respectively as violence taking place between workers including managers and supervisors and any other person present at the workplace, and violence taking place in the workplace between workers themselves including managers and supervisors.

Scholars such as Mayhew<sup>19</sup> have refined that definition by describing external violence in circumstances where outsiders are involved, as for example an attack on a bank by armed robbers; violence by customers towards staff as for example violence towards a train ticket collector or social security office staff or again by a violent patient towards hospital staff<sup>20</sup>.

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<sup>16</sup> The term "repetitive actions" treats actions which are *per se* relatively minor in nature but because of their *cumulative* form qualify as violence. Examples include sexual harassment, mobbing or bullying all of which are repetitive.

<sup>17</sup> Such behaviour as intimidation, mocking, insulting, demeaning, false accusations, making up untrue stories, ridiculing, criticising, and so on. See the numerous examples cited in J.R. Carby-Hall, *The Treatment of Polish and Other A8 Economic Migrants in the European Union, Member States*, Bureau of the Commissioner for Civil Rights Protection, Warsaw, 2008, particularly at 205 -211.

<sup>18</sup> A Code of Practice is a non-legislative measure which needs to be distinguished from a legislative one which includes statutory or ministerial legislation. ILO Codes of Practice «set out practical guidelines for public authorities, employers, workers, enterprises and specialised occupational safety and health protection bodies. They are not legally binding instruments and are not intended to replace the provision of national laws and regulations or accepted standards».

<sup>19</sup> C. Meyhew, *Preventing Violence against Health Workers*, paper presented at the Worksafe Victoria Seminar, Australia, 2003.

<sup>20</sup> See, too, the three similar categories of violence suggested by the Californian Occupational Safety and Health Administration, namely Type I planned robbery where the assailant has no legitimate relationship to the workplace and whose aim is to steal; Type II customer, consumer, patient related violence against the affected workplace; and Type III, violence by one employee against another in the workplace.

The World Health Organisation (WHO) is another international body which defines workplace violence as “an intentional use of physical force or power, threatened or actual, against oneself, another person or against a group or community that either results in, or has a high likelihood of resulting in, injury, death, psychological harm, wrong development or deprivation.”<sup>21</sup>

A brief analysis of this definition shows that *all acts of violence* are included whether they are private or public, verbal<sup>22</sup> or physical acts<sup>23</sup>, with violence that must be *intentional*<sup>24</sup>. Thus unintentional violence is excluded. Physical *power* must feature, which includes intimidating innuendos and threats made by the perpetrator. The violence must result in the stated *health hazards*<sup>25</sup>, namely injury, death and other harms including psychological harm<sup>26</sup>.

### *The European Stage*

What has been said above also applies at European level, namely that there is no **single uniform** definition of the word “violence” apart from the fact that definitions have been attempted by individual researchers and

<sup>21</sup> Source: E. Krug, L. Dahlberg, J. Mercy, A. Zwi, R. Lazano (eds.), *World Report on Violence and Health*, WHO, Geneva, 2002  
[www.who.int/violence\\_injury\\_prevention/violence/world\\_report/en/](http://www.who.int/violence_injury_prevention/violence/world_report/en/) (Accessed 4 March, 2013).

<sup>22</sup> As for example, verbal threats or aggressive behaviour where no physical violence occurs (spitting, threatening gestures, verbal hostility) irrespective of outcome as well as physical violence (punching, assaults, aggravated assaults, grievous bodily harm, homicide).

<sup>23</sup> For example, physical aggression (punching, assaults, aggravated assault, grievous bodily harm, homicide).

<sup>24</sup> See the definitions by scholars where *intent* to cause harm predominates. K. Björkqvist, K. Österman, K.M.J. Lagerspetz, *Sex Differences in Covert Aggression among Adults*, *Aggressive Behaviour*, 1994, 20, 27-33, who define harassment as «repeated activities with the *aim* of bringing mental (but sometimes also physical) pain and directed towards one or more individuals who, for one reason or another, are not able to defend themselves» (emphasis added).

<sup>25</sup> This is inevitable since the WHO is primarily concerned with health issues.

<sup>26</sup> Psychological illnesses constitute a new development in the British common law relating to the employer’s duty of care towards the employee. See J. Carby-Hall, *Mental Illnesses: The British Labour Law Experience*, in J. Wratny (ed.), *Pravo Pracy w Śnietle Procesów Integracji Europejskiej Księga Jubileuszowa Profesor Marii Matey-Tyronicz*, Wolters Kluwer Warszawa, 2011, at 322-363, and J. Carby-Hall, *Employers’ Liability – From Physical to Psychiatric Illnesses*, in L. Bellardi, U. Carabelli, V. Leccese (eds.), *Liber Amicorum. Spunti di Diritto del Lavoro in Dialogo con Bruno Veneziani*, Cacucci Editore, Bari, 2012, at 85-90.

such organisations as health and safety international, European and national institutions.

In 1994 the EU Commission set up an expert meeting to examine the issue of violence at work which came up with the following definition: “Incidents where staff are abused, threatened or assaulted in circumstances related to their work, including commuting to and from work, involving an explicit or implicit challenge to their safety, well being and health”<sup>27</sup>. Such violence includes both its physical and psychological<sup>28</sup> elements.

Although this definition may not be a “single uniform definition”, it is nevertheless widely used by researchers, organisations and the EU Commission. A good example is the Framework Agreement on Harassment and Violence at Work<sup>29</sup>. This Agreement treats both violence and harassment at the workplace<sup>30</sup>. In the words of the Agreement, “harassment occurs when one or more workers or managers are repeatedly and deliberately abused, threatened and/or humiliated in circumstances relating to work”, whereas “violence occurs when one or more workers or managers are assaulted in circumstances relating to work”<sup>31</sup>. Furthermore, “harassment and violence may be carried out by one or more managers or workers for the purpose of violating a manager’s or worker’s dignity, affecting his/her health and/or creating a hostile work environment”<sup>32</sup>.

The Framework Agreement explains the different forms of harassment and violence which can affect the workplace. They include physical,

<sup>27</sup> R. Wynne, N. Clarkin, T. Cox, A. Griffiths, *Guidance of the Prevention of Violence at Work*, Brussels, European Commission DG-V, Ref. CE/VI-4/97, 1997.

<sup>28</sup> The word “implicit” which means something which is “expressed indirectly” or “absolute and unquestioning” or again “contained in, although not stated openly” (as defined by the Collins English Dictionary at 427) in the definition indicates that the psychological aspect is included.

<sup>29</sup> Entered into by BUSINESSEUROPE, UEAPM, CEEP, and the ETUC on 26 April, 2007.

<sup>30</sup> Framework Agreement *Ibid.* 1.Introduction. The EU laws referred to in that agreement include, *inter alia*, Directive 2000/43/EC of 29 June, 2000 (Art.2(3) relating to equal treatment between persons irrespective of racial or ethnic origins; Directive 2000/78/EC of 27 November, 2000 (Art. 2(3) establishing a general framework for equal treatment in employment and occupation; Directive 2002/73.EC of 2002 amending Council Directive 76/207/EEC of 9 February, 1976 on equal treatment for men and women regarding access to employment, vocational training and promotion and working conditions and Directive 89/391/EEC on encouraging improvements in the health and safety of workers at work.

<sup>31</sup> Framework agreement *Ibid.* par. 3 Description.

<sup>32</sup> Framework agreement *Ibid.* par. 3 Description.

psychological and/or sexual forms or a one-off incident or more systematic patterns of behaviour. Other forms of harassment and violence can occur amongst colleagues, between superiors and subordinates or third parties such as customers and clients, patients, pupils, students and so on. These forms may range from minor cases of disrespect to more serious acts including criminal offences<sup>33</sup>.

The expressions “harassment”<sup>34</sup>, “bullying” and “mobbing” have been defined variously, but again there is no **universal definition** for those terms. It is suggested by the European Agency for Safety and Health at Work<sup>35</sup> that the reasons for this phenomenon could be the fact that different countries use different expressions. Thus, expressions such as “bullying, mobbing, harassment, psychological harassment, abusive behaviour, emotional abuse and workplace aggression have been used. Sometimes these terms have been used interchangeably; sometimes they mean different things.” Furthermore, in “different countries terms other than bullying are used to indicate similar behaviour in the workplace, for example work or employee abuse, mistreatment, bossing, victimisation, intimidation, psychological terrorisation, psycho-terror, psychological violence, inappropriate treatment or unwanted behaviour.” The rich variety of meanings mentioned above do not help towards finding a universal definition for those expressions but they do give a general meaning and significance as to what is included in the terms harassment, bullying and mobbing.

As suggested by the European Agency for Safety and Health at Work, the expressions “workplace bullying or mobbing” and “workplace harassment” have been mostly defined by scholars such as Heinz Leymann, whose definition of mobbing is:

hostile and unethical communication which is directed in a systematic way by one or a few individuals mainly towards one individual who, due to mobbing, is pushed into a helpless and defenceless position, being held there by means of

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<sup>33</sup> Framework agreement par. 1. Introduction.

<sup>34</sup> *Cfr.* too Art. 2(2) of Council Directive 2002/73/EC which defines “harassment” as a situation «where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment». Sexual harassment occurs where any form of «unwanted verbal, non-verbal or physical conduct of a sexual nature occurs with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating and offensive environment».

<sup>35</sup> In their publication entitled *Workplace Violence and Harassment: A European Picture*, Luxembourg Publication Office of the EU, 2010, at 20.

mobbing activities. These actions occur on a very frequent basis<sup>36</sup> and over a long period of time<sup>37</sup>.

The European Agency mentions other scholars' and researchers' definitions. Ståle Einarsen<sup>38</sup> labels bullying as having "to occur repeatedly over a long period of time, and the person confronted has to have difficulties in defending him/herself. It is not bullying if two parties of approximately equal "strength" are in conflict or the incident is an isolated one"<sup>39</sup>. Hoel and Cooper<sup>40</sup> describe bullying as "a situation where one or several individuals persistently, over a period of time, perceive themselves to be on the receiving end of negative actions from one or several persons, in a situation where the target of bullying has difficulty in defending himself or herself against those actions. We will not refer to a one-off incident as bullying"<sup>41</sup>. Whereas Zapf<sup>42</sup> defines mobbing as "harassing, bullying, offending, socially excluding someone or assigning offending work tasks to someone. It is a process in the course of which the person confronted end (*sic*) up in an inferior position"<sup>43</sup>, Di Martino defines mobbing and bullying as "a form of psychological harassment consisting of persecution through vindictive, cruel or malicious attempts to humiliate or undermine an individual or groups of employees, including unjustified, constant negative remarks or criticisms, isolating a person from social contacts and gossiping or spreading false information"<sup>44</sup>. It is interesting to note that "enjoyment" by the bullying perpetrator is introduced in the definition by O'Moore *et al.*<sup>45</sup>, who state that "only inappropriate aggressive behaviour that is systematic and *enjoyed* is

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<sup>36</sup> Footnote inserted in this quotation by the author. According to statistical information, obtained by Leymann, at least once a week.

<sup>37</sup> Footnote inserted in this quotation by the author. According to statistical information obtained by Leymann, at least six months.

<sup>38</sup> And other colleagues at the University of Bergen. S. Einarsen, A. Skagstad, *Bullying at Work: Epidemiological findings in public and private organisations*, in *European Journal of Work and Organisational Psychology*, 1996, 5, 185-201.

<sup>39</sup> Source: See footnote 12 above.

<sup>40</sup> From the United Kingdom. H. Hoel, C.L. Cooper, *Destructive Conflict and Bullying at Work*, Manchester School of Management, University of Manchester Institute of Science and Technology (UMIST), 2000.

<sup>41</sup> Source: See footnote 12 above.

<sup>42</sup> From Germany. D. Zapf, *Organisational, work group-related and personal causes of mobbing/ bullying/ at work*, in *International Journal of Manpower*, 1999, 20 (1/2), 70-85.

<sup>43</sup> Source: See footnote 12 above.

<sup>44</sup> Source: See footnote 12 above.

<sup>45</sup> A.M. O'Moore, E. Seigne, L. McGuire, M. Smith, *Victims of Bullying at Work in Ireland*, in *Journal of Occupational Health and Safety*, Australia N.Z., 1998, 14(6), 569-574.

regarded as bullying”<sup>46</sup>. Finally, “faceless bureaucracy” may be the perpetrator of bullying in situations where an individual is defenceless<sup>47</sup>. This variety of imaginative definitions by scholars in the fields of mobbing, bullying and harassment gives the reader a good insight into the European thinking on these expressions.

### *The British stage*

On the British stage there exists an official definition which is both brief and skeletal. The Health and Safety Executive (HSE)<sup>48</sup> defines work-related violence as “Any incident in which a person is abused, threatened or assaulted in circumstances related to their work”<sup>49</sup>. However, meat is added to this skeletal structure through the HSE’s guidance to its enforcing officers. It explains that “the definition includes violence to employees at work by members of the public, whether inside the workplace or elsewhere when the violence arises out of the employees’ work activity”<sup>50</sup>. Verbal abuse and threats are also included in the definition since they lead to physical violence and contribute to the levels of stress experienced by people. The HSE adds to the definition by saying that “physical attacks are obviously dangerous, but serious and persistent verbal abuse or threats can also damage employees’ health through anxiety or stress.” Repeated verbal abuse, which constitutes the most common type of incident, can have the effect of lowering morale in the workplace, developing depression and increasing absences by reason of sickness. Organisations other than the HSE have added sinews to that meat. The DSS “Violence to staff”<sup>51</sup> report talks of

The application of force, severe threat or serious abuse by members of the public towards people arising out of the course of their work whether or not they are on duty. This includes severe verbal abuse or threat where this is judged likely to run into actual violence; serious or persistent harassment (including

<sup>46</sup> The italics in this definition are inserted by the author.

<sup>47</sup> H. Leymann, *Wuxenmobbing psvenska arbetsplatser (Adult bullying at Swedish workplaces)*, Delrapport 1 om frekvenser, Arbetarskyddstyrelsen, Stockholm, 1992.

<sup>48</sup> The Trades Union Congress (TUC) has adopted the HSE’s definition. Source: *Tackling Violence at Work*.

<sup>49</sup> Source: [www.hse.gov.uk/violence](http://www.hse.gov.uk/violence) (Accessed on 30 March, 2013).

<sup>50</sup> This would include violence to staff working in the community or who work alone, violence from pupils towards teachers or ancillary staff and hospital and care home staff from violent patients.

<sup>51</sup> Report of DSS Advisory Committee on Violence to Staff, 1988.

racial or sexual harassment); threat with a weapon; major or minor injuries; fatalities.

“Behaviour which produces damaging or hurtful effects, physically and emotionally, on people” is also added to the definition<sup>52</sup>. Somewhat unusually, the Crime Survey of England and Wales (CSEW) defines violence at work on the basis of the type of offence (assaults or threats); what the victim was doing at the time of the incident (at work or working); and the relationship between the victim and the offender (domestic violence is excluded<sup>53</sup>). Physical assaults include assaults with minor or no injury, wounding and robbery; threats include verbal threats made to or against the victim<sup>54</sup>. The word “violence” is used to refer to both assaults and threats.

Consequently, violence can emanate from people one knows as well as from strangers. Teachers can be threatened by their pupils and patients can attack their nurses and carers. Passengers on trains and buses without tickets can attack railway and bus staff or someone denied social security benefits can take it out on the civil servant concerned. Harassment and violence can be physical, psychological or sexual in nature, it can be a one-off incident or involve more systematic patterns of behaviour, it can be amongst colleagues, between superiors and subordinates, or by third parties such as clients, customers, patients and pupils. Violence may range from minor cases to more serious acts including such criminal offences as murder and manslaughter. Statistics in the UK<sup>55</sup> show that within the 22,000 shop workers reporting incidents of work-related violence, only one in five attacks were physical. Half of the reported incidents were incidents of verbal abuse and a third were threats of violence.

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<sup>52</sup> By the Association of Directors of Social Services in *Guidelines and Recommendations to Employers on Violence against Employees in the Personal Social Services*, 1987.

<sup>53</sup> Incidents in which there is a domestic relationship between the offender and the victim, such as current or former partners, relatives or household members, are all excluded because such cases are likely to be very different to cases of violence at work.

<sup>54</sup> The CSEW analysis is based on victims of working age in employment which includes men aged 16 to 64 and women aged 16 to 64 years of age who said they were in paid work. It is readily noticeable that the criteria are limited although the definition based on the sources is an interesting one.

<sup>55</sup> Source: British Retail Consortium crime survey for 2009.

### 3. Soft and Hard Laws Relevant to Violence at Work

The laws relating to violence at work – whether hard or soft ones – will be examined and evaluated by observing the previous divisions of the international, the European and the British patterns.

#### *The International pattern*

It will be recalled that on the international stage the tool of the ILO to reduce workplace violence in the service sectors is its Code of Practice<sup>56</sup> which is a document which gives guidance to a variety of states and organisations<sup>57</sup> and is not a legally binding document. The Code of Practice is thus soft law which provides advice to those responsible<sup>58</sup> for addressing workplace violence in the services sectors<sup>59</sup>. The Code promotes a proactive approach to prevention based on occupational safety and health management systems.

Four guiding principles govern the Code<sup>60</sup>. These are (i) a healthy and safe work environment<sup>61</sup> which facilitates optimal physical and mental health at work which can help prevent workplace violence; (ii) social dialogue<sup>62</sup> as a key element in the successful implementation of anti-violence policies/programmes<sup>63</sup>; (iii) policy or action against workplace violence to be directed at promoting decent work and mutual respect and combating discrimination at the workplace<sup>64</sup>; and (iv) promoting gender equality to help reduce workplace violence.

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<sup>56</sup> Code of Practice on Workplace Violence in the Services Sectors and Measures to Combat this Phenomenon, October, 2003.

<sup>57</sup> Namely, policy makers in government agencies, employers' and workers' organisations, occupational and health organisations, human resources managers, trainers and workers. In the words of the ILO, it is «intended to promote dialogue, policies and initiatives “to repudiate violence and remove it from the workplace now”».

<sup>58</sup> Namely governments, employers and workers.

<sup>59</sup> It includes commerce, education, financial and professional services, health services, hotels, catering, tourism, the media and entertainment industries, public service, transport and utilities.

<sup>60</sup> Code of Practice par. 1.4.

<sup>61</sup> In accordance with the provisions of the Occupational Safety and Health Convention, 1981, No. 155.

<sup>62</sup> Between employers, workers, trade unions and if appropriate the competent authority (as for example in Great Britain the Health and Safety Executive) (HSE).

<sup>63</sup> Such dialogue is enshrined in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow up.

<sup>64</sup> In accordance with the Discrimination (Employment and Occupation) Convention, 1958, No. 111.

A *policy* against workforce violence should be put in place<sup>65</sup>. So far as it is reasonably practicable, the policy should promote workplace practices which help eliminate workplace violence. Such policy should address a definition of workplace violence; prepare a statement that no workplace violence would be tolerated<sup>66</sup>; an engagement to support any action targeted at creating an environment free from workplace violence; the provision of a fair complaints system; the provision of information, education, training and other relevant programmes; measures to prevent, control and eliminate workplace violence; measures relating to intervention and management of violent incidents; a commitment to effective communication of a policy; confidentiality.

The Code provides for the *allocation of responsibilities* to supervisors, managers and others to implement policies and practices which discourage workplace violence<sup>67</sup>. *Social dialogue* is emphasised in a number of fields<sup>68</sup>. Social dialogue on violence should engage at various levels<sup>69</sup>, in various forms<sup>70</sup> and ways<sup>71</sup>. Social dialogue on workplace violence should be developed on an ongoing basis and be aimed at the protection of safety and health at the workplace. The social partners should monitor and evaluate workplace violence.

A great deal is said in the Code on *organising*<sup>72</sup> with roles and responsibilities imposed on governments<sup>73</sup>, employers<sup>74</sup>, workers<sup>75</sup>, and the general public, customers and clients<sup>76</sup>.

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<sup>65</sup> Code of Practice par. 2.1 to 2.3.

<sup>66</sup> Whether from within the workforce or from third parties such as clients and customers.

<sup>67</sup> Code of Practice par. 2.4.

<sup>68</sup> *Ibid.* par. 2.5.

<sup>69</sup> Namely national, sectoral, enterprise and workplace.

<sup>70</sup> Namely negotiation, consultation, and exchanges of information.

<sup>71</sup> For example formal and informal.

<sup>72</sup> Code of Practice par. 3.1 to 3.4.

<sup>73</sup> Governments should assume leadership in the development and application of preventative interventions in research, the offer of guidelines, legislation and regional and international collaboration (par. 3.1.1).

<sup>74</sup> Who should have policies and procedures to eliminate workplace violence, for example, risk reduction and management, the inclusion of violence prevention in national, sector and workplace/enterprise collective agreements, personnel policies to promote respect and dignity at work, and grievance and disciplinary procedures treating violence at the workplace (par. 3.1.2.1). Employers should initiate programmes which inform, educate and train workers on the prevention of workplace violence (par. 3.1.2.2.).

<sup>75</sup> Who should take all reasonable care to prevent, reduce and eliminate the risks associated with workplace violence by co-operation with employers (i) on occupational safety and health committees (in accordance with the Occupational Safety and Health

Much is also said in the Code on *competence, information and training*. The employer has a duty to train workers on a periodic or continuous basis as required and should initiate programmes which inform workers on the prevention of workplace violence<sup>77</sup>. There should be included training for managers and supervisors<sup>78</sup>.

*Information* features prominently in the Code. Information on workplace violence<sup>79</sup> should be made available by employers in collaboration with workers' representatives to workers, supervisors and managers.

Employers should establish, maintain and communicate workplace violence management system documentation<sup>80</sup> and communications between management and workers should be enhanced<sup>81</sup>.

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Recommendation, 1981 (No. 164); (ii) to develop risk assessment strategies and prevention policies; (iii) in implementing workplace violence prevention policies; (iv) in endeavouring to include provisions on the prevention of workplace violence in collective agreements; (v) in providing information on workplace violence prevention; (vi) in ensuring that factors which increase the risk of workplace violence are addressed by workers; and (vii) report acts of violence at the workplace (par 3.1.3.)

<sup>76</sup> These being key stakeholders in the prevention of workplace violence, their representatives should take part in the development of policies and strategies to prevent workplace violence (par. 3.1.3.).

<sup>77</sup> Training could include the improvement of the ability to identify potential violent situations; improving the capacity of event appraisal; instilling interpersonal communication skills to defuse a potential violent situation; creating a supportive environment; assertiveness training and self-defence training (par. 3.2.1.).

<sup>78</sup> Such staff should receive training on the organisation's policy regarding violence; on identifying behaviour which may indicate a risk of workplace violence; improving methods to eliminate workplace violence; support recovering workers; keeping confidentiality in cases of violence; creating an environment based on mutual trust (par. 3.2.2.).

<sup>79</sup> To be included is (i) information on the nature and causes of workplace violence; (ii) information on the extent and areas of concentration of workplace violence; (iii) suggested measures to prevent workplace violence; (iv) information on gender, multicultural diversity and discrimination to develop sensitivity; (v) information on the laws and regulations covering violence; and (vi) information on the services available to assist victims of workplace violence (par. 3.2.3.).

<sup>80</sup> This should include (i) a health and safety policy on workplace violence; (ii) a system of recording patterns of different categories of workplace violence; (iii) arrangements, procedures and instructions in a way which is understood by those who have to use it; (iv) reasonable access to records relevant to workplace violence taking into account the issue of confidentiality; and (v) records which include categories of workers' exposures, results of monitoring and of acts of workplace violence (par. 3.3.).

<sup>81</sup> For example (i) by establishing communication channels on an ongoing basis for information sharing, (ii) by establishing special communication channels in periods of reform and organisational change; (iii) by providing feedback procedures; and (iv) by time being made available for dialogue, information sharing and problem-solving (par. 3.4.).

Much is said in the Code of Practice about *planning and implementation* as well. The organisation's existing violence management system should be reviewed<sup>82</sup>. Employers and workers or their representatives should jointly assess the current effects of violence in the workplace<sup>83</sup>. Risk assessment should be conducted with worker and employer participation.<sup>84</sup> Acts of violence at the workplace should be recorded<sup>85</sup>. At sector, national and international levels, a comprehensive approach involving governments, employers, workers and their representatives is required to collate and assess data from various sources on violence in the services sectors<sup>86</sup>.

In the *implementation* field, arrangements should be made for adequate implementation of a management system dealing with workplace violence and, where appropriate, response to workplace violence<sup>87</sup>.

The Code treats *control measures*<sup>88</sup> with strategies to prevent, reduce, manage and cope with violence. In developing policy and strategies on

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<sup>82</sup> *Code of Practice* par. 4.1.

<sup>83</sup> The following indicators should provide useful information for identifying the magnitude of the problem at a given workplace, namely (i) national and local surveys on the extent of violence in the community; (ii) surveys which have been carried out in similar workplaces; (iii) absenteeism; (iv) sick leave; (v) accident rates; (vi) personnel turnover; and (vii) opinions of supervisors, managers, workers and their representatives, safety personnel, occupational health and social services personnel (par. 4.1.1.).

<sup>84</sup> In conducting a risk assessment of workplace violence, account should be taken of the following possible signs. Namely (i) physically injuring or assaulting a person leading to actual harm; (ii) intense ongoing violent abuse such as verbal abuse, including swearing, insults or condescending language, aggressive body language indicating intimidation, contempt and disdain, harassment, including mobbing, bullying, racial and sexual harassment; (iii) expression of intent to cause harm, including threatening behaviour, verbal or written threats (par. 4.1.2.).

<sup>85</sup> Employers should review this experience in order to identify patterns and trends, including (i) identifying sources of workplace violence as being internal or external; (ii) categories of severity; (iii) incidence of violence in particular area/task categories; (iv) perpetrator and victim characteristics; (v) forms of violence; (vi) possible contributing factors, such as delays in service provision; (vii) situational contexts (home visits, "over – the – counter" services, conditions outside work premises); (viii) other risk factors such as time of day or night (par. 4.1.3.).

<sup>86</sup> (i) Subsectors and occupations at major risk of violence should be identified (ii) Standardisation of sub –categories used in recording procedures such as abuse, threat and assault should be pursued; (iii) statistics on work violence need to be collated by those working in the criminal justice system and integrated in those collated by the occupational safety and health authorities and harassment data from equality bodies, as well as human resources data from individual organisations; (iv) when substantial national data is available, governments should chart trends and evaluate the effectiveness of different prevention initiatives (par. 4.1.4.).

<sup>87</sup> *Code of Practice*, par. 4.2.

<sup>88</sup> *Ibid.* 4.3.

work violence, special consideration should be given to specific issues, namely that workplace violence is detrimental to the functioning of the workplace and the quality of services<sup>89</sup>. An analysis of the full range of causes which generate violence would be helpful in defining better prevention strategies. Where preventive measures have proved to be particularly effective, they should be given priority wherever possible. Short, medium and long-term objectives and strategies should be identified at the earliest stages in order to organise action towards realistically achievable goals within an agreed time frame. Action should be articulated in a series of fundamental steps which include workplace violence recognition, risk assessment, intervention, monitoring and evaluation<sup>90</sup>.

*Awareness-raising* and *cooperation* in combating workplace violence feature in the Code are important aspects, too<sup>91</sup>. The Code also provides for *organisational preventive measures* by means of communication<sup>92</sup> and work practices<sup>93</sup>. The *improvement of the work environment* is mentioned and treats the physical environment<sup>94</sup> and work security issues<sup>95</sup>. *Incident preparedness*<sup>96</sup>,

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<sup>89</sup> Action taken against such problems is an integral part of organisational development and the promotion of decent work.

<sup>90</sup> *Code of Practice*, par. 4.3.1.

<sup>91</sup> Governments, employers, workers and their representatives should be actively engaged in giving priority to the reduction in violence including measures aimed at (i) enhancing recognition of workplace violence as a major threat to health and safety, service efficiency, productivity, equal treatment and decent work; (ii) disseminating information on workplace violence; (iii) monitoring and examining workplace violence and providing opinions, proposals and considerations to governments, legislative institutions and the community. Furthermore governments, employers, workers and their representatives should pursue local, regional and international cooperation with the aim of reducing workplace violence (par. 4.3.2.).

<sup>92</sup> Suggestions are made concerning communication. Improved communication can reduce the risk of workplace violence. This should take the form of (i) timely and adequate information to the public and clients; (ii) opportunities given to the client to comment on the quality of service and consideration given to those comments; (iii) measures to deal with complaints (par. 4.4.1.).

<sup>93</sup> There are also suggestions made regarding work practices. Preventive measures concerning work practices should include consideration of (i) staff levels; (ii) service capacity and resources; (iii) workload; (iv) scheduling; (v) workplace location; (vi) security of the handling of valuables; (vii) proximity or contact possibility of isolated workers; (viii) specific needs of the service and expectations of the general public (par. 4.4.2.).

<sup>94</sup> The physical features of the workplace may be factors in defusing workplace violence and consideration should be given to noise, lighting and temperature levels (par. 4.5.1.).

<sup>95</sup> To minimise the risk of workplace violence the following should be taken into account. (i) the identification of areas at special risk and the level of risk; (ii) access to and from the workplace, including parking areas and transport facilities; (iii) the existence of

*response plans*<sup>97</sup> and *management support*<sup>98</sup> feature prominently in the Code. Focusing on the individual through medical and other interventions is also recommended. Interventions should be developed to reinforce the capacity of individuals to contribute to the prevention of workplace violence through *medical treatment*<sup>99</sup>, *support*<sup>100</sup>, *debriefing*<sup>101</sup> and *mitigation*<sup>102</sup>.

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security services; (iv) the elimination of impediments to a clear view at the workplace; (v) the identification of restricted areas; (vi) the installation of security systems in dangerous areas following consultation with workers and their representatives; (vii) the banning of weapons except as an inherent requirement of a specific job; (viii) restrictions on alcohol and drugs in the workplace; (ix) access control systems for workers and/or visitors, where appropriate (identification, reception desk(s), gates, etc.); (x) identity documents for workers, where appropriate; (xi) identification of visitors, where appropriate; and (xii) cooperation among enterprises on collective security.(par. 4.5.2).

<sup>96</sup> Violence prevention, preparedness and response arrangements should be established and maintained in all organisations. These arrangements should identify the potential for violent acts at the workplace. A response from the organisation to a violent incident should include a plan of response to the various manifestations within the organisation after a violent incident both in terms of physical and psychological outcomes as far as is reasonably practicable (par. 4.6.).

<sup>97</sup> Management plans for handling situations of workplace violence and associated problems should be set up. The helping of individuals affected by workplace violence should feature in those plans and facilities to deal with the after-effects of violent incidents both physically and emotionally should be available. These plans should include measures to prevent severe psychological and medical problems at the level of post traumatic stress disorder from developing (par. 4.6.1.).

<sup>98</sup> Management should provide support to all workers affected by workplace violence. In particular management should (i) deal with the immediate aftermath of violence and associated problems; (ii) minimise the impact of workplace violence by facilitating or advising on provision of leave where appropriate; (iii) provide information to the immediate families of the workers affected; and (iv) initiate a timely internal investigation where necessary (par. 4.6.2.).

<sup>99</sup> Appropriate medical treatment should be available to workers affected by workplace violence. Where an enterprise has a medical service facility the employer should refer workplace violence victims to that service if there is a competent person able to deal with this issue. Where no in-house medical service exists then workers should be referred to treatment outside the establishment (par 4.7.).

<sup>100</sup> Support to discuss concerns or other support initiatives in consultation with workers and their representatives, may prove beneficial to those affected by workplace violence. For example, counselling and psychological treatment, if appropriate (par. 4.7.2.).

<sup>101</sup> Debriefing as required should be made available by the employer in consultation with workers' representatives, to workers affected by workplace violence. It could include (i) sharing personal experiences with others to defuse the impact of violence; (ii) helping those affected by workplace violence to come to terms with the event and to understand; (iii) offering reassurance and support; focusing on the facts and giving information; and (iv) explaining the help available (par. 4.7.3.).

<sup>102</sup> Governments should promote care and support to victims of workplace violence through public health-care programmes, access to treatment, social security systems,

Regarding *grievance and disciplinary procedures* governments, employers, workers and their representatives should collaborate to develop grievance and disciplinary procedures to deal with complaints regarding workplace violence. The Code recommends that the “rules of natural justice”<sup>103</sup> be observed regarding *disciplinary and grievance procedures*. Furthermore, *privacy and confidentiality*<sup>104</sup> should be observed at all time. Finally, the Code treats the issues of *monitoring and review*. Periodic reviews should be conducted to determine the effectiveness of the workplace violence management system. Such reviews should be conducted by competent persons and the results communicated to the affected parties<sup>105</sup>. Monitoring and evaluation of workplace violence prevention policies should take place<sup>106</sup> and organisational learning on issues related to violence at work<sup>107</sup> should be devised.

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occupational health and safety systems, and other government initiatives. Rehabilitation should be made available to victims. The employer should provide support to victims of workplace violence during the entire period and allow all necessary time to recover, within reason. Workers should be encouraged to return to work, avoiding too much pressure at first, special working arrangements being made to facilitate reintegration (par.4.7.4).

<sup>103</sup> Namely, (i) the procedures should be fair and equitable for the investigation and resolution of complaints.; (ii) the process should ensure that a worker who is the subject of a complaint is informed of the details of the allegation(s) made against him/her; (iii) has the opportunity to respond to the allegation(s); (iv) has the benefit of an impartial, independent and fair hearing by a decision-maker who has not prejudged the issue; (v) that victimisation is prevented; and (vi) that confidentiality and time limits are respected. Furthermore retaliation against victims and witnesses should not be tolerated. (par. 4.8.)

<sup>104</sup> Governments and employers should ensure that any information relating to grievance and disciplinary procedures, medical treatment, counselling and rehabilitation be kept confidential in accordance with national laws and regulations (par. 4.9.)

<sup>105</sup> *Code of Practice*, par. 5

<sup>106</sup> With the cooperation with workers and their representatives, the employer should evaluate the effectiveness of workplace violence prevention policies. This should include (i) regular monitoring of the results of measures introduced; (ii) developing criteria for evaluation and receiving regular feed back to check how well the policies and measures are working and to make the necessary modifications; (iii) the organising of periodic joint meetings of management and workers to discuss measures put in place; (iv) reviewing the management plan on a regular basis, including the assessment of policy implementation (par.5.1.).

<sup>107</sup> With the cooperation of workers and their representatives the employer should develop a strategic learning process on issues relating to workplace violence. The process should include (i) learning from the lessons gained from the design, implementation and evaluation of workplace policies; (ii) reassuring the workforce culture, work organisation and the quality of the work environment to respond effectively to workplace violence; (iii) activating a risk management cycle that makes the elimination of workplace violence and the improvement of the work environment an ongoing process within the

As one can readily notice, the ILO Code of Practice on workplace violence is complete, straightforward, easy to understand, well drafted and realistic in combating workplace violence. The Code meets admirably its objective in providing general guidance in addressing the problem of workplace violence in the service industries. It serves as a basic reference tool for stimulating the development of similar instruments at the regional, national, sector, enterprise, organisation and workplace levels specifically targeted at, and adapted to, different cultures, situations and needs. It is now proposed to evaluate workplace violence at the European Union level.

### *The European Pattern*

Violence, bullying and harassment have become increasingly common features of European workplaces, but the response from organisations and governments remains inadequate. The Director of the European Agency for Safety and Health at Work<sup>108</sup> posited:

Both violence and harassment represent serious but under-reported threats to the safety and wellbeing of workers in Europe. Violence, verbal aggression or threats that employees experience with customers or patients are critical health and safety issues. And the psychological issues are sometimes more dangerous than physical wounds. Workplace harassment can lead to stress, long-term sickness leave, and even suicide. Economic consequences are reduced productivity, increased sickness absence, higher turnover of staff and premature retirement due to disability at often early ages<sup>109</sup>.

The European social partners consider the Framework Agreement on Harassment and Violence at Work which they entered into to be of mutual concern of employers and workers to deal with the issue of harassment and violence at the workplace which can have serious social and economic consequences.<sup>110</sup> They recognise that “harassment and

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organisation. Such an approach would contribute to enhancing quality of service, productivity and decent work.

<sup>108</sup> The mission of this Agency (EU-OSHA) is to make Europe a safer, healthier and more productive place to work. The EU-OSHA was set up by the EU to help meet the information needs in the field of occupational safety and health

<sup>109</sup> Source: *Workplace violence and harassment on the increase in Europe*, Press release 3 January, 2011.

<sup>110</sup> Further reading on harassment and violence will be found at INRS France (*La violence au travail en Europe*) <http://analysesdespratiques.com/wp-content/uploads/2011/03/La-violence-au-Travail.pdf>.

violence can potentially affect any workplace and any worker, irrespective of the size of the company<sup>111</sup>, field of activity or form of the employment contract or relationship”<sup>112</sup>. The report entitled “Workplace Violence and Harassment: A European Picture” states that

in many European countries there is still not enough recognition of workplace violence, with few specific initiatives dealing with the issue. At national level and among individual organisations there is a need to raise awareness, and put in place policies and procedures to tackle and prevent violence and harassment at work.

At European level, the Framework Agreement on Harassment and Violence at Work<sup>113</sup> provisions are similar, though by far not as detailed as those of the ILO Code of Practice. In its introduction, the Framework Agreement mentions the relevance of the four Directives<sup>114</sup> which define the employers’ duty to protect workers against harassment and violence in the workplace. Harassment and violence are issues of mutual concern to employers and workers for they can have serious social and economic consequences.

The aim of the Framework Agreement<sup>115</sup> is twofold; to increase the awareness and understanding of employers, workers and their representatives of workplace harassment and violence and to provide employers, workers and their representatives at all levels<sup>116</sup> with an action-orientated framework to identify, prevent and manage problems of harassment and violence at work.

The Framework Agreement states that “raising awareness and appropriate training of managers and workers can reduce the likelihood of harassment

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SPF Emploi Respect au Travail (*Violences au travail, harcèlement moral et sexuel*)  
<http://www.emploi.belgique.be/WorkArea/showcontent.aspx?id=5948>.

Dublin Foundation (*Preventing violence and harassment in the workplace*)  
<http://www.eurofound.europa.eu/pubdocs/2002/109/en/1/ef02109en.pdf>.

<sup>111</sup> Which includes small and medium size companies (Footnote inserted by the author).

<sup>112</sup> Source: *Framework Agreement on Harassment and Violence at Work*, part 1. *Introduction*.

<sup>113</sup> Concluded on 26 April 2007 by the ETUC/CES, BUSINESSEUROPE, UEAPME and CEEP (and the liaison committee EUROCADRES/CEC). European Social Dialogue.

<sup>114</sup> These Directives are referred to in footnote 30 *ante*. It should be emphasised that these four Directives do not constitute an exhaustive list.

<sup>115</sup> Source: *Framework Agreement on Harassment and Violence at Work*, part 2 *Aim*.

<sup>116</sup> It should be noted that these measures apply to everybody irrespective of the position held by a person in the establishment hierarchy.

and violence at work”<sup>117</sup>. Enterprises need to have a clear statement that harassment and violence would not be tolerated therein. Such statement should specify procedures to be followed where harassment and violence cases arise. Procedures could include an informal stage in which a trusted neutral person acceptable to both management and workers is available to give advice and assistance. Such a person could be an internal colleague or an external adviser<sup>118</sup>. Preliminary procedures could be both suitable and useful when dealing with harassment and violence issues.

The Framework Agreement talks of procedures to be underpinned by, but not confined to<sup>119</sup>, certain matters. The first of these matters suggests that it is in the interest of the parties concerned to proceed with necessary discretion in order to protect the privacy and dignity of all concerned. In the second instance, it is suggested that no information should be disclosed to third parties not involved in the case. Thirdly, complaints should be investigated and dealt with without undue delay. Fourthly, the rules of natural justice<sup>120</sup> should be observed. Fifthly, complaints made should be supported by evidence and/or by other detailed information whether written or oral. In the sixth instance, any unjustified, false and malicious accusations made by a person should not be tolerated and could result in appropriate disciplinary action. The final matter is that third party assistance (whether external or internal) could prove useful.

Where it is established that harassment and violence have taken place, appropriate action – which could include disciplinary action such as dismissal – should be taken against the perpetrator(s). The establishment should give all the help and support necessary to the victim(s) who would be entitled to reintegration.

The Framework Agreement provides for the establishment, reviewing and monitoring of these procedures by the employer – in consultation with workers and/or their representatives – to ensure their effectiveness both in preventing the occurrence of harassment and violence and in dealing with these problems when they occur. It should be noted that the provisions of the Framework Agreement apply to harassment and violence by *third parties* who are external to the establishment. This agreement thus covers clients, customers, patients, and so on.

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<sup>117</sup> *Framework Agreement on Harassment and Violence at Work*, part 4 *Preventing, Identifying and Managing Problems of Harassment and Violence*.

<sup>118</sup> As for example an occupational psychologist.

<sup>119</sup> This means that the description consists of a non-exhaustive list of actions.

<sup>120</sup> For these rules the reader is referred to 13 and to footnote 103 *ante*.

Of particular importance is the fact that this agreement is of a *non-regression* nature and that therefore there can be no reduction in the general level of protection given to workers<sup>121</sup>. The Framework agreement states that:

in the context of Art. 139 of the Treaty, this autonomous European framework agreement commits the members of BUSINESSEUROPE, UEAPME, CEEP and ETUC (and the liaison committee EUROCADRES/CEC) to implement in accordance with the procedures and practices specific to management and labour in the Member States and in the countries of the European Economic Area<sup>122</sup>.

There have been *Guidelines* agreed by the social partners in 2010<sup>123</sup> which treat violence and harassment by *third parties* such as customers, clients, patients, members of the public at large, service users, service providers, parents, pupils and so on. These guidelines provide for a variety of work-related actions taken by third parties relating to violence and harassment which include physical, psychological, verbal, written and sexual acts. There can be cyber bullying and harassment by means of a wide range of information and communication technologies. (ICT). Such work-related acts could occur at the workplace itself, in an open space such as a public park, or in an apartment, house or other private place. Such actions by third parties may range from cases of disrespect to common and aggravated assaults, grievous bodily harm and manslaughter or murder. The acts may constitute intentional or unintentional criminal offences which affect the victim's reputation by the use of slanderous and libellous remarks, or affects property rights, such as buildings, cars, *etc* belonging to the employer, customers and so on. Acts of violence and/or harassment

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<sup>121</sup> There have been a significant number of cases dealing with violence/harassment at work decided by the Court of Justice of the European Union (CJEU). Most of them deal with violence and harassment at work in relation to staff members of the European Union Institutions.

<sup>122</sup> The implementation of the agreement would be carried out within three years after its signing on 26 April, 2007 and member organisations would report on the implementation of the agreement to the Social Dialogue Committee (SDC). It will be recalled that the European Social Dialogue is an instrument for better governance in the European Union. Since the Treaty of Maastricht agreements negotiated by the social partners can be given legally binding effect through a decision made by the Council. The Social Dialogue Committee is given a role in the *implementation* and *follow-up procedures*. A yearly report has to be *drawn up* and *adopted* by the SDC. This offers a yearly opportunity to look at, and where necessary discuss, problems of implementation.

<sup>123</sup> The signatories were the EPSU, UNI europa, ETUCE, HOSPEEM, CEMR, EFEE, EuroCommerce and CoESS, July, 2010.

by third parties could result in the creation of psychological disorders such as personality changes or mental health problems.

Actions by third parties include one-off situations and also well-rehearsed, systematic and premeditated actions carried out by a single person or a group. The third party perpetrator(s) could be acting out of vengeance, for emotional reasons, personal dislikes and prejudices.

### *The British Pattern*

In the United Kingdom there are no *specific* laws relating to violence at work. However, the Health and Safety at Work Act, 1974 (as amended) imposes on the employer a general duty to protect the health and safety of employees<sup>124</sup>. This general duty, it is submitted, covers risks from violence and harassment. Furthermore, the Management of Health and Safety at Work Regulations of 1999<sup>125</sup> require employers to assess all foreseeable health and safety risks so as to identify measures to reduce them. Where the risk of violence or harassment is identified and is reasonably foreseeable, it must be eliminated or reduced to the lowest possible level. Employers also have a duty (a) to establish procedures to be followed in the event of serious or imminent danger and (b) provide information and training on health and safety risks which have been identified as well as control measures which have been put in place. Under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations of 1995<sup>126</sup> employers have an obligation to report to the Health and Safety Executive (HSE) all instances involving physical violence on employees which result in death, major injury or absence from work for three or more days.<sup>127</sup> This includes any act of non-consensual physical violence done to a person at work.

Under the Safety Representatives and Safety Committees Regulations, 1977 and the Health and Safety (Consultation with Employees) Regulations, 1996, Health and Safety Representatives enjoy extensive legal rights which are wide enough to deal with cases of violence and harassment at work. These rights<sup>128</sup> include (a) the investigation of

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<sup>124</sup> Health and Safety at Work, *etc* Act, 1974 Ch. 12 ss. 2 to 9.

<sup>125</sup> Ch. 13.

<sup>126</sup> Ch.49. Known commonly as RIDDOR.

<sup>127</sup> The *Reporting of Injuries, Diseases and Dangerous Occurrences Regulations* do not cover threats, verbal abuse and absences resulting from threats and verbal abuse.

<sup>128</sup> Emanating from the Safety Representatives and Safety Committees Regulations of 1977. It is also known as *The Brown Book*.

potential hazards and dangerous occurrences; (b) inspection of the workplace; (c) the taking up of members' complaints; (d) the receiving of information from the employer; (e) the inspection of health and safety documents; and (f) the enjoyment of paid time off to carry out those functions.

In addition, employers have a duty to consult employees and safety representatives in good time about their arrangements for health and safety, including the introduction of new measures affecting employees and the development and provision of any health and safety training.<sup>129</sup> This should include concerns about violence. Safety Committees may provide a useful channel for employees to report violent acts and threatening incidents which they may not wish to raise directly and personally, as individuals, with their employer.

Under the Corporate Manslaughter and Corporate Homicide Act 2007 an employer may be found guilty of corporate manslaughter in cases where the employee was killed at work due to the employer's failure to exercise his duty of care towards his employees and other workers<sup>130</sup>.

#### 4. Occupational Groups Most Exposed to Violence

Certain occupational groups have a tendency of being more at risk from workplace violence than others. These occupations include, *inter alia*, healthcare employees<sup>131</sup> such as hospital and care home workers<sup>132</sup>, correctional officers such as police and prison officers, school teachers, retail employees<sup>133</sup>, municipal housing inspectors, social services employees and those working in the public sector such as bus drivers,

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<sup>129</sup> Under the Safety Representatives and Safety Committees Regulations 1977 and the Health and Safety (Consultation with Employees) Regulations 1996.

<sup>130</sup> For a distinction between the terms "employee" and "worker" the reader is referred to J. Carby-Hall, *New Frontiers of Labour Law: Dependent and Autonomous Workers*, in B. Veneziani, U. Carabelli (eds.), *Du Travail Salaré au Travail Indépendant: Permanences et Mutations*, (SOCRATES Programme), Cacucci Editore, Bari, 2003, at 163 to 308, especially 246 to 282).

<sup>131</sup> Those providing care to people who are ill, afraid, distressed in a panic or on medication.

<sup>132</sup> See the advice and guidance given in the British Health and Safety Executives (HSE) booklet entitled *Violence and Aggression to Staff in Health Services: Guidance on assessment and Management* (2 Edition), HSE Books, 1997.

<sup>133</sup> See the guidance given by the British HSE booklet entitled *Preventing Violence to Retail Staff*, HSE books HSG 133, 1995.

ticket inspectors in buses and trains and taxi drivers. Those working in smaller businesses tend to be more exposed to violence<sup>134</sup>. Traffic wardens, shop and hotel workers, utility meter readers and school crossing patrols have been known to be exposed to violence. Those handling drugs or having access to them are also at risk of violence. Working with people (a) who have used violence to express themselves or achieve their needs or (b) who exercise power to restrict the freedom of individuals or (c) who have a great deal of anger, resentment or feelings of failure or (d) who have unrealistically high expectations of what the organisation can offer and who are seeking quick and easy solutions to long term and complex problems.

There are also certain **work-related** factors which increase the risk of violence. These include working during periods of intense organisational change such as individual and mass redundancies and industrial action as experienced during the Euro crisis in Greece, Spain, Italy, Ireland, Portugal and Cyprus; handling money such as bank and building society cashiers<sup>135</sup> or shop tills; working in pubs and other premises, such as food and beverages staff in restaurants or cafes where alcohol is served; working in community-based sites such as social workers, home visitors or peripatetic nurses; working with unstable or volatile persons such as in psychiatric hospitals; carrying out enforcement duties such as inspections of premises by government officials or health and safety inspectors; working alone<sup>136</sup> such as a lone store man or a real property agent employee; working in small groups; or working at isolated sites such as at Sonatrach in the Algeria desert oil installations or in isolated or low traffic areas such as public toilets and rest rooms, utility rooms and storage areas. Violence is more prone to occur in badly lit areas or in multi-occupied premises or again in working units which do not have a human image<sup>137</sup>. Working under pressure created by increased workloads, under-staffing and the absence of alternative support for the client is another work-related factor which increases the risk of violence.

Risks of violence may be greater at certain times of the day, night or year, such as deadline cut-off dates for utility bills, early in the morning or late

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<sup>134</sup> See the guidance given by the British HSE entitled *Work-Related Violence: Case Studies – Managing the Risk in Smaller Businesses*, HSG 229 HSE Books, 2002.

<sup>135</sup> See advice and guidance given by the British HSE booklet entitled *Prevention of Violence to Staff in Banks and Building Societies*, HSG 100 HSE Books, 1993.

<sup>136</sup> See the Case Studies Health and Safety Laboratory/Report WIS/03/05a and guidance given by the HSE in its booklet entitled *Managing and Preventing Violence to Lone Workers*.

<sup>137</sup> As for example crowded, busy, uncomfortable workplaces lacking in facilities for the public such as toilets, refreshments, children's toys and telephones.

at night when there are few workers around, holiday or festival periods, pay days and so on. Violence could occur where buildings are close to a risk-prone area such as a pub or a bank or where buildings are isolated. Violence can also occur as a result of frustration from otherwise normal customers. Examples include the lack of information<sup>138</sup>; a feeling of being unfairly penalised<sup>139</sup>; dissatisfaction over a service or product<sup>140</sup>; or disputes over the pricing of a commodity<sup>141</sup>.

### 5. Brief Statistics Relating to Violence

According to the ILO<sup>142</sup>, a 2000 survey of the original fifteen EU Member States indicated that bullying, harassment and intimidation were widespread. A 2002 study in Germany estimated that over 800,000 workers were victims of mobbing<sup>143</sup>. In Spain, approximately 22% of officials in public administration were victims of mobbing. In France acts of aggression against transport workers, including taxi drivers, rose from 3,051 in 2001 to 3,185 in 2002. In Japan, the number of cases brought before court counsellors totalled 625,572 between April 2002 and March 2003. Of these, 5.1%, or some 32,000 related to harassment and bullying whereas from April to September 2003 there were 51,444 consultations requests, 9.6% of which were connected to harassment and bullying. In developing countries the most vulnerable workers were women, migrants and children. In Malaysia, 11,851 rape and molestation cases at the workplace were reported between 1997 and 2001. Widespread sexual

<sup>138</sup> For example, long waits to see a doctor in a hospital or surgery or delays on public transport such as trains, coaches and buses or again waiting for a friend to collect a person.

<sup>139</sup> Parking fines, speeding offences, being stopped by the police, visits from bailiffs and seizure of chattels, the refusal of a refund in a store because of a outdated or lost receipt and so on.

<sup>140</sup> Miss-selling in the financial services industry or wrongly described product or service in a restaurant, shop, internet site, etc.

<sup>141</sup> Where a shop charges a different price at the till compared with the price exhibited for that commodity on the shelves, or a dispute with a tradesman who over-charged the price of the work performed.

<sup>142</sup> Source: As reported by *Pre Employment Screening Services – Info Cubic*, in <http://preemploymentscreeningarticles.infocubic.net/index.php/ilo-workplace-violence-increasing-worldwide/> (Accessed on 8 March, 2013).

<sup>143</sup> Namely a group of workers targeted an individual for psychological harassment.

harassment constituted major concerns, *inter alia*, in South Africa, Ukraine, Kuwait, Hong Kong and China.

In South Africa workers in the health care sector are considered to be the most vulnerable in experiencing physical violence. Over a twelve month period 9% of those employed in the private health sector and about 17% working in the public health sector experienced physical violence.

On the other hand, instances of workplace violence have decreased in England and Wales<sup>144</sup> and the USA<sup>145</sup>.

On the occasion of the International Women's Day<sup>146</sup> the Director General of the ILO said that "Gender based violence is clearly at odds with the meaning of decent work, full and productive employment for women and men in conditions of freedom, equality, security and human dignity"<sup>147</sup>. In the European Union countries 40% to 50% of women experience unwanted sexual advances, physical contact or other forms of sexual harassment at the workplace. In Asia and the Pacific some 30% to 40% of women report some sort of verbal, physical or sexual harassment.

On the European platform, the Fourth European Survey on Working Conditions<sup>148</sup> indicates that 2% (10 million workers) are subjected to physical violence from persons belonging to their workforce; 4% (20 million workers) are subjected to physical violence from persons outside their workforce<sup>149</sup>; 2% (10 million workers) are subjected to sexual

<sup>144</sup> By 1.3 million incidents of violence from a previous survey standing at 849,000 incidents of workplace violence in 2002-2003 of which 431,000 were incidents of physical assaults and 418,000 incidents of threats. It should be noticed that the above figures are not necessarily accurate because of the rise in the proportion of victims who experienced *more than one incident* of violence. Thus, there are fewer victims but a greater number of incidents. The UNISON trade union is calling for employers to "enforce better safety measures to stop the number of *repeat attacks* and for tougher legal action to be taken against attackers" (Italics inserted by the author). Source: *Rise in Workplace Violence Despite Fewer Victims*, in *Safety and Health Practitioner*, 24 January, 2011. According to the Trades Union Congress (TUC) there has been a 43% rise of victims who were *previously* assaulted or threatened.

<sup>145</sup> In the USA homicide is the third leading cause of death at work. In the last few years there has been a decline in both workplace murders and non-fatal assaults Women represent about 61% of all victimised workers because they tend to work in jobs which are considered high risk for assaults.

<sup>146</sup> On 8 March 2013.

<sup>147</sup> Source: [www.kuna.net.kw/ArticleDetails.aspx?id=2297148&language=en](http://www.kuna.net.kw/ArticleDetails.aspx?id=2297148&language=en) (Accessed on 8 March and 27 March 2013).

<sup>148</sup> Dated 23 June, 2009 and based on 30,000 face-to-face interviews with workers in 31 European countries.

<sup>149</sup> In the period 1995 to 2005, the level of physical violence increased by one third from 4% to 6%.

harassment<sup>150</sup> and 5% (25 million workers) are subjected to intimidation, harassment and bullying<sup>151</sup>.

As indicated above, on the English and Welsh platform the number of violent incidents at work shows a downward trend in the last eleven years and in the last five years violent incidents remained fairly constant<sup>152</sup>. According to the Crime Survey for England and Wales (CSEW) of 2011/12<sup>153</sup> there were 463,000 incidents of work-related violence during that period, comprising 324,000 assaults and 319,000 threats. There was a 2% drop in violence compared to the previous year, namely 2010/11 where 654,000 incidents occurred. Between the years 2001 and 2010 and 2011 and 2012 overall violence at work was reduced by 36% with assaults reduced by 23% and threats by 34% over that period<sup>154</sup>.

The risks of being a victim of work-related violence appear to remain low for both genders at 1.4%<sup>155</sup>. An estimated 58% of all victims subjected to assaults and threats at work were repeat victims. In the years 2011/12, 18% of the victims experienced two incidents whereas 24% experienced three or more incidents of workplace violence<sup>156</sup>.

The occupations experiencing the highest risks of work-related violence were those involved in the protective services, namely the police, prison officers and the fire brigade<sup>157</sup>, the health and social welfare services<sup>158</sup>, the

<sup>150</sup> Of the 2% of persons subjected to sexual harassment, it affects three times as many women as men. The highest exposures are to be found in the catering services (hotels and restaurants) with 4% among women with precarious employment status. 5% of women on temporary agency contracts are subjected to sexual harassment compared to 2% of women on fixed-term contracts.

<sup>151</sup> The highest exposure rates are in services (over 8% in the health sector and in hotels and restaurants, over 6% in education, in transport and communications). Female workers are more exposed than male workers with especially young women being affected. Over 8% of 15 to 29 year old women are subjected to bullying and harassment compared to 4% of men in the same age group.

<sup>152</sup> Source: <http://www.rmt.org.uk/news/publications/violence-at-work/>. See the graph entitled *Number Of Victims Of Violence At Work For Adults Of Working Age In Employment 2001/02 To 2011/12*, in Crime Survey for England and Wales, p. 5, figure 2.

<sup>153</sup> Source: P. Buckley, *Violence at Work. Findings from the Crime Survey for England and Wales 2011/12*, Health and Safety Executive and National Office of Statistics, 3, <http://www.rmt.org.uk/news/publications/violence-at-work/>.

<sup>154</sup> Source: *Ibid.*, p. 6, figure 3. See however footnote 144 above.

<sup>155</sup> The highest risk age group was 35 to 54 for men (1.6%) and 16 to 24 for women (1.8%).

<sup>156</sup> Source: P. Buckley, *op.cit.*, p. 9, figure 6.

<sup>157</sup> These groups had the highest estimated risk. 8% of that group experienced one or more incidents of actual or threatened violence at work. Source: P. Buckley, *op.cit.*, p. 9, table 1.

health professionals<sup>159</sup>, the teaching and research professionals<sup>160</sup> and transport and mobile machine drivers<sup>161</sup>. In 2011/12, 60% of the culprits were strangers to the victims of violence in the workplace while 40% were known<sup>162</sup> to the victim<sup>163</sup>. Alcohol and drugs were factors in numerous incidents<sup>164</sup>. Violence at work may result in both physical and emotional consequences for the victims which can affect their health. Although 59% of workplace assaults resulted in no injury in the period 2011 and 12, 41% resulted in physical injury<sup>165</sup>. The cases reported by the employer under the RIDDOR provisions<sup>166</sup> during the period 2011 and 12 were 5,493.

## 6. Concluding thoughts

A striking feature relating to violence at work at international level is that the regulatory element is primarily based on *soft law*<sup>167</sup> with only a sprinkling of hard law<sup>168</sup> which garnishes its edges and gives the Code legislative legitimacy. It will be recalled that at the international level the main document which covers workplace violence is the ILO Code of Practice which is a legally non-binding document. Granted that this Code has been painstakingly drafted and is very complete, it serves only as a

<sup>158</sup> Experienced 3.5% of all violence consisting of 1.8% in relation to assaults and 2% relation to threats. Source: *Ibid.*

<sup>159</sup> Experienced 2.9% of violence consisting of 0.6% assaults and 2.6% threats. Source: *Ibid.*

<sup>160</sup> Who experienced 2.3% of violence consisting of 1.4% assaults and 1% threats. Source: *Ibid.*

<sup>161</sup> Who experienced violence at 1.5% consisting of 0.7% of assaults and 0.8% threats. Source: *Ibid.*

<sup>162</sup> Fellow worker, colleague, client/customer or member of the public, young persons in the area.

<sup>163</sup> Source: P. Buckley, *op.cit.*, p. 10.

<sup>164</sup> 39% of the violence offenders were believed to be under the influence of alcohol whereas those thought to be on drugs was 22%. Source: P. Buckley, *op.cit.*, p. 10.

<sup>165</sup> The type of injury consisted of minor bruises and black eyes in 29% of the cases, severe bruising in 4%, (which resulted in heavier trauma at 12%), with scratches in 12%, cuts in 9% and 5% in other types of injuries. Source: P. Buckley, *op.cit.*, p. 11, figure 7.

<sup>166</sup> For the employer's duty to report under RIDDOR see 17 *ante*.

<sup>167</sup> Namely the ILO *Code of Practice*.

<sup>168</sup> For example the ILO Conventions No. 111, No. 169, No. 189 and No. 200, which deal with sexual harassment and violence at work. Other Conventions relevant to combating workplace violence are those which relate to Child Labour and to Occupational Safety and Health.

document which gives practical guidance to those responsible on the international stage for addressing workplace violence in the services.<sup>169</sup>

It is submitted that the existing soft law, peppered by three ILO Conventions and a Recommendation<sup>170</sup>, efficient as it has proved, is not sufficient to regulate effectively workplace violence particularly against women. This issue is poorly defined and not well understood under international law and industrial relations. The ILO needs to address the issues of sexual and other forms of harassment where there is a predominantly feminised workforce<sup>171</sup>.

What is needed at international, European and British levels is positive action to be taken by way of the enactment of proactive *hard* (rather than soft) labour laws and enforcement mechanisms.

Under the international umbrella, the ILO Director General, taking the lead, maintained that <sup>172</sup> “We are aware that much still needs to be done legally [...] There is still no explicit human rights treaty prohibition on violence against women and [...] the issue remains poorly defined and understood under international human rights law and often in labour and industrial relations”.

Although the Code of Conduct against violence in the services sector is thorough and complete and although the guidelines which treat violence in the workshop in the health sector are useful, both of which constitute soft law, much more is needed by way of hard law to tackle effectively workshop violence. The Director-General talked of the necessary action needed to tackle effectively this issue. He said<sup>173</sup> “Coherent and effective labour laws and enforcement mechanisms” were required “so that

<sup>169</sup> See the discussion which takes place at pp. 8 to 14 *infra*.

<sup>170</sup> Namely, the Convention on Equality in Employment and Occupation (No. 111) treating sexual harassment; the Convention on Indigenous and Tribal Peoples (No. 169) treating special measures protecting indigenous workers from sexual harassment; the Domestic Workers’ Convention (No. 189) dealing with vulnerable feminised workers and the HIV and AIDS Recommendation (No. 2000) on the reduction at the workplace of HIV through the prevention or prohibition of violence and harassment at work. The Occupational Safety and Health and Child Labour Conventions deal *in part* with the combating of violence at work.

<sup>171</sup> The IATA statistics (2007-2009) show that in civil aviation ground hostesses are exposed to “air rage” by discontented passengers which manifest themselves through verbal and psychological abuse, sexual and other forms of harassment as well as physical assaults.

<sup>172</sup> Source: *STOP Violence at Work*, 8 March, 2013, in [www.ilo.org/global/about-the-ilo/who-we-are/ilo-director-general/statements-and-speeches/WCMS\\_206371/lang-en/index.htm](http://www.ilo.org/global/about-the-ilo/who-we-are/ilo-director-general/statements-and-speeches/WCMS_206371/lang-en/index.htm) (Accessed 25 June 2014).

<sup>173</sup> Source: See footnote above.

proactive laws as well as individual complaint-based mechanisms discourage violence.” He added to his speech the need for (a) consistency between labour codes and criminal, civil and family laws and other bodies of law covering not only sanctions but also incentives to “buy into the fight against violence at work.” (b) The “removal of obstacles to women’s access to [...] labour justice” and the need of “a particular focus on the informal economy [...] because this is where so many women work, often hidden and unreported”.

Effective labour laws and enforcement mechanisms are also needed under the European and British umbrellas to tackle effectively violence at work. Under the European umbrella, violence at work is primarily governed by the social partners’ Framework Agreement on Harassment and Violence at Work<sup>174</sup> and the guidelines agreed by the social partners whereas under the British umbrella no *special* or *specific* laws exist on violence at work. The provisions of the Health and Safety at Work Act, 1974 (as amended) and related Regulations do however cover risks from violence and harassment<sup>175</sup>. Although violence at work in England and Wales is *officially* on the decrease<sup>176</sup> there have nevertheless been 643,000 cases of workplace violence in the past year. This is a relatively high number of incidents, the consequences of which may have physical and psychological effects on individuals. It will be recalled that this apparent decrease is due to the fact that numerous victims of violence at work experienced more than one incident of violence<sup>177</sup>. The fact that multiple acts of violence inflicted on one victim (which statistically count as one incident) often occur, indicates that there is a *rise* in workshop violence though fewer victims are affected. British employers need to enforce existing safety measures to stop the number of repeated attacks made against victims. Also required is tougher legal action to be taken against the attacker when needs to be made official government policy buttressed by appropriate hard law.

An issue which has not been addressed by international and European laws<sup>178</sup>, although touched upon by the British common law in the realm of violence at work is the concept of the employer’s *vicarious liability* towards

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<sup>174</sup> See the discussion which took place at pp. 14 to 17 *infra*.

<sup>175</sup> The British pattern has been treated at pp. 17 and 18 *infra*.

<sup>176</sup> See 20 *ante*.

<sup>177</sup> See footnote 144 above which analyses this phenomenon.

<sup>178</sup> Whether they be soft or hard laws.

his employees<sup>179</sup>. A British court has recently made mention of the employer being made liable *vicariously* for acts of violence caused to the victim employee by other employees at the workplace or by third parties.

A brief explanation of the concept of *vicarious liability* is needed at the outset. First, the word “vicarious” originates from the Latin word “vicarious” which means “*substitute*.” Second, the modern meaning of the word “vicarious” is “acting or done for another”<sup>180</sup>. Third, the common legal concept of vicarious liability developed under the law of the tort of negligence and applied to employment law means that the employer is liable vicariously for any physical and (more recently) psychological injury suffered by his employee(s) which has been caused by a fellow employee, a group of fellow employees or a third party in the course of employment. Fourth, this common law liability of the employer applies only to his “employees” and not to “workers” who are not “employees”<sup>181</sup>. It is therefore essential to know what the status of the victim is before the employer becomes vicariously liable in tort.

Although the well rehearsed concept of vicarious liability has a long pedigree in British labour law, to the best of this author’s knowledge, it has never been applied to cases of violence at work. It is submitted that it is high time that violence at work cases be made subject to the British doctrine of vicarious liability where the victim is found to have the status of employee. Furthermore, the concept of vicarious liability should also be included among the international and European instruments<sup>182</sup> which govern violence at the workplace.

Violence and harassment at the workplace has its economic and/or personal consequences on both the individual employee/worker and the employer. Any physical and psychological injury inflicted on the employee/worker victim could lead to a period of sick leave. In the case of stress related illnesses such sick leave could be of long-term duration. A

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<sup>179</sup> It should be noted that this concept is well established in the British common law and originates from the tort of negligence. This common law concept has been applied over the centuries to numerous employment law cases but not, so far, to violence or threats of violence to employees by colleagues at the workplace and third parties, such as customers, clients, *etc* of the employer.

<sup>180</sup> Source: Compact Oxford English dictionary, 2 Edn., Oxford University Press, Oxford, 2002, at 1287.

<sup>181</sup> Hence one of the numerous reasons why it is important to establish whether a worker is working under a contract of employment or of service (where the worker is an employee) or under a contract for services (where the worker is an independent contractor).

<sup>182</sup> Namely hard and soft international and European laws.

victim of violence/harassment may suffer psychological problems<sup>183</sup>, loss of confidence or low morale<sup>184</sup>, stress resulting in depression, anxiety, withdrawal symptoms and other psychological problems. Violence/harassment can also have the effect of the victim being fearful to return to work after a period of absence. The impact that violence/harassment has on the employer could include, *inter alia*, financial losses in respect of sick leave taken by the victim employee or worker<sup>185</sup>, low productivity and profitability<sup>186</sup>, and low staff retention<sup>187</sup> and recruitment<sup>188</sup> problems. In the case of family firms and small employers, violence/harassment may have the effect of making the firm bankrupt and thus lose its members' livelihood. In these circumstances there would be the likelihood that alternative work may not be available<sup>189</sup>. Thus effective violence prevention and the advocated hard laws (suggested above) to buttress these preventative measures, are essential for the health of both employees/workers and employers<sup>190</sup>. Both the

<sup>183</sup> As for example complete or part blameworthiness for the act of violence which occurred or feel inadequate in the face of that violence.

<sup>184</sup> Which could affect the victim's ability to perform work, alternatively, although he/she retains that ability the victim is unable to work effectively.

<sup>185</sup> Sick leave may result as a consequence of a violent act causing workers/employees psychological (e.g. stress related illnesses) or physical ailments (e.g. broken bones, fractured pelvis, fractured skull) resulting from injuries received for the violence.

<sup>186</sup> Resulting from (a) short or extended sick leave of employees/workers; (b) breakdown in customer relations and/or loss of customers and public reputation and goodwill; (c) employees/workers not willing to perform particular types of work; (d) higher insurance premiums by reason of the employer being prone to violent attacks; (e) compensation claims by employee victims claiming that the employer has not exercised under British law a duty of care as is required of him at common law (This latter is incorporated automatically in the employee's contract of employment whether or not it is stated in that contract.) (f) additional retirement costs; (g) staff replacement costs; (h) reduced staff motivation/creativity/satisfaction; (i) possible litigation costs; (j) damage to the firm's image; (k) decrease in the quality of products and (l) increase of employees/workers unfit to work.

<sup>187</sup> Existing members of staff especially senior ones, finding the job unsafe or not being able to cope with or accept violent situations may decide to leave their employment.

<sup>188</sup> Bad publicity of a firm due to frequent violent acts may dissuade potential recruits from applying for a job.

<sup>189</sup> The reader is referred to *Consequences of Work-Related Violence*, published by the European Agency for Safety and Health at Work (European Risk Observatory Report No. 5). Therein will be found references to important research carried out by specialists in the field. The report treats both worker and employer consequences emanating from violence.

<sup>190</sup> In that (a) staff morale and confidence would be high in the knowledge that the employer is taking all the necessary measures to prevent violence from occurring; (b) staff turnover would not suffer; (c) violent incidents would either be eliminated or

employer and the employee have a vested interest in reducing or eliminating violence and harassment at work.

The learned nineteenth century American judge Oliver Wendell Holmes<sup>191</sup> posited “Wisdom has taught us to be calm and meek,

To take one blow, and turn the other cheek;

It is not written what a man shall do

If the rude caitiff smite the other too!”<sup>192</sup>

Prophylactic measures taken against violence by way of hard laws enacted at international, European and national levels is the answer to Oliver Wendell Holmes’ two last lines of his poem.

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reduced considerably; (d) the standard customer care service would be maintained and/or improved; (e) employees/workers in the establishment would feel supported and therefore valued; (f) the working relationship and communication in the establishment would improve; (g) there would be improved productivity and therefore profitability and (h) there will be contentment amongst employees/workers in their knowledge that they can perform their respective jobs in safety.

<sup>191</sup> 1809-1894.

<sup>192</sup> Quoted from *Non-Resistance*, 1861.

# The Paradigm Shift from Industrial Relations to Employment Relations: Implications for Academics and Higher Education Institutions in Nigeria

Chris Chidi \*

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## 1. Introduction

The rise in industrialisation in the 18<sup>th</sup> century laid the foundations for the emergence of European trade unionism. According to Johnson “unions trace their history or origin to the early stages of the Industrial Revolution in eighteenth-century England”<sup>1</sup>. Webb and Webb define a trade union as “a continuous association of wage-earners for the purpose of maintaining or improving the conditions of their working lives”<sup>2</sup>. Fajana defines a trade union as “an association of wage/salary earners formed with the object of safeguarding and improving the wage and employment conditions of its members and to raise members’ social status and standard of living in the community”<sup>3</sup>. Thus, industrialism and the concomitant development of trade unionism gave birth to industrial relations.

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\* Chidi Odogwu Christopher (Ph.D.) is a Lecturer at the Department of Industrial Relations and Personnel Management, Faculty of Business Administration, University of Lagos, Nigeria. Email Addresses: [ochidi@unilag.edu.ng](mailto:ochidi@unilag.edu.ng) & [krischidi2002@yahoo.com](mailto:krischidi2002@yahoo.com). Telephone: +234(1)802-303-4213

<sup>1</sup> A.G. Johnson, *The Blackwell Dictionary of Sociology: A Users Guide to Sociological Language* (2 ed.), Blackwell Publishers, USA, 2000, p.330.

<sup>2</sup> S. Webb & B. Webb, *The History of Trade Unionism* (2 ed.), Longman, London, 1920, p.1.

<sup>3</sup> Sola Fajana, *Industrial Relations in Nigeria: Theory and Features* (2 ed.), Labofin and Company, Lagos, 2000, 133.

The Department of Industrial Relations and Personnel Management of the University of Lagos – the first ever established in Africa – was inaugurated in August 1982 with the aim of providing education in this fascinating discipline in response to increasing industrial demand. The then Dean of the Faculty of Business Administration, Professor Ukandi Damachi, who had worked with the International Labour Organisation (ILO) proposed to establish an academic department to cater for the need for specialists in industrial relations and personnel management on the part of trade unions, employers and governments. The first intake at both the undergraduate and postgraduate levels commenced at the beginning of the 1982/83 academic session. The M.Phil/Ph.D. degree programme started in October, 1985, and the Master's Degree of Industrial and Labour Relations in 1995. In October 2011, the Master's Degree in Employment and Labour Studies was introduced.

Since the 1990s, the Department has assisted other universities in Nigeria and Africa, including the Ghanaian Trade Union Movement, Zimbabwe and South Africa to set up programmes in this field using the curriculum of the University of Lagos. Pressure on the part of multinationals has produced significant changes in workplace relations and new models of employee relations based on HRM practices.

Fundamental changes have also involved the terminology employed to describe the management of people at work. The labels used to describe the management of people at work have been in a state of flux in response to the dynamic business environment<sup>4</sup>. As reported by Fajana<sup>5</sup>, it began as labour administration at the turn of the 20th century, and then changed to labour and staff administration in the 1920s. This label later changed to personnel administration in the 1950s. In the 1960s, people management became personnel management. In the 1980s, influential and innovative US multinationals introduced the use of human resource management. As of now, many human resource management experts are of the view that the label should be human capital management as humans are viewed as assets and not as a cost that requires investment to

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<sup>4</sup> O.P. Ogunyomi, A.O. Shadare & O.C. Chidi, *Current Trends and Future Directions of Human Resource Management Practices: A Review of Literature*, *European Journal of Economics, Finance and Administrative Sciences*, 2011, Issue 29, 19-25.

<sup>5</sup> Sola Fajana, *Human Resource Management: An Introduction*, Labofin & Company, Lagos, 2002

impact on the bottom-line<sup>6</sup>. As far as workplace relations are concerned, many scholars have adopted different terminologies in consideration of their orientations.

Among these labels are industrial relations, employee relations, employment relations and labour management relations (labour relations). Mamoria and Gankar are of the view that “industrial relations is also known as labour-management relations or labour relations”<sup>7</sup>. According to Blyton and Turnbull, “the management of employees, both individually and collectively remains a central feature of organisational life”<sup>8</sup>. However, the authors adopted the wording employee relations rather than industrial relations. Beardwell<sup>9</sup> used the terms industrial relations and employee relations interchangeably. Jubber<sup>10</sup> employed industrial relations and labour relations as synonymous. Edwards<sup>11</sup> has argued that “in order to survive, industrial relations needs to change its focus to employment relations.” Students and the lay reader are confused about which is the most appropriate terminology to be used to refer to the foregoing practices.

The objective of this paper is to examine the paradigm shift from industrial relations to employment relations as well as that of personnel management to human resource management and the implications for academics and higher education institutions in Nigeria.

## 2. Literature Review

This section examines the conceptual issues and the theoretical underpinnings which are germane to industrial relations and employment relations

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<sup>6</sup> O.P. Ogunyomi, A.O. Shadare & O.C. Chidi, *op. cit.*

<sup>7</sup> C.B. Mamoria, S. Mamoria, & S.V. Gankar, *Dynamics of Industrial Relations* (15 ed). Himalaya Publishing House, India, 2005, p.182

<sup>8</sup> P. Blyton, & P. Turnbull, *The Dynamics of Employee Relations* (2 ed), Palgrave, New York, 1998, p.3

<sup>9</sup> I. Beardwell, *How Do We Know How It Really Is? An Analysis of the New Industrial Relations in I. Beardwell (Ed.), Contemporary Industrial Relations: A Critical Analysis*, Oxford University Press, Oxford, 1996, 1-10.

<sup>10</sup> K. Jubber, (Ed), *South Africa Industrial Relations and Industrial Sociology*, Juta and Company Ltd, Cape Town, 1979.

<sup>11</sup> P.K. Edwards, *From Industrial Relations to the Employment Relationship: The Development of Research in Britain, Relations Industrielles*, 1995, vol.50, No.1, 39-65.

## 2.1 Conceptual Framework

- **Industrial Relations**

Yesufu has defined industrial relations as “the whole web of human interactions at work which is predicated upon, and arises out of, the employment contract and asserts that the employment contract constitutes the hub around which the web of industrial relations is spun”<sup>12</sup>. Dunlop views industrial relations as a network of rules which govern the workplace and work community<sup>13</sup>. According to Flanders (as cited in Hyman) “industrial relations is the study of the institutions of job regulation”<sup>14</sup>. In Flanders’ words, a system of industrial relations is a system of rules as proposed by Dunlop. He opines that the rules of any industrial relations system are seen as procedural and substantive. In fact, it is the substantive rules of collective bargaining that regulate jobs. Thus, the collective agreement is made up of both the procedural and substantive clauses. Hyman defines industrial relations “as the study of the processes of control over work relations and among these processes, those involving collective worker organisation and action are of particular concern”<sup>15</sup>. Hyman further argues that unceasing power struggle for control is a central feature of industrial relations. To Hyman, this struggle for control emanates from the nature and characteristics of capitalist society. According to McQuarrie, the term “industrial relations is more appropriate as a descriptor of union-employer relationships than of non-union-employer relations”<sup>16</sup>. In other words, the substance of collective relations in industry is the meat of industrial relations<sup>17</sup>. Katz and Kochan points out that “employment is analysed through the perspectives of industrial relations, which is the interdisciplinary field of study that concentrates on individual workers, groups of workers and their unions and associations, employers and their organisations, and the environment in which these parties interact”<sup>18</sup>.

<sup>12</sup> *Ibid.* p. 129

<sup>13</sup> J.T. Dunlop, *Industrial Relations System*, Holt, New York, 1958.

<sup>14</sup> R. Hyman, *Industrial Relations: A Marxist Introduction*, Macmillan, London, 1975, p.11

<sup>15</sup> *Ibid.* p.12

<sup>16</sup> F.A.E McQuarrie, *Industrial Relations in Canada*, John Wiley and Sons, Canada,2003,p.6

<sup>17</sup> D. Otobo, *Industrial Relations: Theory and Controversies* (2 ed.), Malthouse Press Ltd., Lagos, 2005, p.8

<sup>18</sup> H. C. Katz & T.A Kochan, *An Introduction to Collective Bargaining and Industrial Relations* (3 ed), McGraw-Hill/Irwin, New York,2004, p.3

- **Employment Relations**

Rose<sup>19</sup> chose to adopt the employment relations rather than industrial relations label. To Rose, “industrial relations” denotes an exclusively collective orientation to the employment relationship. He goes on to argue that “employment relations is the study of the regulation of the employment relationship between employer and employee, both collectively and individually, and the determination of substantive and procedural issues at industrial, organisational and workplace levels”<sup>20</sup>. “Employment relations” encompasses industrial relations, employee relations, and labour-management relations as it covers both unionised and non-unionised workplace relations. In other words, the expression “employment relations” is the broadest and most encompassing of the three labels. According to Blyton and Turnbull<sup>21</sup>, employment relationship comprises important individual aspects; it is only by recognising the simultaneous existence of collective aspects in the employment relationship that an adequate picture can be constructed of how a workforce is constituted, and the nature of relations between managers and employees. Edwards has argued that “in order to survive, industrial relations needs to change its focus to employment relations”<sup>22</sup>. This entails examining how the employment relationship operates in practice rather than just examining institutions<sup>23</sup>. According to Bamber, Lansbury and Wailes, the term “employment relations is used to encompass industrial relations (IR) and human resource management (HRM)”<sup>24</sup>.

- **Employee Relations**

In the employee relations model, unions are not allowed in the workplace and the contract of employment is individualised. According to Leat:

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<sup>19</sup> E.D. Rose, *Employment Relations* (3 ed.), Pearson Education Ltd, London, 2008

<sup>20</sup> *Ibid.* p.9

<sup>21</sup> P. Blyton, & P. Turnbull, *op. cit.*

<sup>22</sup> P.K. Edwards, *op. cit.*

<sup>23</sup> P. Blyton, & P. Turnbull, *op. cit.*

<sup>24</sup> G.J. Bamber, R.D. Lansbury & N. Wailes (Eds), *International and Comparative Employment Relations: Globalisation and the Developed Economies* (4 ed.), SAGE Publications Ltd., London, 2004, p.1.

Employee relations rather than industrial relations is itself symptomatic of the influence that human resource management (HRM) has had upon the nature and management of the employment relationships, the former encompassing individualism and non-union relationships, while the latter is associated with collectivism and decision making involving trade unions<sup>25</sup>.

However, Marchington and Wilkinson<sup>26</sup> view employee relations as encompassing both individual and collective relations.

### • Labour Relations or Labour-Management Relations

Akpala<sup>27</sup> opines that labour relations or labour–management relations connotes a relationship between worker, not as individuals but in their collective identity, and the employer. The concept of labour relations is narrower in scope than industrial relations, because it concerns the internal arrangement between employers and the unions in a bipartite relationship. Their activities would seem to exclude the possible intervention of the government as an umpire in the employment relations regulations. When such intervention by the government as a third party occurs, the relationship becomes more involved and is known as industrial relations. “Industrial relations” is regarded to be wider than labour relations. Fashoyin opines that “labour relations, as distinct from industrial relations, is defined as the day to day relationship between union members and manager in the workplace, with particular emphasis on the implementation and enforcement of the collective agreement”<sup>28</sup>. The practice of employment/industrial relations has benefited immensely from theoretical frameworks of leading theorists<sup>29</sup>.

<sup>25</sup> M. Leat, *Exploring Employee Relations* (2 ed.), Butterworth-Heinemann, UK, 2007, p.319

<sup>26</sup> M. Marchington & A. Wilkinson, *Human Resource Management at Work: People Management and Development* (3 ed.), CIPD, U.K, 2005.

<sup>27</sup> A. Akpala, *Industrial Relations Model for Developing Countries: The Nigerian System*. Fourth Dimensions Publishers, Enugu, 1982.

<sup>28</sup> Tayo Fashoyin, *Industrial relations in Nigeria: Development and Practice* (2 ed.), Longman Nigeria PLC., Lagos, 1992. p.202

<sup>29</sup> O. C. Chidi & O.P. Okpala, *Theoretical Approaches to Employment and Industrial Relations: A Comparison of Subsisting Orthodoxies*, in A. López-Varela (Ed.), *Theoretical and Methodological Approaches to Social Sciences and Knowledge Management*, InTech Publishers, Croatia, 2012, 251-266.

## ***2.2 Theoretical Underpinnings***

### **• The Unitary Theory of Employment/Industrial Relations**

The unitary frame of reference is credited to Fox<sup>30</sup>. The unitary perspective views the organisation as pointing towards a single or unified authority and loyalty structure. Emphasis under the unitary perspective is placed on common values, interests and objectives. Those subscribing to this view see all organisational participants as a team or a family thereby implicitly emphasising shared values, shared goals and common destiny. In essence, unitarism implies the absence of factionalism within the enterprise<sup>31</sup>. Conflict is viewed as irrational and the dismissal of striking workers is preferred to consultation or negotiation. Conflict is regarded as pathological or evil or bad. Trade unionism is outlawed and suppressed as an illegitimate intrusion or encroachment on the management's right to manage. According to Rose<sup>32</sup>, under the unitary perspective, trade unions are regarded as an intrusion into the organisation from outside, competing with management for employee loyalty. The unitary theory tends towards authoritarianism and paternalism. It is pro-management and emphasises consensus and industrial peace. The underlying assumption of this view is that the organisation exists in perfect harmony and conflict is unnecessary<sup>33</sup>.

### **• The Pluralist/ Pluralistic Theory of Employment/Industrial Relations**

The pluralist or the pluralistic frame of reference is synonymous with the conflict theory which is also credited to Fox<sup>34</sup>. This theory views the organisation as the coalescence of sectional groups with different values, interests and objectives. Thus, employees have different values and aspirations from those of management, and these values and aspirations are always in conflict with those of management. Pluralist theorists argue that conflict is inevitable, rational, functional and normal in organisations,

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<sup>30</sup> A. Fox, *Industrial Sociology and Industrial Relations*. Royal Commission Research Paper N0. 3 HMSO, London, 1966.

<sup>31</sup> Sola Fajana, *op. cit.*

<sup>32</sup> E.D. Rose, *op. cit.*

<sup>33</sup> *Ibid.*

<sup>34</sup> A. Fox, *op. cit.*

which is resolved through compromise and agreement or collective bargaining. Pluralist theorists view trade unions as legitimate challenges to managerial rule or prerogatives and emphasise competition and collaboration. This view recognises trade unions as legitimate representative organisations which enable groups of employees to influence management decisions<sup>35</sup>. Rose further states that the pluralist perspective would seem to be much more relevant than the unitary perspective in the analysis of employment/industrial relations in many large unionised organisations and congruent with developments in contemporary society<sup>36</sup>.

- **The Systems Theory**

Citing Dunlop, Ootobo argues that “an industrial-relations system at any one time in its development is regarded as comprised of certain actors, certain contexts, an ideology which binds the industrial-relations system together and a body of rules created to govern actors at the workplace and work community”<sup>37</sup>. According to Dunlop, the systems theory provides the analytical tools and the theoretical basis to make industrial relations an academic discipline in its own right. The actors that make up the industrial relations system are:

- i. A hierarchy of managers and their representatives in supervision
- ii. A hierarchy of workers (non-managerial) and their spokesmen
- iii. Specialised governmental agencies and specialised private agencies created by the first two actors, concerned with workers, enterprises and their relationships.

- **Social Action Theory**

According to Green<sup>38</sup>, “the social action theory views industrial relations from the individual’s viewpoint and motivation”. It is credited to Max Weber (1864-1920), a German sociologist. Social action theory represents a contribution from sociologists to the study of organisations. It attempts to view the organisation from the standpoint of individual members or

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<sup>35</sup> E.D. Rose, *op. cit.*

<sup>36</sup> *Ibid.*

<sup>37</sup> D. Ootobo, *op.cit.* p.19

<sup>38</sup> G.D. Green, *Industrial Relations Text and Case Studies* (4 ed), Pitman Publishing, U.K., 1994, p.4.

actors of industrial relations. The theory seeks to analyse why actors take certain lines of action. This contrasts with the approach which states that behaviour is the result of the structure and processes of the system. Social action arises out of the expectations, norms, attitudes, values, experiences, situation and goals of the individuals working in the system. Salamon opines that the importance of the social action theory of industrial relations is that it weakens the fatalism of structural determinism and stresses that the individual retains at least some freedom of action and ability to influence events in the direction that the individual believes to be right or desirable<sup>39</sup>. Social action theorists emphasise the use of interviews, surveys and participant observations in determining the reality of both society and of organisations.

### 3. The Employment Contract

All labels have one thing in common which is the employment contract. As earlier expressed by Yesufu, “the employment contract constitutes the hub around which the web of industrial relations is spun”<sup>40</sup>. In those workplaces where the culture of collectivism exists, workers are governed by individual contracts and collective contracts or agreements. However, only the individual contract governs workers in a workplace where individualism prevails. The employment contract is the foundation of employment relations. It specifies or defines the terms of an employment relationship<sup>41</sup>. What is an employment contract then? According to Akpala, “employment contract is a relationship well-known by an agreement between a person who agrees to render services to another, obey his orders and submit to his direction and control as a worker in consideration for wages paid by the receiver of the labour service as the employer”<sup>42</sup>.

Some writers prefer to use the concept of labour contract as against that of employment contract. Both terms have the same meaning. In my view, the employment contract is preferable and often used in the literature. A labour contract, or agreement, is a legal document and the very basis of an employer-employee relationship. The contract of employment is arguably

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<sup>39</sup>M. Salamon, *Industrial Relations Theory and Practice* (4 ed.), Pearson Education Ltd., London, 2000.

<sup>40</sup>T. M. Yesufu, *op. cit.* p.129

<sup>41</sup>Segun Matanmi, *Employment Relationships that Endure: Lessons for Nigeria: An Inaugural Lecture*, delivered at the Lagos State University, on Tuesday the 20 of February, 2007.

<sup>42</sup>A. Akpala, *op. cit.* p.16

the most important document in the whole sphere of employment relations as it underpins the legal relationship between the employer and employees<sup>43</sup>. In a formal employment contract, the terms and conditions governing the relationship between the employer and employees are codified or expressed in writing. Everything in the employment relationship will then flow and connect back to this important piece of documentation<sup>44</sup>. It will be a reference point for pay, hours of work, holiday, sickness, pension, disciplinary and grievance matters to mention a few. According to Aturu<sup>45</sup>, the 1974 Nigerian Labour Act which has been incorporated into the 1990 Laws of the Federation contains the foregoing provisions. Section 7 (1) provides that an employee must be given a written letter of appointment within three months of engagement. Such letter should specify, among other things, the date, name and place of work where the worker is engaged, the nature of the employment, whether, for example, work is for a definite duration and when the contract expires. The Act also requires that the employment contract should state the hours of work, rate of pay and the periodicity of payment, holiday and terms relating to provision for sickness, injury and so forth. In the event of disengagement, the letter also states the period of notice by either party or payment in lieu. In order for a contract of employment to be binding it must satisfy the requirements of validity. These are: offer, acceptance, consideration, intention to create legal relations and parties must be of sound mind to enter into a contractual relationship.

The offer must be definite and the acceptance must be absolute and in line with the terms of the offer. An acceptance subject to a condition amounts to a counter-offer. Consideration or *quid pro quo* means a bargain for a bargain. In an informal employment contract, the terms and conditions governing the relationship between the employer and employees are not codified or expressed in writing. Employment contracts can be informal if they are verbal and psychological.

In essence, a verbal contract is concluded when an offer is made and acceptance is given. This will usually happen immediately after a job interview when a candidate will be told that he/she has been offered the job, subject to various references and checks, and at which point the candidate usually tenders verbal acceptance of it. At this point, the contract is created, albeit in an embryonic form, and legal redress is

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<sup>43</sup> K. Cheatele, *Mastering Human Resource Management*, Palgrave, New York, 2001.

<sup>44</sup> *Ibid.*

<sup>45</sup> B. Aturu, *Nigerian Labour Laws: Principles, Cases, Commentaries and Materials*. Friedrich Ebert Stiftung, Lagos, 2005.

available to challenge and support it<sup>46</sup>. The offer can be withdrawn by the employer and the acceptance by the employee. The point at which some written confirmation of the contractual offer comes into being is an offer of employment which is usually a precursor to the creation of the formal contract of employment and the written terms and particulars<sup>47</sup>.

The employment contract which establishes an intention to create legal relations between the employer and employee is known as a formal contract. However, with the emerging psychological contract, the nature of the employment relationship is changing. The psychological contract which is informal is a description of what an employee expects to contribute in an employment relationship as well as what the employer will provide the employee in exchange for those contributions<sup>48</sup>. There are two broad types of psychological contracts, namely transactional and relational<sup>49</sup>. A transactional contract is defined in terms of a monetary exchange over a specific period of time, with the employer contracting for specific skills for specific tasks and then compensating the skill holder for satisfactory performance. By comparison, a relational contract is not time-bound; rather it establishes an ongoing relationship between the person and the organisation and involves the exchange of both monetary and non-monetary benefits including mutual loyalty, support and career rewards<sup>50</sup>.

While the formal employment contract is written or codified, the informal psychological contract is unwritten or not codified. It describes unspoken expectations that are widely held by employees and employers. The psychological contract is also called “expectations agreements”. According to Noe, Hollenbeck, Gerhart, and Wright<sup>51</sup> in exchange for top performance and working longer hours without job security, employees want companies to provide flexible work schedules, comfortable working conditions, more control over how they accomplish work, training and development opportunities and financial incentives based on how organisations perform. Employees realise that companies cannot provide employment security, so they want employability. This means they want

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<sup>46</sup> K. Cheadle, *op. cit.*

<sup>47</sup> *Ibid.*

<sup>48</sup> R. A. Noe, J.R. Hollenbeck, B. Gerhart, & P.M. Wright, *Fundamentals of Human Resource Management* McGraw – Hill/ Irwin, New York, 2004.

<sup>49</sup> N. Heaton & C. Ackah, *Changing HR Careers: Implications for Management Education*, *Journal of Management Development*, 2007, vol.26, No.10, 951-961.

<sup>50</sup> *Ibid.*

<sup>51</sup> R. A. Noe, J.R. Hollenbeck, B. Gerhart, & P.M. *op. cit.*

their organisations to provide them training and job experiences to help ensure that they can find other employment opportunities, if something happens. Mullins defines the psychological contract as a range of expectations of rights and privileges, duties and obligations, which though do not form part of the formal employment agreements, but have significant influence on people's behaviour in organisations<sup>52</sup>. The social contract on the other hand, exists between the citizenry and the government of a country, where citizens pledge to be law abiding, to pay their taxes, to maintain peaceful relations with one another and with the government and the like; and the government promises to protect the lives and property of the citizenry, provide employment and other social amenities to make life comfortable for the citizens.

#### **4. The Paradigm Shift from Industrial Relations to Employment Relations**

According to Katz and Kochan<sup>53</sup> “work plays such a central role in our lives and in society that the study of relations between employee and employer cannot be ignored”. According to McQuarrie<sup>54</sup>, the term “industrial relations is more appropriate as a descriptor of union-employer relationships than of non-union-employer relations”. McQuarrie further asserts that because of the definition of industrial relations as a broad interdisciplinary field of study and practice that encompasses all aspects of the employment relationship, some commentators have argued that the term should also be used to describe workplace relationships between employers and non-unionised workers. In other words, the study of industrial relations should include both unionised and non-unionised workplaces<sup>55</sup>. McQuarrie argues that “a considerable amount of industrial relations research on non-unionised workplaces focuses on how non-unionised organisations replicate or adopt structures and systems found in unionised organisations. Therefore, non-union industrial relations research is still closely related to the study of unionised organizations”<sup>56</sup>.

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<sup>52</sup> L.J. Mullins, *Management and Organisational Behaviour* (7 ed.), Prentice Hall, New York, 2005.

<sup>53</sup> H.C. Katz & T.A Kochan, *op. cit.* p.3

<sup>54</sup> F.A.E McQuarrie, *op. cit.* p.6

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

According to McQuarrie<sup>57</sup> many higher education institutions do not have courses devoted solely to the study of industrial relations, and instead address the subject only in the context of human resource management (HRM). Thus, the simplest way to explain the difference between human resource management and industrial relations is that the former has a broader range and is generally applied to employment related issues of importance to all organisations<sup>58</sup>. According to Dessler, Cole, Goodman and Sutherland<sup>59</sup>, human resource management entails “the activities, policies and practices involved in obtaining, developing, utilising, evaluating, maintaining and retaining the appropriate number and skill mix of employees to accomplish the organisation’s objectives”. This definition is applicable to both unionised and non-unionised workplaces, since these HRM roles are carried out in any organisation that has employees, whether those employees are unionised or not<sup>60</sup>. Thus, industrial relations deals with employee-employer relationship in unionised organisations, while human resource management deals with employer-employee or organisation-worker relationships in all types of organisations. McQuarrie further asserts that the two fields certainly have issues in common, but the focus of industrial relations (IRs) is more specific and less generalised than that of human resource management (HRM). According to Blyton and Turnbull<sup>61</sup> “personnel management (human resource management) deals with individual aspects of the employment relationship, while industrial relations is concerned with the collective aspects of the employment relationship”. Since change is ongoing, there could be changes in adopted culture, hence the bi-directional arrow linking the culture of individualism and collectivism.

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<sup>57</sup> *Ibid.*

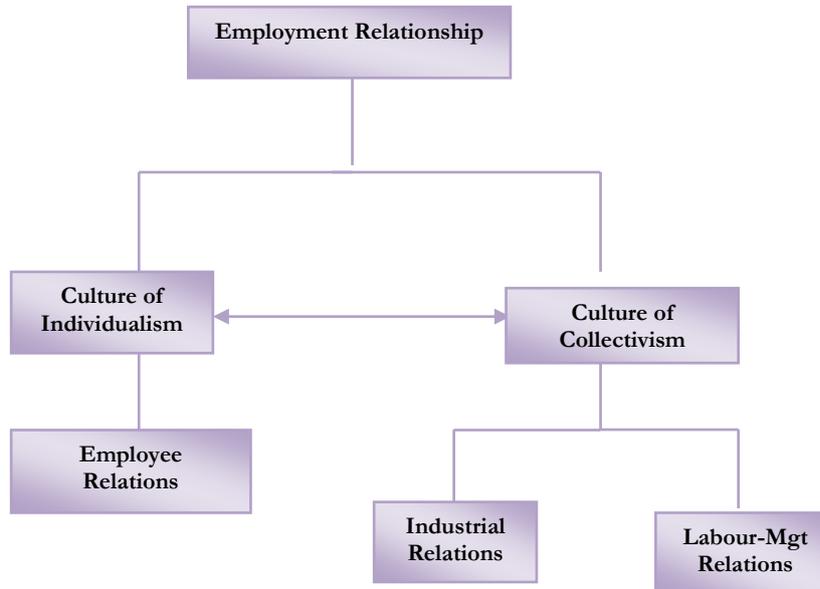
<sup>58</sup> *Ibid.*

<sup>59</sup> G. Dessler, N.D. Cole, P.M. Goodman, & V. Sutherland, *Management of Human Resources* (2 Canadian edition), Pearson Education Inc, Canada, 2007.

<sup>60</sup> F.A.E McQuarrie, *op. cit.*

<sup>61</sup> P. Blyton, & P. Turnbull, *op. cit.*p.9

**Figure 1: Diagrammatic Representation of Employment Relationship**



**Source:** Author's Own Elaboration

Industrial relations is at the cross-road of many disciplines because of its multi-disciplinary nature, notably; labour history, industrial psychology, labour economics, political science, labour law, management as well as industrial sociology. For instance, a labour historian might be interested in the events that led to the formation of trade unions or particular industrial relations conflict such as the Haymarket square violence in Chicago-USA in 1886 caused by a general strike in favour of an eight-hour day at the McCormick Harvester Plant in Chicago; which led to the commemoration of workers' day every first of May. An industrial sociologist might be interested in how group or cultural dynamics affect the actions of a union or an employer. Also, an industrial psychologist might be interested in how individual attitudes towards unions or employers develop or change. A labour economist might be interested in how negotiated wage rates in unionised organisation affect wage rates in non-unionised organisation or the cost of living in a given geographical area. A political scientist might be interested in how or why a ruling political party changes labour legislation. Also, a labour lawyer might be interested in how the language and conditions of labour legislation affect the unions' ability to represent

their membership effectively<sup>62</sup>. More so, management experts might be interested in how managerial styles affect the union-management relationship.

The focus of employment relations encompasses industrial relations, employee relations, and labour-management relations as it covers both unionised and non-unionised workplace relations. It is in recognition of this that the International Industrial Relations Association (IIRA) based in Geneva decided to change its name to International Labour and Employment Relations Association (ILEREA) in 2010, being that workplaces are characterised by union and non-union relations. The IIRA was established in 1966, had its first World Congress in September, 1967, and was established to encourage and to promote the objective study of industrial relations throughout the world irrespective of national boundaries, cultural, political and social differences<sup>63</sup>. When the IIRA was established in 1966, the label *industrial relations* referred to relations between employers and workers, with a focus on relations in unionised companies and in the public sector. Since 1966, there have been significant changes in labour markets, owing to new technologies and globalisation.

Over the years, the association has broadened its scope of subject matter to include issues such as transnational labour activity, non-standard work arrangements, social dialogue, decent work agenda, employment in the informal economy, labour market regulation, trade and labour standards as well as employment discrimination. The term *employment relations* is used to describe all types of workplace relations and is intended to be broader than the industrial or manufacturing sector (ILEREA). This has also led to the change from Nigerian Industrial Relations Association (NIRA) to Nigerian Industrial and Employment Relations Association (NIERA) in 2011. In the same vein, some foreign Universities are adopting employment relations as against industrial relations as well as the modification of their curricula to address contemporary issues in the world of work and in society. Universities such as the University of Warwick, Rutgers, London School of Economics and Political Science to mention a few have courses on employment relations and human resource management. It is observed that the department of Industrial Relations and Personnel Management of the University of Lagos has modified its

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<sup>62</sup> F.A.E McQuarrie, *op. cit.*

<sup>63</sup> B.C. Roberts (Ed.), *Industrial Relations: Contemporary Issues*, Macmillan, UK, 1968.

curriculum which reflects employment relations and human resource management but has not altered its former nomenclature.

While employee relations model is practised in work settings with unitary ideology and individualistic culture, labour-management relations and industrial relations are practised in work settings marked with pluralist/pluralistic ideology and collectivist culture. Thus, in unionised work-settings, there exists the culture of collectivism. “Labour-management relations” and “labour relations” refer the kind of employment relationship that exists between the management of an organisation and the workers (labour union). According to Otobo “the contents of the relations between and among the manager and the managed inside economic organisations are an aspect of industrial relations, more appropriately labelled labour-management relations”<sup>64</sup>. The emphasis is on two parties which gives rise to a bipartite relationship. Some authors have equated employee relations with industrial relations. Others have used labour-management relations and industrial relations interchangeably as earlier stated in this paper. Both terms are not synonymous and cannot be used interchangeably. While “labour-management relations” emphasises bipartism, “industrial relations” emphasises tripartism. Simply put, labour relations involves two parties, namely management (employer) and the unions (workers), while industrial relations involves three parties, most notably management (employer); unions (workers) and the State (government). Thus, according to Dunlop as cited in Otobo<sup>65</sup>, there are three actors in an industrial relations system. The involvement of the government, management and workers is only termed industrial relations when it relates to labour matters such as remuneration and other terms and conditions of employment. When government and management disagree over the issuance of an import licence, raw materials importation or export, these are not within the remit of industrial relations.

However, the influences of multinational companies, host communities and other relevant stakeholders on industrial relations system have necessitated the shift of emphasis from tripartism to tripartism-plus, pointing out the involvement of more than three actors as earlier maintained by Dunlop. Thus, the reigning label that encompasses individual and collective workplace relations is employment relations in line with the views of Rose that “employment relations is the study of the

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<sup>64</sup> D. Otobo, *op. cit.* p.7

<sup>65</sup> *Ibid.*

regulation of the employment relationship between employer and employee, both collectively and individually, and the determination of substantive and procedural issues at industrial, organisational and workplace levels”<sup>66</sup>. and Edwards, according to whom “in order to survive, industrial relations needs to change its focus to employment relations, examining not just institutions but how the employment relationship operates in practice, and exploring the outcomes of efficiency and equity”<sup>67</sup>. Edward further asserts that there has been a move from a focus on unions and collective bargaining to an interest in the regulation of the employment relationship.

## 5. Conclusion and Recommendations

This paper set out to examine the paradigm shift from industrial relations to employment relations as well as that of personnel management to human resource management and the implications for academics and higher education institutions in Nigeria. With the paradigm shift, the International Industrial Relations Association (IIRA) based in Geneva has changed its name to International Labour and Employment Relations Association (ILERIA) in 2010, as well as the scope of the issues dealt with. Over the years, the association has broadened the scope of subject matters to include issues such as the transnational labour movement, non-standard work arrangements, social dialogue, decent work agenda, employment in the informal economy, labour market regulation, trade and labour standards as well as discrimination in employment inter alia. In Nigeria, the Nigerian Industrial Relations Association (NIRA) has changed its name to Nigerian Industrial and Employment Relations Association (NIERA) in 2011. It is against this backdrop that the author recommends that the existing label as adopted by Nigerian Universities, including the University of Lagos need some modifications to reflect the emerging label of employment relations and human resource management in view of the new courses and contents that have been incorporated in the curriculum. See Tables 5-11 in the appendix. This will assist in educating students in the field on how to work and manage in both unionised and non-unionised work settings. This is food for thought for

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<sup>66</sup> E.D. Rose, *op. cit.* p.9

<sup>67</sup> P.K. Edwards, *op. cit.* p.40

academics, higher education institutions and practitioners in the field of employment studies in Nigeria and globally.

## APPENDIX

### UNIVERSITY OF LAGOS DEPARTMENT OF INDUSTRIAL RELATIONS AND PERSONNEL MANAGEMENT

#### LIST OF UNDERGRADUATE COURSES ACCORDING TO LEVELS

**TABLE 1: FORMER 100 LEVEL COURSES**

100 LEVEL COURSES (FIRST SEMESTER)		
GROUPING	COURSE CODES	COURSE TITLES
<b>CORE</b>	FBA 110	MATHEMATICS I
	GST 105	USE OF ENGLISH I
	ECN 195	ELEMENTS OF ECONOMICS
	GAS 101	GENERAL AFRICAN STUDIES
<b>OPTIONAL</b>	FRE 187	FRENCH I
	PHY 123	INTRO. TO PHILOSOPHY CRITICAL THINKING
	HIS 103	HISTORY OF WEST AFRICA
	PSY 100	INTRODUCTORY PSYCHOLOGY
	POL 103	POLITICS & GOVT. IN WEST AFRICA
	SOC 114	INTRODUCTION TO SOCIAL PROBLEMS I
	MAS 101	INTRODUCTION TO MASS COMM. I
	<b>(SECOND SEMESTER)</b>	
<b>CORE</b>	FBA 120	MATHEMATICS II
	ECN 106	ECONOMICS II
	GST 106	USE OF ENGLISH
	GAS102	GENERAL AFRICAN STUDIES II
<b>OPTIONAL</b>	FRE 188	FRENCH II
	PHY131	PHILOSOPHICAL PSYCHOLOGY

	HIS 101	INTRODUCTION TO ECONOMICS HISTORY II
	PSY101	ELEMENTS OF PSYCHOLOGY
	MAS 104	INTRODUCTION TO MASS COMM. II
	SOC124	INTRODUCTION TO SOCIAL PROBLEMS II

**Source:** University of Lagos, Department of Industrial Relations and Personnel Management Handbook 2011-2013

**TABLE 2: FORMER 200 LEVEL COURSES**

<b>200 LEVEL COURSES</b>		
<b>(FIRST SEMESTER)</b>		
<b>GROUPING</b>	<b>COURSE CODES</b>	<b>COURSE TITLES</b>
<b>CORE</b>	ACC 210	PRINCIPLES OF ACCOUNTING
	BUS210	MATHEMATICS FOR BUS. I
	BUS 211	INTRODUCTION TO MANAGEMENT
	IRP 210	FOUNDATIONS OF INDUSTRIAL RELATIONS
	POL 201	ELEMENTS OF GOVERNMENT
	FIN 210	INTRODUCTION TO FINANCE
<b>(SECOND SEMESTER)</b>		
<b>CORE</b>	FBA 220	STATISTICS I
	BUS 220	MATHEMATICS FOR BUSINESS II
	ACC 220	ELEMENTS OF COST ACCOUNTING
	IRP 220	FOUNDATION OF PERSONNEL MANAGEMENT
	BUS 221	NIGERIAN BUSINESS ENVIRONMENT

**Source:** University of Lagos, Department of Industrial Relations and Personnel Management Handbook 2011-2013

**TABLE 3: FORMER 300 LEVEL COURSES**

<b>300 LEVEL COURSES</b>		
<b>(FIRST SEMESTER)</b>		
<b>GROUPING</b>	<b>COURSE CODES</b>	<b>COURSE TITLES</b>
<b>CORE</b>	IRP 310	TRADE UNIONS AND EMPLOYERS' ASSOCIATION
	IRP 311	INDUSTRIAL CONFLICTS
	FBA 310	STATISTICS II
	FIN 310	BUSINESS FINANCE I
	CIL 308	BUSINESS LAW
	GST 307	ENTREPRENEURIAL STUDIES OF CORPORATE GOVERNANCE II
<b>(SECOND SEMESTER)</b>		
<b>CORE</b>	IRP 320	COLLECTIVE BARGAINING
	IRP 321	COMPENSATION MANAGEMENT
	CSC262	INTRODUCTION TO COMPUTER SCIENCE
	FIN 320	BUSINESS FINANCE II
	FBA320	RESEARCH SEMINAR
	GST308	ENTREPRENEURIAL STUDIES OF CORPORATE GOVERNANCE I

**Source:** University of Lagos, Department of Industrial Relations and Personnel Management Handbook 2011-2013

**TABLE 4: FORMER 400 LEVEL COURSES**

<b>400 LEVEL COURSES</b>		
<b>(FIRST SEMESTER)</b>		
<b>GROUPING</b>	<b>COURSE CODES</b>	<b>COURSE TITLES</b>
<b>CORE</b>	BUS 410	BUSINESS POLICY I
	IRP 410	COMPARATIVE INDUSTRIAL RELATIONS SYSTEM & THEORY
	IRP 411	MANPOWER PLANNING
	IRP 412	RECRUITMENT AND SELECTION
	IRP 413	INDUSTRIAL PSYCHOLOGY
	IRP 414	QUANTITATIVE METHODS IN INDUSTRIAL RELATIONS &

<b>(SECOND SEMESTER)</b>		
		PERSONNEL MANAGEMENT
<b>Core</b>	BUS 420	BUSINESS POLICY II
	IRP 420	LABOUR MARKETS
	IRP 421	SOCIOLOGY OF INDUSTRY
	IRP 422	MOTIVATIONS, LEADERSHIP AND PRODUCTIVITY IN INDUSTRY
	IRP 423	LABOUR LAW
	IRP 424	RESEARCH PROJECT

**Source:** University of Lagos, Department of Industrial Relations and Personnel Management Handbook 2011-2013

**TABLE5: MODIFIED AND CURRENT 100 AND 200 LEVEL COURSES**

<b>100 LEVEL COURSES</b>		
<b>GROUPING</b>	<b>COURSE CODES</b>	<b>COURSE TITLES</b>
		<b>100 LEVEL: FIRST SEMESTER</b>
CORE	GST 105	USE OF ENGLISH
	FBA 110	ALGEBRA FOR BUSINESS STUDENTS 1
	ECN 111	PRINC. OF MICRO-ECONS
	ACC 110	INTRO TO ACCOUNTING
	IRP 110	ELEM. OF LABOUR-MGT RELATIONS
	FSC 103	INTRO TO COMPUTER
OPTIONAL	FRE 197	FRENCH 1
	IRP 111	LABOUR HISTORY
	HIS 103	HIST OF WEST AFRICA
	PSY 100	INTRO TO PSYCHOLOGY
	POL 102	PRE-COLONIAL AFRICA'S POLITICAL SYSTEM
	SOC. 111	INTRO TO SOCIOLOGY
		<b>100 LEVEL: SECOND SEMESTER</b>
CORE	FBA 120	CALCULUS FOR BUS STUDENTS
	ECN 121	PRIN. OF MACRO ECONS
	BUS 120	PRINC OF MANAGMT
	IRP 120	ELEM. OF HUMAN RES MANAGEMENT
OPTIONAL	IRP 121	ELEM OF HUMAN RELATIONS
	FRE 198	FRENCH II

	PHY 131	PHILOSOPHICAL PSYCHOLOGY
	PSY 101	ELEM OF PSYCHOLOGY
	POL 113	INTRO TO AFRICAN POLITICS
	HIS 112	INTRO TO ECON HISTORY
<b>200 LEVEL COURSES</b>		
<b>200 LEVEL: FIRST SEMESTER</b>		
CORE	GAS 201	GENERAL AFRICAN STUDIES
	FIN 210	INTRO TO FINANCE
	IRP 210	INTRO. TO IND. RELATIONS
	BUS 211	INTRO TO INSURANCE
	IRP 211	COMMUNICATION IN IRPM
OPTIONAL	IRP 212	HUMAN RES DEVT.
	POL 201	ELEM OF GOVERNMENT
	ACC210	PRIN OF ACCOUNTING
<b>200 LEVEL: SECOND SEMESTER</b>		
CORE	GAS 202	GENERAL AFRICAN STUDIES II
	FBA 220	INTRO TO BUS STATISTICS
	IRP 220	INTRO. TO HR MANAGEMENT
	BUS 221	INTRO TO MGT THEORY AND ENV
	FBA 223	BUSINESS COMMUNICATION
OPTIONAL	IRP 222	HEALTH, SAFETY AND SECURITY AT WORK
CORE	ACC220	ELEMENTS OF COSTING

**Source:** University of Lagos, Department of Industrial Relations and  
Personnel Management Handbook  
2011-2013

**TABLE 6: MODIFIED AND CURRENT 300 LEVEL COURSES**

<b>300 LEVEL COURSES</b>		
	<b>COURSE CODES</b>	<b>COURSE TITLES</b>
<b>300 LEVEL: FIRST SEMESTER</b>		
CORE	FBA 310	APPLIED BUS STATS
	FBA 311	BUSINESS INFO TECH
	GST 307	ENTREP AND CORP GOVERNANCE
	IRP 310	TRADE UNIONS
	IRP 311	INDUSTRIAL CONFLICT
	IRP 314	MICRO-ECON FOUND OF LABOUR MARKET'S
OPTIONAL	IRP 312	SEPARATION IN HRM
	IRP 313	MNCs AND HRM
	BUS 311	PRODUCTION MANAGEMENT
<b>300 LEVEL: SECOND SEMESTER</b>		

CORE	FBA 321	RESEARCH SEMINAR
	GST 308	ENTREP AND CORP GOVERNANCE II
	BUS 320	PRINC OF MARKETING
	IRP 320	COLLECTIVE BARGAINING
	IRP 321	COMPENSATION MANAGEMENT
OPTIONAL	IRP 322	HR INFO SYSTEMS
	IRP 323	ORGANISATIONAL TRANSFORMATION
	IRP 324	COMP. HRM

**Source:** University of Lagos, Department of Industrial Relations and Personnel Management Handbook 2011-2013

**TABLE 7: MODIFIED AND CURRENT 400 LEVEL COURSES**

400 LEVEL COURSES		
	COURSE CODES	COURSE TITLES
		<b>400 LEVEL: FIRST SEMESTER</b>
CORE	BUS 410	BUSINESS POLICY AND STRATEGIC MGT
	FBA 410	BUSINESS QUANT. METHODS
	IRP 410	IND. RELS THEORY
	IRP 411	HR PLANNING
	IRP 412	EMPLOYEE RESOURCING
	IRP 414	RESEARCH & QUANT METHODS IN IRPM
OPTIONAL	IRP 413	INDUSTRIAL PSYCHOLOGY
	IRP 415	COMP IR SYSTEMS
	IRP 416	DIVERSITY AND EQUALITY IN HRM
	IRP 417	WORKPLACE AND WORKFORCE RESTRUCTURING
	IRP418	INTERNATIONAL LABOUR INSTITUTIONS
		<b>400 LEVEL: SECOND SEMESTER</b>
CORE	FBA 420	CORPORATE SOCIAL RESPONSIBILITY
	IRP 420	MACRO-ECON ASPECTS OF THE LABOUR MARKET
	IRP 421	SOCIOLOGY, WORK & INDUSTRY
	IRP 423	LABOUR LAW
	IRP 499	RESEARCH PROJECT
	IRP 422	MOTIVATION, LEADERSHIP AND PRODUCTIVITY
OPTIONAL	IRP 424	COMPETENCY & PERFORMANCE MGT
	IRP 425	HRM IN THE PUBLIC SERVICE
	IRP426	GLOBALISATION, STATE AND INDUSTRIAL RELATIONS

**Source:** University of Lagos, Department of Industrial Relations and Personnel Management Handbook 2011-2013

## LIST OF POSTGRADUATE COURSES ACCORDING TO LEVELS

### A) Master's of Science Degree in Industrial Relations and Personnel Management (M.Sc.)

The Department offers a 12-month Master of Science degree in Industrial Relations and Personnel Management. Candidates must take and pass a minimum of six (6) units of the optional courses

**TABLE 8: MASTER OF SCIENCE DEGREE IN INDUSTRIAL RELATIONS AND PERSONNEL MANAGEMENT COURSES**

GROUPING	COURSE CODES	COURSE TITLES
<b>CORE</b>	IRP 812:	MANAGERIAL ISSUES IN INDUSTRIAL RELATIONS & HUMAN RESOURCES
	MAT 840	QUANTITATIVE RESEARCH METHODS
	IRP 806	RESEARCH METHODS IN INDUSTRIAL RELATIONS & HUMAN RESOURCES
	IRP 800	HUMAN RESOURCE MANAGEMENT
	IRP 802	LABOUR MARKET ANALYSIS
	IRP 803	INDUSTRIAL RELATIONS THEORY
	IRP 804	TRADE UNIONS, GOVERNMENT AND STRUCTURE
	IRP 811	GRADUATE SEMINAR
	IRP 813	INTERNSHIP REPORT
	IRP 899	M.SC. RESEARCH PROJECT
<b>OPTIONAL</b>	IRP 808	COMPARATIVE INDUSTRIAL RELATIONS SYSTEM
	IRP 809	CORPORATE MANPOWER PLANNING
	IRP 817	HUMAN BEHAVIOUR ANALYSIS
	IRP 821	LABOUR LAW AND PUBLIC POLICY
	IRP 814	MAN AND THE WORK ENVIRONMENT
	IRP 819	CORPORATE MANAGERIAL REWARDS AND COMPENSATION
	IRP 842	MULTINATIONALS AND INDUSTRIAL RELATIONS
	IRP 841	GLOBALISATION, STATE AND INDUSTRIAL RELATIONS IN AFRICA
IRP 844	COMPENSATION MANAGEMENT IN	

		THE PUBLIC SECTOR
	IRP 845	ADVANCED WORKPLACE RELATIONS
	IRP 846	WOMEN AND WORK
	IRP 847	COMPARATIVE HUMAN RESOURCES MANAGEMENT
	IRP 848	EMPLOYMENT AND GENDER DISCRIMINATION
	IRP 849	INTERNATIONAL LABOUR MOVEMENT AND INSTITUTIONS
	IRP 815	PRINCIPLES AND PRACTICES OF JOB VALUATION
	IRP 816	MULTINATIONAL AND PERSONNEL MANAGEMENT

**Source:** University of Lagos, Department of Industrial Relations and Personnel Management Handbook 2011-2013

### **B) Master of Science in Employment and Labour Studies (MELS)**

The programme seeks to equip participants with both theoretical and applied knowledge in the broad field of employment and labour studies. The programme focuses on a wide range of relevant areas, including labour administration, labour inspection, international labour relations, social dialogue, social protection, development and employment, research methodology, writing skills and human resources. It also focuses on a number of cross cutting issues such as globalisation, poverty and development, labour law and labour relations, gender, HIV/AIDS in the workplace, information and communication technology and child labour. Candidates must take and pass a minimum of eight (8) units of the optional courses.

**TABLE 9: MASTER OF SCIENCE IN EMPLOYMENT AND LABOUR STUDIES COURSES**

<b>GROUPING</b>	<b>COURSE CODES</b>	<b>COURSE TITLES</b>
<b>CORE</b>	ELS 800	LABOUR AND EMPLOYMENT STUDIES
	ELS 801	ADVANCED LABOUR LAW AND

		PUBLIC POLICY
	ELS 802	ADVANCED LABOUR AND OCCUPATIONAL SAFETY AND HEALTH INSPECTION
	ELS 806	LABOUR MARKET ANALYSIS
	ELS 808	ADVANCED COMPARATIVE LABOUR LAW
	ELS 809	GLOBAL ISSUES
	ELS 810	RESEARCH METHODS AND WRITING SKILLS
	MAT 840	QUANTITATIVE RESEARCH METHODS
	ELS 811	MELS PROJECT
<b>OPTIONAL</b>	ELS 803	ADVANCED INTERNATIONAL LABOUR RELATIONS
	ELS 804	SOCIAL DIALOGUE AND POLICY MAKING
	ELS 805	SOCIAL PROTECTION
	ELS 807	HUMAN RESOURCES MANAGEMENT
	IRP 841	GLOBALIZATION, STATE AND INDUSTRIAL RELATIONS IN AFRICA
	IRP 843	WORK RELATIONS IN UNORGANIZED SECTOR
	IRP 844:	COMPENSATION MANAGEMENT IN PUBLIC SECTOR
	IRP 848	EMPLOYMENT AND GENDER DISCRIMINATION
	IRP 849	INTERNATIONAL LABOUR MOVEMENT AND INSTITUTIONS

**Source:** University of Lagos, Department of Industrial Relations and Personnel Management Handbook 2011-2013

### **C) A Two (2)-Year Master's of Industrial and Labour Relations (MILR)**

The Master of Industrial and Labour Relations is especially designed to meet the growing need of practising managers who are interested in acquiring specialised skills in Industrial Relations and Personnel Management. As such, it is restricted to those who have had considerable experience in the field but are unable to leave their work to engage in full-

time study. Candidates must take and pass a minimum of ten (10) units of the optional courses.

**TABLE 10: MASTER'S OF INDUSTRIAL AND LABOUR RELATIONS COURSES**

<b>GROUPING</b>	<b>COURSE CODES</b>	<b>COURSE TITLES</b>
<b>CORE</b>	IRP 812	MANAGERIAL ISSUES IN INDUSTRIAL RELATIONS & HUMAN RESOURCES
	MAT 840	QUANTITATIVE RESEARCH METHODS
	IRP 806	RESEARCH IN INDUSTRIAL RELATIONS & HUMAN RESOURCES
	IRP 800	HUMAN RESOURCE MANAGEMENT
	IRP 802	LABOUR MARKET ANALYSIS
	IRP 803	INDUSTRIAL RELATIONS THEORY
	IRP 804	TRADE UNIONS, GOVERNMENT AND STRUCTURE
	IRP 811	GRADUATE SEMINAR IN INDUSTRIAL RELATIONS AND PERSONNEL MANAGEMENT
	IRP 899	MILR RESEARCH PROJECT
	<b>OPTIONAL</b>	IRP 807
IRP 808		COMPARATIVE INDUSTRIAL RELATIONS SYSTEM
IRP 809		CORPORATE MANPOWER PLANNING
IRP 817		HUMAN BEHAVIOUR ANALYSIS
IRP 821		LABOUR LAW AND PUBLIC POLICY
IRP 814		MAN AND THE WORK ENVIRONMENT
IRP 819		CORPORATE MANAGERIAL REWARDS AND COMPENSATION
IRP 842		MULTINATIONALS AND INDUSTRIAL RELATIONS

	IRP 841	GLOBALISATION, STATE AND INDUSTRIAL RELATIONS IN AFRICA
	IRP 844	COMPENSATION MANAGEMENT IN THE PUBLIC SECTOR
	IRP 845	ADVANCED WORKPLACE RELATIONS
	IRP 846	WOMEN AND WORK
	IRP 847	COMPARATIVE HUMAN RESOURCE MANAGEMENT
	IRP 848	EMPLOYMENT AND GENDER DISCRIMINATION
	IRP 849	INTERNATIONAL LABOUR MOVEMENT AND INSTITUTIONS
	IRP 815	PRINCIPLES AND PRACTICES OF JOB EVALUATION
	IRP 816	MULTINATIONALS AND PERSONNEL MANAGEMENT

**Source:** University of Lagos, Department of Industrial Relations and Personnel Management Handbook 2011-2013

#### D) M.Phil / Ph.D. Degree Courses

**TABLE 11: M.Phil / Ph.D. DEGREE COURSES**

COURSE CODES	COURSE TITLES
IRP 900	ADVANCED TOPICS IN INDUSTRIAL RELATIONS AND PERSONNEL MANAGEMENT
IRP 902	ADVANCED RESEARCH METHODS IN INDUSTRIAL RELATIONS AND PERSONNEL MANAGEMENT
IRP 903	UNIONS, GOVERNMENT & POLITICS OF COLLECTIVE BARGAINING
IRP904	ADVANCED SEMINAR: COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS THEORY AND PROCESSES
IRP 905	ADVANCED SEMINAR: PERSONNEL MANAGEMENT, STAFFING AND COMPENSATION THEORY
IRP 906	LABOUR MARKETS: PROCESSES AND DYNAMICS
IRP 907	ADVANCED SEMINAR IN LABOUR MARKET

<b>THEORY AND RESEARCH</b>	
<b>IRP 910</b>	<b>MEDIATION, CONCILIATION AND ARBITRATION</b>
<b>IRP 911</b>	<b>HISTORY OF THE LABOUR MOVEMENT</b>
<b>IRP 912</b>	<b>PERSONNEL MANAGEMENT PROCESS</b>
<b>IRP 914</b>	<b>WAGES AND EMPLOYMENT THEORY &amp; STRUCTURE</b>
<b>IRP 915</b>	<b>SEMINAR: THEORY OF INDUSTRIAL CONFLICT</b>
<b>IRP 918</b>	<b>TRADE UNIONS STRUCTURE AND MANAGEMENT</b>
<b>IRP 923</b>	<b>MOTIVATION, COMPENSATION AND PERFORMANCE</b>
<b>IRP 950</b>	<b>SEMINAR: INDUSTRIAL RELATIONS AND PUBLIC POLICY</b>
<b>IRP 951</b>	<b>SEMINAR: INTERNATIONAL LABOUR ORGANISATIONS</b>
<b>IRP 952</b>	<b>SEMINAR: MANPOWER DEVELOPMENT AND UTILISATION</b>
<b>IRP 953</b>	<b>SEMINAR: INCOMES POLICY THEORY AND PRACTICE</b>
<b>IRP 954</b>	<b>SEMINAR: INDUSTRIAL ORGANISATION AND SOCIETY</b>
<b>IRP 999</b>	<b>THESIS WRITING</b>

**Source:** University of Lagos, Department of Industrial Relations and Personnel Management Handbook 2011-2012



# The Economic Crisis and the Return of Brazilians from the USA

Marina Tomassini \*

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## 1. Introduction

While Americans try to recover from the downturn of 2008 - 2009, Brazil grew at its fastest rhythm in more than two decades in 2010, and unemployment is at historical lows, despite the recent slowdown. In Brazil, from the time of the outbreak of the crisis in 2008 until early 2012, the country experienced a period of economic growth, ranking it as the sixth-largest economy in the world. However, recently, the impact of the crisis in the country has begun to gain more visibility, interrupting this period of confidence. Thus, should Brazilian immigrants stay in the United States or should they return? Did this crisis affect their jobs? How? Will they have better jobs and opportunities in Brazil? Are Americans willing to take these jobs under the same conditions?

The aim of this article is to contextualize data about Brazilian immigrants who have decided to stay in the United States, those with intentions to leave, and those that had already left. These immigrants attest to the influence of the crisis on the decision and the impact on their occupations and income. The hypothesis is that the natives of Brazil increased with the crisis, but the migration may continue with less intensity. Nevertheless, the profile of immigrants and types of migration may change.

I will bring this subject through the analyzation of recent reports and academic productions. I will also show the information collected at the International Airport of Rio de Janeiro and São Paulo to Brazilians, during the arrivals of flights from United States - Miami, Detroit, Dallas, New

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\* Marina Tomassini is Research Fellow at the State University of Rio de Janeiro/Institute of Social and Political Studies (Brazil).

York, Newark, Atlanta and Washington. Finally, I will explore the methodological obstacles that I have found during this research.

## **2. The Influence of the Crisis on Migration Flows and Labour Market**

Since the beginning of the crisis there have been publications, articles and reports about the causes and consequences of it. According to Ghosh<sup>1</sup>, economic crises usually generate unemployment, growth of border restrictions, reduction of migration flows, low values of remittances, increased number of deportations and natives. Based on the experiences of the past recessions, he also states that the labor market takes longer to recover than the economy. Which is directly reflected in the patterns of migration policies. In times of crisis, we see the impacts on both the country of origins and destination. The countries of destination should contain new migrations due to the reduction of labor demands, which leads to a drop in irregular immigration. Another trend is the decreased tolerance to foreigners as a result of increased competition for jobs and resources. However, general characteristics affect countries differently, making each flow between two points a single event.

The International Organization for Migration (IOM), international migration has shown its resilience in the face of economic downturns and can be expected to grow further in size and complexity over the next few decades. The 2010-2011 period was characterized by a slow and sometimes hesitant march towards economic recovery from the worst global recession in decades. Gross Domestic Product (GDP) growth rates diverted positive for higher-income countries in early 2011, while many emerging and developing economies posted healthy indicators of growth. For the IOM:

i) While a number of global trends were observable, there was considerable variation at the regional and local levels; ii) migrant stocks built up over several decades remained largely unchanged; iii) there were many indications of reduced migratory flows to destination countries; iv) many major countries of destination adjusted their migration programme targets downwards, either in anticipation of a reduced demand for migrant workers or simply to protect their domestic labour markets; and v) fears of greatly reduced remittances proved to be unfounded; following relatively small decreases, they

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<sup>1</sup> B. Ghosh, *The Global Economical Crisis and Migration: Where do we go from here?*, International Organization for Migration, Geneva, 2010.

rebounded healthily in 2010 and are expected to continue to increase in the coming years<sup>2</sup>.

The latest annual report on International Migration conducted by the Organization for Economic Cooperation and Development (OECD)<sup>3</sup>, based on data from 2010 and 2011, states that the fall in the flow of legal immigration that has occurred in recent years was due to the global economic crisis that is coming to an end. Immigration for the 23 OECD countries decreased in 2010 for the third consecutive year. However, the decline was modest (3% compared with the previous year, compared to 7% in 2009, the study says).

Nonetheless, to the International Labor Organization (ILO)<sup>4</sup>, a record of 202 million people could be unemployed across the world in 2013. It stated, in the beginning of this year, that with the emergence in five years of the financial crisis, unemployment is on the rise again as economies around the world lose jobs and the fragile recovery is threatened by "incoherent monetary policy" in the U.S and Europe. The estimated rise in global unemployment was 4.2 million in 2012. This was one of the largest increases since the early 2000s, excluding the recent crisis years. Reaching 197.3 million jobseekers in 2012, the number of unemployed is expected to rise greater by about 5.1 million in 2013 and by 2.9 million in 2014, in the ILO's baseline projection. For the organization, the global economy was expected to show a modest gain in 2013, with outputs up to 3.6% compared to 3.3% in 2012, according to the International Monetary Fund. Yet this fragile recovery is threatened by political uncertainty on both sides of the Atlantic that threatens recovery worldwide. So, will it directly influence the international migration flow around the globe? Is it really resilient? Could this crisis be a milestone that is putting a definite end on the classical south-north migration and generating new flows and destinations?

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<sup>2</sup> International Organization for Migration, *World Migration Report 2011: Communicating Effectively about Migration*, International Organization for Migration, Geneva, 2011.

<sup>3</sup> OECD, *International Migration Outlook 2012*, 2012, [www.oecd-ilibrary.org/social-issues-migration-health/international-migration-outlook-2012\\_migr\\_outlook-2012-en](http://www.oecd-ilibrary.org/social-issues-migration-health/international-migration-outlook-2012_migr_outlook-2012-en) (accessed 25 June 2014).

<sup>4</sup> International Labour Organization, *Global Employment Trends 2013: Recovering from a Second Jobs Dip*, 2013, [www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_202326.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_202326.pdf) (accessed 25 June 2014).

### 3. Brazil

The OECD report insists on the slow increase of international migration and also notes this trend towards Brazilian immigrants, in Japan, after a drastic decrease of 22.900 Brazilian immigrants in 2007 to 3.000. In 2009 at the height of the crisis, the Brazilian population increased again in 2010 to 4.700. In Portugal, the number of Brazilian immigrants increased again to 3.400, in this year after having decreased from 5.000 in 2007 to 2.900 in 2009. In Spain and Italy the decreases persisted in 2010, but was more moderate than the previous. Cathy McIlwane, a researcher at Queen Mary, University of London, also agrees that the economic crisis in Britain and the growth in Brazil have not created an exodus of migrants<sup>5</sup>.

According to the Brazilian Census 2010<sup>6</sup>, the number of Brazilians who decided to return corresponds to 174.597 and the majority of them came from the United States (52.000). In the Brazilian Census 2000, the total number of natives was 143.600 and 29.591 of them were Brazilians returning from the United States. The last Census also states that the United States is still the main destination for Brazilians, corresponding to 117.104 (23,8%). Yet despite being the most complete data about migration available in Brazil, the Census' number is underestimated. The Ministry of Foreign Affairs states that the number of Brazilians living in the United States is around 1.388.000. It also states that the issue of developed countries leads many Brazilians to make the journey back home. While only 20% of those living in the U.S. and a quarter of those who live in Japan have returned since the beginning of the recession in 2008<sup>7</sup>. For the American Community Survey, the Brazilian population in the United States has declined by a little over 8 percent between 2009 and 2011. The biggest decline was in Massachusetts, where the Brazilian population decreased by 22 percent from 2005 to 2011<sup>8</sup>. According to the Center for Brazilian Immigrants in Boston, 15.000 to 20.000 of the state's 200.000 Brazilians left home in 2008 – 2009, and they anticipate additional departures in the

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<sup>5</sup> See R. Pinto, *Is Brazil's economic growth enough to draw emigrants home?*, BBC News, March 6, 2012, [www.bbc.co.uk/news/uk-17272698](http://www.bbc.co.uk/news/uk-17272698) (accessed 25 June 2014).

<sup>6</sup> Instituto Brasileiro de Geografia e Estatística, *Censo Demográfico 2010: Características da População e dos Domicílios – Resultados do Universo*, IBGE, Rio de Janeiro, 2011.

<sup>7</sup> Ministério das Relações Exteriores, *Brasileiros no Mundo: Estimativas*, MRE, Brasília, 2012, [www.brasileirosnomundo.itamaraty.gov.br/a-comunidade/estimativas-populacionais-das-comunidades/APENDICE%20Diplomacia%20Consular%20-%20Brazileiros%20no%20Mundo.pdf](http://www.brasileirosnomundo.itamaraty.gov.br/a-comunidade/estimativas-populacionais-das-comunidades/APENDICE%20Diplomacia%20Consular%20-%20Brazileiros%20no%20Mundo.pdf) (accessed 25 June 2014).

<sup>8</sup> See American Community Survey at [www.census.gov/acs/www/data\\_documentation/2009\\_release/](http://www.census.gov/acs/www/data_documentation/2009_release/)

future, unless the economy improves and immigration reform allows the undocumented to work legally<sup>9</sup>.

According to Maxine Margolis' research<sup>10</sup>, there are other indicators of this return, although indirect, from travel agents with a Brazilian clientele. One agent in Danbury said that the number of Brazilians purchasing tickets for the return increased after 2006. In the beginning, the profile corresponded to single men, but later to the entire families. Some other two agencies confirmed the same. The moving companies have also noticed this increase. One company said that the contracts had increased 30 percent in 2009 compared to two years earlier. Owners of remittance agencies also said that over the last four years businesses have decreased drastically.

Brazilian officials are claiming that the country needs to increase the foreign skilled and unskilled workforces to maintain its current economic position. They stated that if the government does not control the current conditions, the country could lose its international competitiveness in relation to other economies in the world. Currently the Brazilian government is still doing its own advertisement to invite highly qualified workers (foreigners and natives living abroad) to come to the country in order to fill the demand for different specialties. Unemployment in Brazil is at a record low. The jobs that are easily available are for those mentioned above and also are for the ones on the opposite side, who have a basic education. Workers in the middle, who have spent around ten years in school but do not have any college education or professional qualifications, struggle to find work. And for the non-qualified workers, the quality of life that they have, doing the same activity in Brazil and abroad are much different. For some authors, the mass return is not a rule, because the living conditions in the countries of origin did not change much and many migrants have already rooted abroad with family and social relations.

Yet Brazil is definitely after "brains and human capital". A special Strategic Actions Secretariat (SAE) is working on a strategy to attract selective quality immigration, says Ricardo Paes de Barros, head of SAE. In 2012, Brazil extended 73.022 work visas for foreigners, but only 8.340 were permanent. Of that total, 9.209 were for U.S. residents, followed by workers from the Philippines, Haiti, United Kingdom, India, Germany, China and Italy. Brazil previously attempted to attract qualified immigrants following the collapse

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<sup>9</sup> *Brazilian Immigrant Center*, Annual Report, 2010, [www.braziliancenter.org/images/resources/resources-BIC\\_Report\\_5-1-10\\_to\\_12-31-10.pdf\\_color.pdf](http://www.braziliancenter.org/images/resources/resources-BIC_Report_5-1-10_to_12-31-10.pdf_color.pdf) (accessed 25 June 2014).

<sup>10</sup> M. Margolis, *Goodbye, Brazil: Emigrés from the Land of Soccer and Samba*, University of Wisconsin Press, Madison, 2013.

of the Soviet Union in the nineties and the exodus of scientists from the former super power never managed to take off<sup>11</sup>.

The recent data published by the Brazilian Institute of Geography and Statistics (IBGE) states that the unemployment rate was estimated at 5.7%. This is the lowest rate for March since the beginning of the series and it did not change in comparison to the results of February (5.6%). The unemployed population (1.4 million people) was stable in comparison to the previous month and decreased to 8.5% (127 thousand people) in comparison to March last year. The employed population (23.0 million) remained stable in comparison to February. Contrasting with February 2012, there was an increase of 1.2%, which meant an increase of 276 thousand employed individuals within 12 months. The number of workers with a formal contract in the private sector (11.4 million) did not record change in relation to February. In the annual comparison, there was an increase of 2.8%, which accounted for an additional 309 thousand jobs with a formal contract in a year. Compared to March last year, the employed persons' purchasing power increased to 0.6%<sup>12</sup>.

In an article published in the Brazilian newspaper Estado de São Paulo, Mac Margolis points out that the rise of emerging countries is revolutionizing the global immigration:

Before exporters of people, poor countries have attracted workers worldwide today. The flow of immigrants between developing countries already competes with the classic migration from South to North, the United Nations estimates. The economic crisis in Europe, USA and Japan only intensifies this trend. Brazil is in the midst of this whirlwind demographic. Two decades ago, the Brazilians used to run away as Haitians. Now, they return. Stable, democratic, with a booming economy and in the sights of investors, the "new" Brazil, once again, became a country that attracts people. Reissuing the history of the 19th and 20th centuries, the country opens the doors to European immigrants, but also for Latinos<sup>13</sup>.

Despite the flurry of Haitian migration to Acre, there is a very modest presence of immigrants in Brazil. Foreigners were over 1 million in 1970,

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<sup>11</sup> Mercopress, *Brazil reviewing immigration policy and is looking for "brains and human capital"*, April 2, 2013, <http://en.mercopress.com/2013/04/02/brazil-reviewing-immigration-policy-and-is-looking-for-brains-and-human-capital> (accessed-25 June 2014).

<sup>12</sup> Instituto Brasileiros de Geografia e Estatística, *Pesquisa Mensal de Emprego*, 2013, [www.ibge.gov.br/home/estatistica/indicadores/trabalhoemprego/pme/pmemet2.shtm](http://www.ibge.gov.br/home/estatistica/indicadores/trabalhoemprego/pme/pmemet2.shtm) (accessed 25 June 2014).

<sup>13</sup> M. Margolis, *Brasil, Novo Pólo de Imigração*, Estado de São Paulo, January 08, 2012, <http://www.estadao.com.br/noticias/impresso,brasil-novo-polo-de-imigracao-,819891,0.htm> (accessed 25 June 2014).

606.000 in 1991 and only 433.000 in 2010, according to IBGE. Including undocumented immigrants, which are not even 2% of the national population.

According to Patarra<sup>14</sup>, growth and economic stability in Brazil has attracted not only natives, but also immigrants from around the world. Once more, the data diverge: the Ministry of Justice registered 1.466 million foreigners living in the country regularly in 2011. In 2010, there were 961.000 and it continues to still increase.

Despite some initiatives to evaluate the impact of the economic crisis on the return of Brazilian immigrants, most of the data published in the country corresponds to the period prior to 2011, and are insufficient to illustrate the reality. Brazilian studies about the return have focused on the cause and circularity of migration, based on the Theory of Social Networks they are concentrated in certain regions of Brazil, such as Governador Valadares and Ipatinga.

A study of nearly four hundred Brazilians who left the United States for Governador Valadares after the crisis demonstrates that more than 40 percent of thenatives returned to Brazil because they were working less and earning fewer dollars. Some individuals held up three jobs and earned as much as \$20 an hour before the beginning of the crisis. After which they were earning only \$9 an hour, and they thought that staying in the United States was simply not worth the sacrifice<sup>15</sup>.

Another Brazilian research tried to measure the impact of the crisis on the return from the United States and Portugal, and they concluded that the golden era of the Brazilian migration had come to an end. Several factors have contributed to this, as the "building" of a fortress, Europe grounded in xenophobia and restrictive laws to immigrants in the United States that criminalize irregular migration. The economic crisis extinguished jobs and reduced the productive capacity of countries that had an immigrant workforce for their continued growth. On the Brazilian side as a factor of attraction, the response of the economy to the economic crisis and the efforts that led the country to an enviable position in the international arena

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<sup>14</sup> N.L. Patarra, *O Brasil: país de imigração?*, in *Revista Eletrônica de Estudos Regionais e Urbanos e-metropolis*, July 2012, No. 9, ano 3, 6-18.

<sup>15</sup> S. Siqueira, G.O. Assis, E.C. Campos, *Of the Place for the Global: Configuration of Transnational Flows Between Brazil and the United States*, paper presented at the meeting of the Latin America Studies Association, Toronto, October 6-9, in M. Margolis, *Goodbye, Brazil: Emigrés from the Land of Soccer and Samba*, University of Wisconsin Press, Madison, 2013.

have offered for those who live abroad the dilemma of leaving everything and facing a new immigration: the return<sup>16</sup>.

Yet on the other hand, the data also shows that most immigrants don't mention the crisis as their most important reason to return. The majority stated the reason for their return was related to their family (either because they missed them, or because there was a relative who was a sick). Only 10% cited that the 2008 crisis hampered the conditions of employment, reducing working hours and increasing the costs of living in the United States. The other 10.5% of the respondents returned to Brazil because they have achieved what they sought abroad. 7.1% of respondents stated that health issues, such as depression or diseases and accidents among family members abroad were reasons to return to Brazil. It is noteworthy that 18.5% returned to Brazil for various reasons such as fear of deportation, the end of college or having intentions of going into higher education in Brazil, difficulties adapting abroad, new prospects and other factors.

According to the same research, several academic works have pointed to an increase of the feminization of international migration. The possibility of greater permanence of women at the destination via the maintenance of their work in time of crisis (mostly domestic), compared to the difficulties encountered by men, can be one of the biggest factors that indicate the increased number of male immigrants between natives. The Brazilians who were interviewed used to work predominantly in the market and the services sector in Brazil, before leaving, and in the services and civil construction sector in the United States. Most of them decided to go to the United States to save money, to have a better quality of life and for better job opportunities.

The research study mentioned above, that was conducted in the cities of Poços de Caldas and Teófilo Otoni (State of Minas Gerais) states that since 2008, the municipalities in the study were receiving massive returns of Brazilians who lived abroad. In the qualitative part executed in 2011 and Poté and Botelhos (neighboring these two main cities), respondents reported that the flow of return was intense. In Poté and Botelho most current natives are considered as "borrowers" (people who make loans), stated by the bank clerks. Since the beginning of the global crisis, there were not a significant number of international migrants who have returned to the cities of Minas with money applied. The Bank of Brazil continues to receive remittances, but the values are much smaller.

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<sup>16</sup> C.S. Nunan, D. Fernandes, M. Carvalho, *O fenômeno internacional de retorno como consequência da crise mundial*, in *Revista de Estudos Demográficos*, July 2011, No. 49, 69-98.

Despite the strict enforcement of irregular immigration, the main negative aspects of the international crisis in the opinion of the natives were the reduction in working hours, cutting of overtime, rising of inflation and the devaluation of the dollar, all resulting in a lower financial gain. The majority of migrants regretted returning to Poté, because there were many difficulties associated with reintegration into the labor market in the city in Brazil. Respondents reported that after the 2008 crisis, the youth of Poté changed their goals, since they are more interested in attending colleges in Brazil, rather than pursuing opportunities for a better life in the United States. Although there was no direct interviews with the natives who were at the same time, without money and unemployed, all respondents emphasized that most natives were out of money and out of the market. The commercial movement in the city decreased, hampering the opening of their own business through loans and then having financial return. That's why the city has become dependent on international remittances. According to Soares<sup>17</sup>, in Governador Valadares and Ipatinga, the remittance used to contribute to local economic activities, especially the real estate sector. In this case, the impact of remittances can even change the condition of the household (own, rented, transferred, etc.). According to IOM, Brazil is the second largest receptor of remittances of Latin America, after Mexico<sup>18</sup>. Although such remittances do not represent a national development effect, they may have a localized effect on municipalities for which they are sent. Between 2007 and 2008, 700,000 jobs were lost in construction in the United States, in Newark, New Jersey, Mount Vernon, New York, Pompano Beach, Florida and elsewhere, Brazilians have been leaving home by the hundreds. According to Margolis, in a single month in 2009, around fifty Brazilian families in Newark, including those who had real estate there and had not planned to leave, pulled up the stakes and headed home. As a consequence, the number of the patrons in local restaurants, grocery stores, hair salons, and other business that catered to Brazilians decreased. The editor of Newark's Brazilian newspaper stated that while many Brazilians are indeed leaving the area because of the lack of jobs, not all are returning to Brazil. Several are moving to other states, such as California and Florida,

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<sup>17</sup> W. Soares, *Da metáfora a substância: redes sociais, redes migratórias, e migração nacional e internacional e Valadares e Ipatinga*, PhD Thesis (Demography), Faculdade de Ciências Econômicas da Universidade Federal de Minas Gerais, Belo Horizonte, 2002.

<sup>18</sup> International Organization for Migration, *World Migration Report 2010: Building Capacities for Change*, IOM, Geneva, 2010.

in search of employment. Some of the men in Newark are leaving their spouses and children behind to seek work elsewhere in the United States<sup>19</sup>. For Martes<sup>20</sup>, the economic crisis reached both documented and undocumented immigrants. Nearly 40 percent of the natives interviewed in Governador Valadares were legally in the United States but had decided to return because of the economic difficulties. Nonetheless, many Brazilians who had green cards or became American citizens (25% of the sample), hoped the crisis would pass and that they would be able to return to the United States and find work. So, they stated that they are living in Brazil temporarily. If the U.S economy improves they would consider returning to their native land.

If many are returning, fewer are leaving Brazil to go to the United States recently. For Siqueira, this is because of the transnational connections between friends and relatives living abroad influencing decisions to stay home. It shows that the American Dream has begun to fray<sup>21</sup>.

But returning is usually more difficult than leaving. In the study of Vedana<sup>22</sup> about the return of Brazilians and the processes of acculturation and adaptation related to forms of consumption, the majority of the natives think that the return was a bad decision. Her study found that among the main products and services that the natives usually miss are: food, clothing (quality), electronics (affordable), transportation and security. The data collected through 21 interviews in Porto Alegre demonstrates how this lack is directly related to a negative process of adaptation. Many were outraged by the prices in Brazil, by having to spend a lot of time working to purchase goods. The loss of purchasing power by doing the same activities in the country is a common negative factor that complicates the process of return, which is usually accompanied by a small depression.

For Siqueira and Santos, the crisis in the American economy has also made Brazilians return on an intensity greater than normal in a migratory flow. They applied 235 structured interviews to immigrants that had returned from 2006 to 2011, in 25 cities, which belong to the Northeast Region of

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<sup>19</sup> M. Margolis, *Goodbye, Brazil: Emigrés from the Land of Soccer and Samba*, University of Wisconsin Press, Madison, 2013.

<sup>20</sup> A.C.B. Martes, *New Immigrants, New Land: A Study of Brazilians in Massachusetts*, University Press of Florida, Gainesville, 2010.

<sup>21</sup> S. Siqueira, *Migrantes e Empreendedorismo na Microrregião de Governador Valadares – sonhos, sucesso e frustrações*, PhD Thesis (Philosophy and Human Sciences), Universidade Federal de Minas Gerais, 2006.

<sup>22</sup> S.N. Vedana, *Viver no exterior e voltar para o Brasil: uma análise do processo de aculturação e readaptação de consumidores brasileiros*, Master Thesis (Management) Universidade Federal do Rio Grande do Sul, Porto Alegre, 2010.

Brazil. The data shows that the immigrants were young people who ages ranged between 21 and 30 years old, unmarried. They stated the main reason for migration was to get money, invest in their homeland and go back in a better economic situation. The main reason for their returning was the unfavorable conditions to get money and strict supervision regarding documentation. The majority didn't have any investment in Brazil and they came back without reaching the initial project. They sought to find a space in the labor market; however, they found difficulties due to years of absence, the knowledge gap and the low qualifications<sup>23</sup>.

One particular shock for newcomers is the strength of Brazil's currency, the real. That may help Brazilians snapping up apartments in places like South Beach in Miami, where properties cost about a third of their equivalents in Rio's exclusive districts. This also hurts the country's manufacturers and exporters... As Simon Romero asked: "Brazil is doing great, but honestly, every other week I ask myself, when is this going to end?"<sup>24</sup>.

#### 4. United States

The unemployment rate in the United States is higher today than Brazil at 7.6 percent, the U.S. Bureau of Labor Statistics reported last March. Employment grew in professional and business services and in health care but declined in the retail trade. Both the number of unemployed individuals at 11.7 million, and the unemployment rate, at 7.6 percent, were little changed. Among the major worker groups, the unemployment rates for adult men (6.9 percent), adult women (7.0 percent), teenagers (24.2 percent), whites (6.7 percent), blacks (13.3 percent), and Hispanics (9.2 percent) showed little or no change in March. The unemployment rate for Asians was 5.0 percent (not seasonally adjusted), little changed from a year earlier. In March, the number of long-term unemployed (those jobless for 27 weeks or more) was little changed at 4.6 million. These individuals accounted for 39.6 percent of the unemployed. The number of individuals employed part time for economic reasons (sometimes referred to as

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<sup>23</sup> S. Siqueira, M.A. Santos, *Emigração, Crise Econômica e Retorno: O Caso da Microrregião de Governador Valadares*, Anais do XVIII Encontro Nacional de Estudos Populacionais, 2012.

<sup>24</sup> S. Romero, *Foreigners Follow Money to Booming Brazil, Land of \$35 Martini*, New York Times, 8 August 2011, [www.nytimes.com/2011/08/13/world/americas/13brazil.html?pagewanted=all&\\_r=1](http://www.nytimes.com/2011/08/13/world/americas/13brazil.html?pagewanted=all&_r=1) (accessed 25 June 2014).

involuntary part-time workers) fell by 350,000 over the month to 7.6 million. These individuals were working part time because their hours had been cut back or because they were unable to find a full-time job. In March, 2.3 million individuals were marginally attached to the labor force, essentially unchanged from a year earlier. These individuals were not in the labor force that they wanted but, were available for work, and had looked for a job sometime in the prior 12 months. They were not counted as unemployed because they had not searched for work in the 4 weeks preceding the survey. Among the marginally attached, there were 803,000 discouraged workers<sup>25</sup> in March, little changed from a year earlier. The remaining 1.5 million individuals marginally attached to the labor force in March had not searched for work for reasons such as school attendance or family responsibilities. So, it reveals that the recovering is still slowly happening<sup>26</sup>.

Unauthorized movements of migrants looking for work went down as well during recession. Such movements are not cost-free and with no guarantee of finding a job, they no longer look so attractive to potential migrants and their families. Part of the large drop in unauthorized movements to the U.S. from Mexico and Central America (border patrol apprehensions decreased from 875,000 in 2007 to 350,000 in 2011) is due to the impact of recession<sup>27</sup>.

Following the statistics of the U.S. Immigration and Customs Enforcement (ICE), the highest number of Brazilians removed from the country was in 2005, when there were 32,112 of them deported. One year later this number decreased to 2,957. In 2008 the beginning of the crisis, it started to increase, corresponding to 3,814, but it is now slowly reducing again<sup>28</sup>.

It is largely publicized that there are about eleven million irregular immigrants in the U. S. According to the OECD, labor migration accounts for almost 40% of immigration flows into the European Union, compared with only 6% in the United States. In the U.S. there is little permanent (green card) labor migration, because its system, which is based on numerical limits, favors family migration. The U.S. has the largest share on family migrants in the OECD. About three out of four new permanent

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<sup>25</sup> Discouraged workers are persons not currently looking for work because they believe no jobs are available for them

<sup>26</sup> See updated data at Bureau of Labor Statistics: [www.bls.gov/](http://www.bls.gov/).

<sup>27</sup> OECD, *International Migration Outlook 2012*, 2012, [www.oecd-ilibrary.org/docserver/download/8112071e5.pdf?expires=1380564908&id=id&accname=guest&becksum=BA2DF3C769E2C7124378B8035AC0003C](http://www.oecd-ilibrary.org/docserver/download/8112071e5.pdf?expires=1380564908&id=id&accname=guest&becksum=BA2DF3C769E2C7124378B8035AC0003C) (accessed 25 June 2014).

<sup>28</sup> Data available at [www.ice.gov/removal-statistics/](http://www.ice.gov/removal-statistics/).

immigrants are in this category. Overall in OECD countries, in spite of some decline, family migration continues to be the main category for permanent migration in 2010, accounting for 36% of the flows.

According to a recent research realized by the firm Latino Decisions, 85% of undocumented Latino immigrants have U.S. citizen family members and 87% would plan to apply for citizenship if immigration reform passes. According to the results, they have deep roots in America, with strong family and social connections to U.S. citizens, painting a portrait of a community that is very integrated into the American fabric, and hopeful of a chance to gain legal status and ultimately citizenship<sup>29</sup>.

The situation now is that facing economic difficulties in the region. Most Californians for example, are advocates of more flexible laws for foreigners for the first time in history. With the shortage of Latinos, entrepreneurs already speak about a collapse in California's agriculture within a few months, if the government does not allow the entry of new workers by the Mexican border. Since 2011, illegal immigration between countries is 0%, according to a survey of the Pew Hispanic Center<sup>30</sup>.

The crisis of the real estate market in the United States had also a strong impact on immigrants. Brazilians, along with other nationalities, were targets of subprime-mortgage lenders since most lacked good credit histories or proof of employment and income. Moreover, their immigration status apparently was of no consequence to these lenders. According to Margolis, some mortgage companies offered financing to Brazilians and other immigrants without requiring documentation of any kind. Consequently, since the beginning of 2007, many Brazilians, documented and undocumented, in various communities in the United States were able to buy houses with subprime loans. Because of this credit many believed that this was a good deal because their mortgage, at least initially, cost only a little more than what they were paying for rent. In addition, they could divide their houses into two or three separate living units, one for their own family and the others to rent out. The rent money, in turn, would help pay off the mortgage. But this scenario changed once higher interest rates kicked in. According to her example, the mortgage of one Brazilian family in the Boston area for example, increased from \$1.500 to \$2.600 a month. This was because of the weak economy, "the husband, who had a job in

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<sup>29</sup> M. Barreto, G. Segura, *Poll of undocumented immigrants reveals strong family and social connections in America*, Latino Decisions, [www.latinodecisions.com/blog/2013/04/15/poll-of-undocumented-immigrants-reveals-strong-family-and-social-connections-in-america/](http://www.latinodecisions.com/blog/2013/04/15/poll-of-undocumented-immigrants-reveals-strong-family-and-social-connections-in-america/) (accessed in 25 June 2014).

<sup>30</sup> Data available at Pew Research Center: [www.pewresearch.org/](http://www.pewresearch.org/).

construction, was working fewer hours and his wife, who cleaned thirty houses, lost more than one-third of her clients”<sup>31</sup>. As a subprime, high-risk borrower, the family had to pay an interest rate on the mortgage that suddenly rose to 12 percent annually. The family did not pay too much attention to the contract, they family became aware of the problem only once monthly payments skyrocketed.

## 5. The Research

It is not easy to deal with migration statistics. Numbers can differ greatly from one another and they aren't very precise, mostly because of the great number of irregular immigrants. This is also the case of returnees. The numbers available are a combination between consulate registrations, the department of Homeland Security in the US, Non Governmental Organizations and others academic researches. Most academic researches work with the “snow ball”<sup>32</sup> methodology, which is quite common in recent migration studies, because of the large existing methodological obstacles<sup>33</sup>. Therefore, to get closer to the natives themselves, I decided to collect the first data of my research at the International Airport of Rio de Janeiro and São Paulo. The initial proposal was to apply questionnaires to Brazilians that are returning from the United States. For those who have lived there, I would make questions in order to trace a profile, including: reasons for living in the United States; their occupation and income in Brazil (before traveling) and in the United States; living conditions in both countries; remittances; and reasons to return. The flights from the United States are concentrated in the morning period at both airports. From 6:00 AM to

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<sup>31</sup> M. Margolis, *Little Brazil: imigrantes brasileiros em Nova York*, Papirus, Campinas, 1994, 210.

<sup>32</sup> The first group consists of a random sample of respondents who are asked to identify other elements that belong to the target population of the survey. This process can be performed in successive waves, obtaining referrals or information from the interviewee, using its own network of friends and relatives. The following groups are part of a non-random sampling technique, which presents a disadvantage because the data cannot be generalized. The statistical data can be used only as useful guidelines.

<sup>33</sup> M. Margolis, *Little Brazil: imigrantes brasileiros em Nova York*, Papirus, Campinas, 1994 and L.M. Anicio, *O imigrante internacional de retorno e sua inserção no mercado de trabalho: um estudo entre as microrregiões Teófilo Otoni e Poços de Caldas*, Master Thesis (Geography), Pontifícia Universidade Católica de Minas Gerais, Belo Horizonte, 2011.

10:00 PM the flights usually come from Miami, Detroit, Dallas, New York, Newark, Atlanta and Washington.

I have spent ten days at each Airport and I have contacted at least 50 people a day<sup>34</sup>. Yet the number of people that I found who were really retuning was surprisingly irrelevant (less than 1%). Thus, right at the beginning I decided to apply not only the questionnaires to the natives but interview all the people who were coming from the United States, including the families waiting at the arrivals. Therefore, I found out that most of them were coming back from a tourist travel (73%), business trip or conference (7%), or they were young people returning from their exchange program or academic studies abroad (4%).

About 15% of them were returning only to visit Brazil. Those people have a stable economic situation in the United States and, according to them they were not really affected by the crisis. Their professions were: housewives, hairdressers, flight attendants, manicurists, cleaners, teachers, bank clerks, models, military soldiers, advertisers, administrators, and consultants. Talking to them I found out that they were living at least for three years in the United States (some are abroad for more than thirty years) and don't think about returning to Brazil. They also have a regular status and they can come and go whenever they want. For the few natives the crisis didn't influence their decision and they already had a job or studies arranged in Brazil.

There are some important facts however, that should be considered here. First of all, while I was interviewing individuals, there were many others going out, therefore a research like that would need more people to have a better accurate data. Another relevant consideration is that strong irregular networks are established in others states like Minas Gerais, Ceará, Goiás, and we believe that those irregular immigrants are the most affected by the crisis<sup>35</sup>.

I have also visited the only Brazilian center of information and support to international returnees, which is located in the Japanese neighborhood in São Paulo. They mostly receive people returning from Japan. According to their data from January 10, 2011 to December 26, 2012 they received 2.044

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<sup>34</sup> I have decided to stop my research to reformulate its method and validity after this preliminary experience.

<sup>35</sup> At the airport of São Paulo there is a Center of Humanized Service for Brazilians who were deported and ask voluntarily for any kind of help. I went there but the staff wasn't allowed to give me any information without the permission of the Department of Social Welfare and Development. We have been in touch and they will send me their data soon, so I can present it at the Conference.

people and only 29 of them were returning from the United States. The Brazilian government intends to create more centers like this, to give support, lectures on entrepreneurship, information about the Brazilian market and qualification courses<sup>36</sup>.

## 6. Final Considerations

All the information and data collected demonstrates that the current situation is still uncertain. The job market is really taking longer to recover and there are doubts about the resilience of the immigration. Even if there is a recovery, things have definitely changed. After the crisis it is clear that an important number of Brazilians living in the United States, especially those with an irregular status, have had their jobs affected. At least a fifth decided to return, but it is not clear if the Brazilian great economy is enough to keep these individuals here and to assure an adequate job market insertion. The cost and quality of living in Brazil are problems that all natives face unfortunately.

There are also subjective aspects that are relevant when we think about the impact of the crisis. When natives do not mention the crisis as the main reason, one should consider the difficulty to assume failure in the migration process and other aspects such as the feelings of being homesick. This is what Sayad<sup>37</sup> calls the constant desire of return, and when it materializes it seems to be associated by the individual to a single reason. There are important studies about it that should interchange with more macro ones.

It also seems that the United States has a demand for some kind of activities that Americans are not willing to fulfill. This is something that is getting more evident each day, as we can see now in the rural area of California.

It is clear that there is a strong necessity of deeper studies and data to evaluate the facts. In which one must understand the impact on different regions in Brazil, the United States and also between the rural and urban area.

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<sup>36</sup> Data available at: [www.bunkyo.bunkyonet.org.br](http://www.bunkyo.bunkyonet.org.br).

<sup>37</sup> A. Sayad, *A imigração ou os paradoxos da alteridade*, São Paulo, Edusp, 1998.

# Labour Codes of Conduct and Labour Policy Codes: An Overview

Adrián Todolí Signes \*

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## Introduction

Labour codes of conduct and labour policy codes are two legal instruments which employers have at their disposal to regulate stakeholder relations (workers, suppliers and customers). Yet their purpose is often unclear. Labour codes of conduct apply to suppliers, worker's suppliers and customers. They are also regarded as soft laws and this is why some difficulties arise when they are challenged in court. Conversely, labour policy codes concern employees and are fully enforceable. The problem stems from the terminology employed to describe them, which makes it particularly difficult to draw a distinction. Accordingly, this paper seeks to clarify the differences between these two codes considering their features, the applicable rules, and their scope of application.

## 1. Corporate Social Responsibility

Corporate Social Responsibility (CSR) concerns the company's social obligations which go beyond the traditional goal of maximizing profits. There are two main schools of thought regarding social responsibility<sup>1</sup>. From a neoliberal perspective, Friedman argues that business ethics

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\* Researcher and Assistant Professor, Department of Labor and Employment Law, School of Law, University of Valencia (Spain).

<sup>1</sup> Classical economic theory establishes the concept of "company" as a production unit, the goal of which is to maximize benefits, G. Seara L., *La Responsabilidad social de la empresa*, in *RMTAS*, No. 50, 2004, p. 15.

compliance ends when laws begin. Therefore, the public sector is responsible for protecting human rights, the rights of workers and consumers, and the environment through limitations imposed by the law. Thus, a business will be considered ethical if complies with the laws of the country where it is located. Another perspective concerns the social conception of the company. It implies that every productive organization has a certain moral obligation to promote ethical behavior and higher values. It also contributes to improving living conditions, even beyond provisions of law (Galbraith, Roger Commons and Ayres).

Consequently, CSR falls under the latter definition. CSR is an old concept and its origins are not clear,<sup>2</sup> yet its relevance has increased in recent years<sup>3</sup>. Labour codes of conduct are situated within this interpretation of CSR, as they seek to establish social responsibility guidelines regarding the rights of the workers and employers they apply to. Since the 1990s, these self-regulatory codes have undergone spectacular growth<sup>4</sup> for a number of reasons.

First, the relocation of companies headquartered in developed countries has increased their interaction with subsidiaries or suppliers located in developing countries, particularly to benefit from cheap labour and lack of labour rights in the host country<sup>5</sup>. Therefore, offshoring produced a social problem that was non-existent before: the direct use on the part of transnational companies (TNC)<sup>6</sup> of workers without labour rights in the host country.

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<sup>2</sup> CSR can be seen as an evolution of long-awaited policies which are now given new labels and contents, A. Tovar J.M., V. De La Vega B., *Sobre el concepto de responsabilidad social de las empresas. Un análisis europeo comparado*, in *Cuadernos de relaciones laborales*, vol. 27, No. 1, 2009, p. 54. Some authors go even further, relating CSR to the very origin of the capitalist system. A case in point is Robert Owen (XIX) who was able to combine efficiency and accountability, laying the foundation of current thinking of CSR. See B. Bellovi M., P. Senovilla L., *Responsabilidad Social y condiciones de trabajo*, in *INSHT*, No. 31, 2004, p 26 y 27.

<sup>3</sup> B. Bellovi M., P. Senovilla L., op cit., p. 25.

<sup>4</sup> R. Jenkins, R. Pearson, G. Seyfang, *Corporate responsibility & Labour Right: Codes of Conduct in the Global Economy*, Earthscan, London, 2002, p. 1.

<sup>5</sup> "It is precisely the inequality of social standards, especially the yawning gap between developed and developing countries, which produces offshoring", Gutierrez Solar Calvo B., *Deslocalización productiva y relaciones laborales*, in *RL*, No.1, 2005, p. 552 .

<sup>6</sup> The most commonly used term is multinational companies, but according to the United Nations "multinational" is assigned exclusively to companies jointly owned by several States, or whose capital is divided and owned by investors from several different countries. So, that term is not suitable for these companies, since they often produce and sell in several countries but its capital is located in a single country. The United Nations

The second reason why CSR and labour codes of conduct are now a necessity is that most companies have become mere brands that do not manage the production system. In other words, transnational companies buy their products from suppliers located in developing countries and sold them through distributors in developed ones. Thus, the main asset of these companies happens to be their brand because it is the only value they add to the product<sup>7</sup>. Consequently, these companies are exposed to public opinion and campaigns for the protection of workers' rights.

Third, community engagement concerning labour and environmental rights in developing countries has increased of late. This calls for employers with financial interests in these countries to develop strategies increasing their credibility on this aspect. This indicates that codes of conduct such as unilateral declarations exist out of the will of employers to publicize their commitment to safeguarding workers' labour rights. To put it differently, any company can maintain decent labour standards in developing countries without implementing codes of conduct. Their existence is only justified by the desire to publish their pledge to ensure labour rights and to show consumers that they are socially responsible<sup>8</sup>. Indeed, labour codes of conduct are unilateral manifestations of the employers' will to make a public commitment to safeguarding and fulfilling labour rights.

However, the lack of regulations on labour codes legitimizes the use of different terminology. Examples include: codes of conduct, transnational framework agreements, codes of practice, and codes of ethics. Yet only few of them properly convey the idea of self-imposed obligations on the part of the company and its network of firms (suppliers, distributors subsidiaries) to ensure compliance with minimum labor standards. Further, two kinds of codes can be identified under the same labels which have nothing in common although they are frequently treated as the same thing: labour codes of conduct and labour policy codes. It is easy to mistake codes of conduct (CRS) for company labour policy (ethical codes,

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go on to argue that TNC (transnational company), also applies to companies that produce in different countries. Naciones Unidas, *Las corporaciones multinacionales en el desarrollo mundial*, ed. Centro sobre Empresas Transnacionales, New York, 1973.

<sup>7</sup> M. Posner, J. Nolan, *Can codes of conduct play a role in promoting worker's right?* In R. J. Flanagan, W.B. Gould IV, *International Labor Standards*, Stanford University Press, 2004, p. 208. C. Rodríguez Garavito, *Global Governance and Labor Rights: Codes of Conduct and Anti-Sweatshop Struggles in Global Apparel Factories in Mexico and Guatemala*, in *Politics & Society*, vol. 33, No. 2, 2005, p. 219.

<sup>8</sup> J.M. Aparicio Tovar, B. Valdés De La Vega, *op. cit.*, p. 58.

codes of practice, protocols) which target workers within a company and impose obligations as required by the employment contract. Consequently, a part of the literature has already established that the codes of conduct of transnational corporations must not be confused with circulars or instructions issued by the employer with the intention of managing the activities of the company within the limits of his power<sup>9</sup>. It is thus important to draw a distinction between the two concepts based on their characteristics rather than their labels:

- A labour code of conduct has a voluntary character and does not impose any obligation on the company. Such a code can also be negotiated by international unions and workers' representatives in the firm<sup>10</sup>, by non-governmental organizations, or associations which are concerned with workers' rights in developing countries<sup>11</sup>. Labour policy codes are also issued by the employer voluntarily and unilaterally, and without the consent of workers' representatives, otherwise they would be collective agreements.

- Being voluntary and unilateral in character, it is the employer who issues both labour codes of conduct and labour policy codes. Yet they might address a different audience. Labour codes of conduct are self-imposed whereas transnational corporations are bound by minimum labour standards. Consequently, codes of conduct target any entity making business with transnational companies, while labour policy codes only apply to the employees of the company issuing them<sup>12</sup>.

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<sup>9</sup> L.E. De La Villa Gil, *Acercas de la responsabilidad social corporativa. Algunas consideraciones críticas desde la perspectiva de las relaciones laborales*, in *Revista General de Derecho del Trabajo y de la Seguridad Social*, No. 16, 2008, p. 4. Online version available at [http://www.iustel.com/v2/revistas/detalle\\_revista.asp?id=12&numero=16](http://www.iustel.com/v2/revistas/detalle_revista.asp?id=12&numero=16).

<sup>10</sup> There is at least one union in charge of negotiating these codes with multinationals. In the worst scenario, the international trade union secretariat can assign to each multinational a legitimate union representing workers in the industry. W. Justice, *The international trade union movement and the new codes of conduct* in R. Jenkins, R. Pearson, G. Seyfang, *op. cit.*, p. 97.

<sup>11</sup> The NGO Clean Clothes has created its own code of conduct model which can be joined by transnational corporations, the social responsibility of which is certified by the foregoing association. The original version of the code of conduct established by the NGO is available at

[http://www.cleanclothes.org/documents/Full\\_Package\\_Approach.pdf](http://www.cleanclothes.org/documents/Full_Package_Approach.pdf).

<sup>12</sup> W. Justice, *The international trade union movement and the new codes of conduct* in R. Jenkins, R. Pearson, G. Seyfang, *op. cit.*, p. 97.

- While labour codes of conduct are soft law measures, for reasons which will be discussed later, labour policy codes are hard law, directly enforceable by the company and even by workers. So, the company cannot oblige anyone to comply with a code of conduct and its breach cannot be sanctioned. Conversely, compliance with a code of labour policy may be enforced by the company, and workers who fail to comply with it can be liable to disciplinary action. Furthermore, those violating a code of labour policy are liable for damage, as demonstrated by many Supreme Court decisions in Spain (STS de 30 de November de 2011 (rec. ud. 887/2011))<sup>13</sup>.

- Unlike labour policy codes, labour codes of conduct are part of corporate social responsibility. The code of conduct is intended to self-impose the protection of workers' rights aside from what the law requires, in order to maintain business ethics that go beyond profit maximization<sup>14</sup>. By contrast, labour policy codes impose mandatory measures on workers. These instructions are by no means CSR measures, as they form part of the private regulation of the business activity to optimize the use of human capital by the company<sup>15</sup>.

This distinction is not a hard and fast one, since the protection of social interests may require workers to behave in a certain manner and in line with certain business instructions to meet this goal<sup>16</sup>. These ethical codes involve all workers, who are obliged to perform a series of actions or face restrictions to keep up with their business ethics. Therefore, though these ethical codes are clearly codes of labour policy, since the worker is bound to perform some duties, they can also be understood as CSR initiatives.

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<sup>13</sup> Referred to in A. Todoli Signes, *La insuficiente aplicación del baremo del automóvil para el cálculo de indemnizaciones por vulneración de derechos fundamentales (A propósito de la STS de 27 de diciembre de 2011)*, in *AL*, No. 15, 2012.

<sup>14</sup> Those arguing against CSR maintain that the ultimate goal of a code of conduct is the preservation of the good name of the brand. So, the goal remains that of maximizing the benefit of the company without granting dignity to workers. In other words, non-compliance with human rights on the part of the company implies a sanction from consumers. Therefore, compliance with human rights is not an ethical issue for these companies but an economic issue, P. Redmond, *Sanctioning Corporate Responsibility for Human Rights*, in *Alternative Law Journal*, No. 1, 2002, p. 23-28.

<sup>15</sup> J. Lahera Forteza, *Códigos de conducta laborales: poder de dirección, negociación colectiva y responsabilidad social de la empresa. Comentario a la STS de 7 de marzo de 2007*, in *RL*, No.20, 2007, p. 816.

<sup>16</sup> *Ibid.*, p. 819.

Thus, the foregoing characteristics make it possible to make a clear-cut difference. On the one hand, labour codes of conduct are unilateral and self-imposed regulations (but can be negotiated with employee representatives) form part of CSR and are not legally binding (soft law). On the other hand, labour policy codes are a set of instructions that the employer unilaterally imposes on workers, having a binding character (hard law) intended to fulfill the company's objectives (profit-making). This distinction is important in either legal or moral terms. So far, it has been argued that one of the main reasons to adopt a code of business conduct is to promote the image of the company as a socially responsible entity. Therefore, naming a labour policy code the same as a labour code of conduct can be misleading to consumers, due to the fact that the former imposes burdens on workers and is intended to regulate HR activities. It implies that the company has adopted a CSR initiative, when its true intention is to place a limitation on workers' decision-making through the power of corporate management. It is important for consumers to be aware of the content of these codes and report any mislabeling, in order to head off this risk. As the following pages will try to explain, this distinction also points out that different types of codes exist to deal with different issues.

## 2. Labour Policy Codes

Labour policy codes (also called codes of ethics, business labour protocols, and codes of practice) are employer's voluntary and unilateral acts intended to supplement or describe one's working conditions in a given functional area<sup>17</sup>. According to a decision of the Spanish Supreme Court, they are intended to be binding on workers as long as they do not violate the law or a collective agreement. These codes are based on managerial powers (art. 20 ET), meaning that their source is the employment contract<sup>18</sup>. Therefore, codes of labour policy may not regulate anything that the employer has vetoed in the exercise of his power<sup>19</sup>. Contrasting this code and the employer's power, two aspects emerge:

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<sup>17</sup> L. E. De La Villa Gil, *op. cit.*, p. 2.

<sup>18</sup> J. Lahera Forteza, *op. cit.*, p. 1.

<sup>19</sup> L. E. De La Villa Gil, *op. cit.*, p. 3.

- The first aspect concerns the rejection of the possibility of the unilateral labour policy code setting down regulatory powers<sup>20</sup>. It is undisputed that neither the constitution nor the law attributes to employers unilateral regulatory powers to govern the labour conditions and the behaviors of their workforce. Thus, while these codes are drafted unilaterally by the company, they will never be as a legally binding as a contractual clause<sup>21</sup>.

- The second aspect refers to the fact that the scope of these codes is limited. They may only contain instructions that the worker can receive according to the employer's managerial power. These codes are limited by superior provisions, such as collective agreements and the employment contract. Thus, they cannot amend the clauses agreed upon in the contract, and they are effective in those situations that neither the law nor the collective agreement, nor the employment contract has regulated.

### *2.1. Codes of Labour Policy: Major Shortcomings*

The purpose of these codes is to exercise the company's organizational power by means of instructions and circulars. A set of rules and recommendations are then issued with which all employees must comply; not only in the performance of their tasks but in any relation within the company. Significantly, these codes are widely implemented in those countries where a legal gap is created due to low levels of state regulation. However in certain countries, e.g. Spain, these legal vacuums are to be filled by collective bargaining, which significantly reduces the scope of these codes<sup>22</sup>.

Even so, there will always be gaps left by collective bargaining and labour contracts that the employer may fill with instructions, circulars, or codes of labour policy. It must be taken into account that the way the entrepreneur chooses to fill these vacuums does not change the fact that the managerial power in a company is limited by fundamental rights, labour laws, and collective agreements.

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<sup>20</sup> The internal regulations that supplemented the employer's unilateral regulatory power were progressively replaced by collective bargaining, J. Sagardoy Bengoechea, *Los reglamentos de Régimen interior y el Estatuto de los Trabajadores*, in *ACARL*, No. 6, 1982, p. 17.

<sup>21</sup> J. Lahera Forteza, *op. cit.*, p. 817.

<sup>22</sup> A. Merino Segovia, *La definición de las cualidades morales y éticas de los trabajadores de la empresa de dimensión trasnacional: los códigos de comportamiento ético y profesional*, in *Revista de Derecho Social*, No. 31, 2005, p. 99.

Thus, and based on the decision of the Supreme Court, the penalties imposed on workers for violating a code of labour policy will be subject to judicial review, which will mainly consider the legitimate nature of the instructions given by the code<sup>23</sup>.

In this connection, an interesting question arises in relation to ethical codes, since they contain a number of instructions that workers must follow in terms of business ethics. Ethical codes have a mixed character. First, they try to sort and organize the provision of work, increasing workers' duties while incorporating elements of social responsibility, as they are partly intended to promote high ethical standards a positive corporate image. Ethical codes particularly target workers, and it is they who must comply with these ethical values,<sup>24</sup> otherwise they will be sanctioned.

In the author's opinion, ethical codes are also to be attributed to the employer and are thus subject to those limitations described in this section. As established by the Decision of the Supreme Court of 7 March 2007 concerning the ethical code of the Central Bank of Spain,<sup>25</sup> when these codes affect workers' fundamental rights, they have to comply with the criteria of suitability, necessity and proportionality taking into account the social benefits sought by the company<sup>26</sup>.

This is an interesting innovation. So far, legal opinion was used to deal with these criteria, in consideration of either workers' rights or employers' interests. Now, the social function of the instructions issued by the company is also evaluated. Therefore, the Supreme Court suggests that a legitimate social interest may tip the balance toward management, since employers concurrently safeguard the private interests of the company (Article 38 EC), and the social interests of those concerned.

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<sup>23</sup> A. Merino Segovia, *La definición de las cualidades morales y éticas de los trabajadores de la empresa de dimensión transnacional: los códigos de comportamiento ético y profesional*, in *Revista de Derecho Social*, No. 31, 2005 p. 105 *et seq.*

<sup>24</sup> Indeed, these codes of conduct are a set of duties and obligations concerning workers' conduct that at times are clearly defined and involve the labour relations inside and outside the company (e.g. with customers). They are defined as ethical standards, A. Bayos Grau, *Códigos de conducta y buenas prácticas de las empresas en materia laboral. El problema de su exigibilidad jurídica*, in *Estudios de derecho judicial*, No. 66, 2004, p. 252.

<sup>25</sup> As mentioned, a code of conduct is not binding and do not imposes any instruction on workers. Accordingly, either we are dealing with a labour policy code or a code of ethics, but not with an employment code of conduct.

<sup>26</sup> J. Lahera Forteza, *op. cit.*, p. 819.

### 3. Labour Codes of Conduct

By issuing labour codes, the employer agrees to implement certain minimum labour standards and requires compliance by its suppliers or contractors operating in the countries where the company is based<sup>27</sup>. Thereby, they are measures which are not legally binding and are adopted by the company on a voluntary basis<sup>28</sup>. Aside from these features and the mandatory laws applicable to employers, these codes are CSR measures requiring companies to behave ethically. For this reason, codes of conduct are intended to establish minimum labour rights which supplement the rules of the host country and apply not only to the company but also to those which maintain business relations with it<sup>29</sup>. In other words, the company that issues a code of conduct does not seek mere compliance with the law of the country in which is located (Milton Friedman).

Companies do not try to avoid any responsibility for the protection of human rights, even if they could. This is because by outsourcing work and activities and by fragmenting the company into different legal entities, they could avoid liability for violations of these rights. Rather, this code of conduct is a tool through which parent companies are responsible for everything that happens “under their control” and thus, they are encouraged to take measures to protect workers, whether or not they are their own workers, and although they are not legally required to do so (Galbraith)<sup>30</sup>.

The concept of CSR began circulating during the 1950s in the U.S. in the field of business management to convey the idea of the corporate involvement in the society they belong to<sup>31</sup>. Years later, and as a result of this new U.S. trend, the first code of conduct was issued. In the 1970s, more codes followed to protect smaller states from the power of multinationals. So, the first codes were aimed at punishing acts such as the corruption of civil servants operating in developing countries<sup>32</sup>. By mid-

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<sup>27</sup> J. Aparicio, *El Derecho del Trabajo ante el fenómeno de la internacionalización*, in *Contextos*, No. 1, 1997, p. 70.

<sup>28</sup> J. Lahera Forteza, *op. cit.*, p. 816.

<sup>29</sup> W. Justice, *op. cit.*, p. 93.

<sup>30</sup> Ironically, as Bayos (2004) has argued, the concentration of power of the parent company, together with the fragmentation in different legal personalities of the subsidiaries in various areas as a way to reduce the responsibility of the company, was one of the underlying reasons for transnationalization and globalization.

<sup>31</sup> J.M. Aparicio Tovar, B. Valdés De La Vega, *op. cit.*, p. 55.

<sup>32</sup> R. Jenkins, R. Pearson, G. Seyfang, *op. cit.*, p. 3.

1980, the pressure on the part of public opinion to adopt such codes had diminished.<sup>33</sup>

When in the 1990s the idea of CSR was given new momentum, transnational corporations put in place labour standards through codes of conduct.<sup>34</sup> Companies like Nike, Levi's and Reebok adopted their first codes of conduct in 1992, after being strongly criticized over the way clothes and goods were manufactured and facing allegations of using child labour<sup>35</sup>. Ten years later, a World Bank report estimated that some 1,000 codes of conduct were issued to regulate labour obligations, human rights and environmental issues in supply companies.<sup>36</sup>

### *3.1 The Objectives of Labour Conduct Codes*

The structure of the first codes of conduct reveals the main purpose of these documents. Corporate social responsibility and labour codes of conduct originated out of an increasing public concern over the negative performances of the first multinationals adopting codes of conduct<sup>37</sup>. Initially, 90% of them were issued after some scandals, particularly those concerning the bribery of civil servants in the host country on the part of employers<sup>38</sup>. Other codes of conduct were established when allegations of child labour were made involving product providers.

1) Such timely move suggests that codes of conduct are intended by the company to protect the business brand<sup>39</sup>. The development of new communication technologies in the last decades has contributed to focusing the interest of consumers on products and working conditions. Now, there is an increased public interest on this subject and it is easier to access accurate information about human rights violations being

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<sup>33</sup> J. Kline, *International Codes and Multinational Business: Setting Guidelines for International Business Operations*, in *Quorum Books*, Westport, 1985, p. 108.

<sup>34</sup> R. Jenkins, R. Pearson, G. Seyfang, *op. cit.*, p. 3.

<sup>35</sup> A. Bayos Grau, *op. cit.*, p. 249.

<sup>36</sup> World Bank, *Company Codes of Conduct and International Standards: An Analytical Comparison*, 2003, p. 2. The report is available at [http://siteresources.worldbank.org/INT/PSD/Resources/CSR/Company\\_Codes\\_of\\_Conduct.pdf](http://siteresources.worldbank.org/INT/PSD/Resources/CSR/Company_Codes_of_Conduct.pdf).

<sup>37</sup> R. Jenkins, R. Pearson, G. Seyfang, *op. cit.*, p. 2.

<sup>38</sup> J. Kline, *op. cit.*, p. 23-25, 103.

<sup>39</sup> M. Posner, J. Nolan, *op. cit.*, p. 209.

committed by these brands<sup>40</sup>. It must be added that the business model of these transnational corporations has become essential in marketing and distribution companies that produce very little of what they sell. Accordingly, the protection of the brand is a key strategy in their business model<sup>41</sup>. Indeed, the campaigns launched by NGOs and consumer associations in favour of workers' rights and against exploitation have the potential to seriously damage the brand image, causing the collapse of the business model. Thereby, these companies publish labour codes of conduct to promote their reputation at the international level and protect their brand. In this sense, it has been argued that at the time of adopting these codes the company is not given complete discretion, because a sanction can be imposed in the event of a reduction in sales and brand smear campaigns resulting from non-compliance with such codes<sup>42</sup>.

2) Strategic differentiation is also related to codes of conducts. With codes of conduct, companies try to satisfy those expressing concern over human rights. The end-result is two-fold: to avoid negative publicity and to gain access to niche markets. Codes of conduct are a tool for consumers to ensure employer compliance with workers' rights. This is part of the business strategy to differentiate the company's products from competitors and to enter market niches otherwise inaccessible. The adoption of a code of conduct can also be useful to attract the standard consumer. Other things being equal, most consumers tend to prefer a brand that show respect for human rights. Thus, this distinction may once again increase sales<sup>43</sup>. The mechanism described earlier is the same used by companies identifying themselves as organic or green; they advertise that they are committed to avoiding the use of pesticides or other artificial products. Thus, they will attract clients concerned about environmental protection or worried by the effects on health of these products. In both cases, the company issues a unilateral message that is incorporated by its distinctive brand and targets a specific audience.

3) Codes of conduct have been criticized as a tool to promote deregulation and as an alternative to collective bargaining<sup>44</sup>. Multinationals

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<sup>40</sup> R. Jenkin, R. Pearson, G. Seyfang, *op. cit.*, p. 2.

<sup>41</sup> M. Posner, J. Nolan, *op. cit.*, p. 209.

<sup>42</sup> P. Redmond, *op. cit.*, p. 23-28.

<sup>43</sup> A. Perulli, *Diritto del Lavoro e Globalizzazione*, Cedam, Padova, 1999, p. 300, in BAYOS GRAU A., *op. cit.*

<sup>44</sup> C. Rodríguez Garavito, *op. cit.*, p. 216.

have shown interest in developing their own non-binding and voluntary codes of conduct, preferring them over governmental rules or collective agreements. As pointed out by Merino and Rentero<sup>45</sup>, these CSR initiatives can question the law-making role of the state and the function of trade unions, replacing collective bargaining and action, and favouring privatization and government deregulation.

This concern of a part of legal opinion is also shared by the European Trade Union Confederation (ETUC), which in 2001 provided its support for CSR development initiatives, pointing out that they were complementary to the collective regulation of labour relations. According to the ETUC, these newly-issued measures should be implemented in the framework of the European Social Model and considering the position of trade unions – not NGOs – concerning the structure and content of social dialogue and collective bargaining in European national systems<sup>46</sup>. The ETUC is not only concerned about deregulation but also about the risk that transnational corporations might start using NGOs as partners to defend the rights of workers in lieu of traditional unions. For the ETUC, codes of conduct (soft law) have only to be used as a transitional tool, while concluding binding agreements (hard law) through collective bargaining. Legal opinion also makes clear that these codes are not intended to replace state regulation. The very fact that they are not negotiated with employee representatives – but issued unilaterally by the employer – and that they are not binding is clear evidence that the rights of workers are not sufficiently protected by these codes. The intent of these CSR initiatives should not be that of relieving the government of its obligations to safeguard workers' rights. These codes can only be used in order to achieve the goals of social and ethical responsibility aside from what is legally required of employers<sup>47</sup>.

4) A fourth objective that can be attributed to these codes of conduct is their educational character. These codes can help workers become aware of their labour rights. For instance, those working for subcontractors in developing countries can learn when their employer violates their labour rights. And although they have no legal means to bring the case before the court, they could inform the parent company. Thereby, employers would

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<sup>45</sup> A. Merino Segovia, J. Rentero Jover, *Formulas atípicas de regulación de las relaciones laborales en la empresa transnacional: códigos de conducta y buenas prácticas*, in A. Bayos Grau, (coord.) *La dimensión europea y transnacional de la autonomía colectiva*, Bomarzo, Albacete, 2003, p. 293.

<sup>46</sup> A. Bayos Grau, *op. cit.*, p. 251.

<sup>47</sup> J. Lahera Forteza, *op. cit.*, p. 21.

have to modify their behavior, otherwise their contract might be terminated. Consequently, it is important that workers within the enterprise network are aware of this code of conduct, have to be apprised of their rights and provided with a copy of the document in their own language. Monitoring the effective implementation of a code of conduct is one of the most controversial issues since, being not binding in character, it is necessary to find alternative ways to ensure compliance. Options include monitoring activities on the part of private companies, NGOs, local government, international unions and workers themselves. In the author's opinion, the latter, along with the support of employee representatives, is perhaps the best way to ensure such compliance<sup>48</sup>.

5) Finally, it has been shown that the pressure exerted by NGOs and consumer associations on companies to comply with worker's rights in developing countries is more effective if they have previously adopted a corporate code of conduct. In other words, codes of conduct work as lever for change and once in place, employers will be far more exposed to criticism if they fail to implement them. Apart from non-compliance with human rights, and with employers failing to fulfill their obligations, far less social pressure is necessary to change their behavior when they have already issued a code of conduct<sup>49</sup>.

### 3.2. Types of Codes of Conduct

As seen, there are different types of codes of conducts. In what follows, the focus will be on three of them: internal, external and transnational agreements.

#### a) Internal Codes of Conduct

These are codes issued and adopted voluntarily by the parent company without the involvement of trade unions or other partners and are implemented by contractors or suppliers of the subsidiaries operating in host countries<sup>50</sup>. These entities are usually characterized by the fact that they issue and enforcement the code on their own. They are perfectly

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<sup>48</sup> N. Ascoly, I. Zeldenrust, *Working with codes: perspectives from the Clean Clothes Campaign* in R. Jenkins, R. Pearson, G. Seyfang, *op. cit.*, p. 177-178.

<sup>49</sup> C. Rodríguez Garavito, *op. cit.*, p. 237.

<sup>50</sup> A. Bayos Grau, *Globalización y Derecho del Trabajo: Realidad y Proyecto*, in *Cuadernos de Relaciones Laborales*, No. 15, 1999, p. 37.

modeled on the needs and objectives pursued by the company and external control is not exerted during the development and implementation stage. Internal codes of conduct are intended to fulfill CSR objectives, with the protection of workers' rights which becomes a public relations and marketing tool<sup>51</sup>. As seen in the previous section, a code of conduct serves many, and at times even contradictory, purposes. Some of them respond to business interests, others to social needs. However, the lack of control on the part of third parties sees to it that business interests are given priority over social ones<sup>52</sup>. Significantly, the one-sided nature of these codes and the lack of involvement of external control mechanisms are clear evidence of the unwillingness on the part of companies to comply with internal codes of conducts. They then become a means to appease conscious consumers.

#### b) External Codes of Conduct

By contrast, external codes of conduct are developed by international bodies with the collaboration of trade unions and business organisations in the relevant sector. Codes of conduct drawn up by NGOs are also considered external one. They regulate minimum labour standards for workers in certain sectors and they are adopted and implemented on a voluntary basis. For this reason, the violation of external codes on the part of companies cannot be sanctioned<sup>53</sup>. They are mere publicity tools. Yet the objectives set down in these codes are not all business-related and the involvement of trade unions ensures that some social goals are pursued. A company that chooses to adopt an external code is probably more interested in CSR and in the defense of social rights than that implementing an internal one.

In the 1990s, some attempts were made at establishing international and mandatory codes that would govern the social and environmental conditions under which wares were produced and marketed. But the effort was unsuccessful and the adoption and implementation of codes is still at the employer's unfettered discretion<sup>54</sup>.

The Code of Conduct developed at EU level to combat sexual harassment is a nice example of external codes of conduct, as are the code of practice on implementation of equal pay for men and women for work of equal

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<sup>51</sup> A. Merino Segovia, J. Rentero Jover, *op. cit.*, p. 282.

<sup>52</sup> *Ibid.*

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

<sup>54</sup> *Ibid.*, p. 281.

value and the code of practice to remove discrimination on reason of gender or marriage, in promoting equal opportunities in employment. They all have the objective to establish recommendations or guidelines to be followed by companies. It must be said that, while the specific recommendations made in these codes are voluntary, both sexual harassment and discrimination are prohibited by law. Accordingly, while the adoption of these recommendations is discretionary, the objectives pursued by them involve all those concerned. Criticisms on a part of legal opinion are concerned with the idea that the enforcement of the law seems to depend on its specification in the codes of conduct, an aspect which might bring to serious consequences<sup>55</sup>. The misleading assumption is that since the adoption of international codes of conduct takes place on a voluntary basis, those companies that do not want to adopt them can break the law. Moreover, one might be led to think that any law should be complemented by a code of conduct or a series of recommendations in order to be enforceable.

While it is true that EU recommendations have positive effects in terms of law enforcement, some issues might arise if they are limited to ensure minimum legal compliance. As mentioned, CSR provides business ethical standards beyond mere compliance with the law. Therefore, codes of conduct should widen the social protection granted by law in order to be of use.

Other international bodies, such as the ILO<sup>56</sup> and the OECD<sup>57</sup>, have their own codes of conduct, which are configured as recommendations involving the workplace that employers should respect, irrespective of whether host countries are members. However, because of their voluntary nature, the ultimate responsibility lies with governments, which have to pressure TNCs to respect these guidelines<sup>58</sup>.

### c) Transnational Framework Agreements

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<sup>55</sup> L.E. De La Villa Gil, *op. cit.*, p. 7.

<sup>56</sup> ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 1977.

<sup>57</sup> Guidelines in relation to multinational companies were agreed on for the first time in 1976, and they were supplemented with a new package in 2000. These guidelines have a larger scope than those of the ILO, covering environmental issues, measures against corruption or the protection of consumer interests.

<sup>58</sup> A. Merino Segovia, J. Rentero Jover, *op. cit.*, p. 280.

Transnational Framework Agreements can be seen as external codes, since they are not drawn up by the company. Yet they differ from them as they are not issued by international organizations, but by international industry associations which negotiated their terms with international trade unions operating at sectoral level<sup>59</sup>. The purpose of transnational framework agreements is to serve as a basis for companies to develop their own codes of conduct. Although these codes do not act directly on companies, they can be fully or partly reflected in the codes that are adopted<sup>60</sup>. They represent a model code for companies in the same sector.

### 3.3. Codes of Conduct and their Content

The code content might vary depending on management and the objectives set down in the preliminary phase. Yet compliance with human rights at the workplace, the promotion of decent working conditions, occupational health and safety and workers' professional growth are recurrent themes. Specifically, companies usually commit to safeguarding rules, laws and customs at the workplace<sup>61</sup>. Evidently, companies tend to focus on individual rights overlooking collective ones. Critics argue that codes of conduct are unable to ensure the right to organize and collective bargaining in those countries where they are forbidden. Parent companies make no effort to help workers in developing countries to have the legal means to defend their own interests<sup>62</sup>. Workers are fully aware of the main work-related problems; yet their opinion is not taken into account, neither in the development nor in the application of these codes of conduct<sup>63</sup>. Companies ignore workers' feedback when drafting such codes and do not grant them the right to associate and the power to defend themselves

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<sup>59</sup> A. Bayos Grau, *op. cit.*, p. 259.

<sup>60</sup> A. Merino Segovia, J. Rentero Jover, *op. cit.*, p. 286.

<sup>61</sup> Remember the criticisms made in this paper about how damaging can be a code of conduct that is limited to establishing that a company has to comply with national laws. Besides being ineffective, national labour laws are often not as stringent as to protect the rights of workers.

<sup>62</sup> These collective rights would allow workers to decide what issues to address, what concessions to make and what struggles to take against their employers, and they would probably do more to improve labour standards than anything else we can think, K. Elliot, R.B. Freeman, *Can Labor Standards Improve Under Globalization?*, Institute for International Economics, Washington D.C., 2003. p. 31.

<sup>63</sup> D.W. Justice, *op. cit.*, p. 96. According to the author, the problem is that almost all companies adopting such codes operate in sectors where few workers belong to a union and in countries where trade union rights are not recognized.

without resorting to codes of conduct from a parent company located in another country. Since collective rights are not ensured, workers will always depend on the employer's goodwill at the parent company or on consumers in wealthy countries to promote them. This argument is ultimately based on the belief that some significant improvements in working conditions in global factories can be achieved if workers are given certain powers. Collective rights allow workers to have a say in the content and pace of their struggles with the employer and to actively participate in the regular monitoring of the daily operations of the plant. In my opinion, this is the key to lasting benefits for individual rights<sup>64</sup>.

### 3.4. Codes of Conduct and Court Decisions

This section will consider two situations: the enforcement of codes which is challenged in court and the requirement on the part of the tribunal to comply with them.

#### a) Challenging a Code of Conduct

If, as seen, these codes impose restrictions or obligations on workers, the latter can bring the case to court to determine their lawfulness and that of the employer's possible decision to impose sanctions on them. However, a provision placing obligations on workers is not a code of conduct but a labour policy code governed by its own rules. Being voluntary in character, a labour code of conduct that establishes measures to promote labour rights cannot be challenged in court. This can happen when codes of conducts impose on workers more obligations than allowed, thus limiting their rights.

#### b) Requiring the Enforcement of a Code of Conduct

This second aspect is more controversial. A company promotes the adoption of a certain code of conduct, either internal or external, but it does not comply with it, nor do the companies under its control. The question is whether the controlling company can be held accountable for the infringements committed by subcontractors located overseas. According to Bayos,<sup>65</sup> the company can be held liable, adding that

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<sup>64</sup> C. Rodríguez Garavito, *op. cit.*, p. 228.

<sup>65</sup> A. Bayos Grau, *Códigos de conducta y buenas prácticas de las empresas en materia laboral. El problema de su exigibilidad jurídica*, in *Estudios de derecho judicial*, No. 66, 2004, p. 20-22.

transnational corporations can be sued in the country where they are headquartered. Bayos considers trade unions and their interest to fulfill CSR commitments, which has a clear relation to the notion of collective conflict. Accordingly, he is of the opinion that trade unions at the national level can take the matter to court to stop the infringement and obtain compensation.

In my opinion, the solution proposed by Bayos might be questioned. First, if the code of conduct has a unilateral and voluntary nature and no binding effect, non-compliance can neither amount to misconduct nor result in compensation. Soft law, by definition, cannot be challenged in court, otherwise the company would not have promoted the code.

As seen, its adoption is voluntary, and so is its structuring. Accordingly, if the code is drawn up and defined within the company, trade unions are not in the position to claim compensation for its breach. Things are different if the code of conduct has been agreed upon with trade unions at the company or sectoral level. In this case, the agreement becomes binding and, unless otherwise agreed, the union may seek compensation in the event of a violation. The code cannot be enforced because it does not have a normative character, but the union can claim compensation for damages caused by the breach of the agreement<sup>66</sup>.

To sum up, I agree with Bayo that compensation can be claimed in the event of an agreement discussed with trade unions even if the company is a different legal entity from the one executing the agreement. This is because at the time of drafting these codes, it is assumed that the controlling company will make sure that any parent company will comply with them.

### 3.5. The Effectiveness of Labour Codes of Conduct

Courts usually favour the enforcement of these codes, thus the only way to ensure compliance on the part of company is to exert social pressure (NGOs and consumer associations). Being this the case, it is crucial for those entities to collect accurate information of what happened in the parent company. This “monitoring system” consists of a set of actions and measures put in place to verify compliance with a code of conduct.

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<sup>66</sup> As A. Bayos Grau, *Códigos de conducta y buenas prácticas de las empresas en materia laboral. El problema de su exigibilidad jurídica*, in *Estudios de derecho judicial*, No. 66, 2004, p. 20-22, said, breach of a code of conduct puts into question the ability of the union to act, what is essentially to the freedom of association.

The monitoring system can be internal or external. In the first case, it is the employer that ensures compliance with the code on the part of affiliates and suppliers. In the second case, a third party is empowered with code compliance. As it is with internal codes of conduct, internal system are unreliable; being that the code of conduct is only a publicity tool, the company has no interest in disclosing violations of the code on the part of their suppliers<sup>67</sup>.

As for external monitoring systems, it is possible to hire a private agency which operates at the parent company and performs tracking. Yet this avenue might prove unfeasible, since the private agency reports to the parent company creating a catch-22 situation.

An alternative is state control. In other words, governments in developing countries where suppliers are located can verify whether codes of conduct are being respected. The problem is that these countries are often unable to tackle multinationals preventing them from improving workers' rights, let alone to report cases of non-compliance. Therefore, this too might be an unviable option<sup>68</sup>.

Another possibility is that of empowering NGOs or international unions with monitoring tasks, ensuring fairness and motivation when reporting violations by manufacturers. Yet international organizations would have more difficulties in accessing internal information and ascertaining compliance with the code.

Workers should also be involved in the monitoring activity, particularly to assess the liability of the information provided on code compliance. However, making workers aware of their rights, allowing them to be part of the monitoring system and consequently safeguard collective rights do not appeal to transnational corporations. Thus, once again, compliance with workers' rights in developing countries depends on third parties (NGOs, transnational corporations, unions operating outside the company and so forth).

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<sup>67</sup> M. Posner, J. Nolan, *op. cit.*, p. 210.

<sup>68</sup> C. Rodríguez Garavito, *op. cit.*, p. 216.

## Conclusions

To conclude, some distinctive traits characterize the attempt to transnational corporations to comply with labour codes of conduct: collective labour rights of workers are neither protected, nor are they taken into account for the development and monitoring of the code. Accordingly these guidelines which are intended to improve their working conditions are made by companies operating in different countries, which are unaware of the ongoing situation and in turn, are frequently monitored by external bodies. Workers are not asked to provide their feedback on the establishment and the development of these codes.

A consequence of this state of play is that codes of conduct have been rejected for being public relations strategies orchestrated by transnational corporations in cooperation with NGOs and consumer groups, favorable to the market government<sup>69</sup>. In the same spirit, the Permanent Peoples' Tribunal condemns the use by transnational companies of these codes, claiming that their only intent is to mask the real working conditions of the company and weaken labour laws and regulations. The voluntary character of labour codes of conduct also attracts criticism in that the existence of such regulations legitimizes the absence of a binding regulation agreed by governments at the international level<sup>70</sup>. They also claim that the creation of these codes silences the voices of those advocating for the effective regulation of minimum labour rights.

In fact, in the 1990s, there were attempts to establish codes of conduct to set mandatory social and environmental conditions under which goods were produced and marketed. These codes would have been implemented through international organizations like the United Nations Conference on Trade and Development (UNCTD). However, during these years, multinational companies began to implement their own codes of conduct, silencing consumer associations and NGOs advocating for those initiatives. Apparently through this system, companies succeeded in avoiding the implementation of compulsory measures. The regulation process failed. Now, codes of conduct can be issued at the employer's discretion, so they still depend on the ethical values of consumers and the will of management at the parent companies.

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<sup>69</sup> R. Shamir, *Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony*, in B. Santos, C. Rodríguez Garavito, *Law and Globalization From Below*, Cambridge University Press, 2005.

<sup>70</sup> R. Jenkins, R. Pearson, G. Seyfang, *op. cit.*, p. 5.

In the author's opinion, codes of conduct which are complied with on a voluntary basis affect the international regulation of minimum working conditions. The rights of workers in developing countries cannot rest on the will of a multinational company or consumer preferences. International regulation must be in place to ensure these minimum rights in all countries. And compliance with such regulation should be mandatory and binding for companies. Finally, it is important to remember that these minimum rights cannot focus only on individual rights and health protection. It is essential to recognize the collective rights of workers in countries where the state fails to do so. Ensuring labour rights rests on the awareness of the needs of the workers in developing countries.



# The Abuse of Fixed-Term Employment Contracts: A Permanent Feature of the Spanish Labour Market

David Montoya Medina \*

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## 1. The “Causality Principle” in Fixed-Term Employment Contracts

Labour legislation in Spain does not favour the conclusion of open-ended employment contracts over fixed-term ones. Art. 15 of the Worker’s Statute (hereafter WS) establishes that a contract of employment may be of either a definite or an indefinite duration. Prior to the 1994 labour law reform, Art. 15 of the WS established a presumption in favour of open-ended employment contracts. Accordingly, Spanish labour law sought to generalise the conclusion of open-ended employment contracts, with fixed-term contracts regarded as an exception.

While not prioritising the implementation of contracts of an indefinite duration, the Spanish labour relations system still considers as exceptional the conclusion of permanent contracts, especially following the 1994 labour law reform. Unlike other regulatory models (e.g. the United Kingdom), Spanish employers are not free to decide whether to conclude open-ended or fixed-term employment contracts. By and large, fixed-term contracts can only be entered into in specific circumstances established by the law (e.g. to satisfy a temporary demand for manpower)<sup>1</sup>.

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\* David Montoya Medina is Associate Professor of Labour Law & Social Security Law at the University of Alicante (Spain).

<sup>1</sup> Other provisions of the WS indicate the preference of lawmakers for open-ended employment contracts over temporary ones. This is the case of Art. 8.2 WS (which establishes that an employment contract which is not concluded in writing is considered to be of an indefinite duration, unless evidence is given of its temporary nature). It is also

Therefore, the Spanish legal system limits the recourse to fixed-term contractual arrangements, which are subject to the “causality principle”<sup>2</sup>. In other words, a justifying reason must be provided to conclude temporary contracts, which is related to the temporary nature of the task to be performed. Otherwise, open-ended employment contracts are to be entered into. In this connection, Art. 15.3 WS sanctions the fraudulent use of fixed-term contracts<sup>3</sup>, i.e. when not provided by the law<sup>4</sup>.

According to Art. 15.3 WS, fixed-term employment contracts can only be entered into in three circumstances: on a temporary basis, when the worker is hired to carry out a specific project or service which is somehow related to the core business (*contracts for a specific project or service*); to deal with certain market fluctuations (e.g. a peak in production) or periods of peak demand (*temporary contract due to production overload or backlog*)<sup>5</sup>; to temporarily substitute workers (*temporary contracts*).

The three circumstances just described which validate the use of temporary contracts are regulated by Art. 15 WS, which in turn, was implemented through Spanish Royal Decree No. 2720 of 18 December 1998.

Although the foregoing examples are referred to in the law as “*numerus clausus*”<sup>6</sup>, Spanish legislation contemplates other cases where fixed-term contractual arrangements can be used which are not regulated by Art. 15 WS: training contracts (either in-house training or apprenticeships)<sup>7</sup>,

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the case of Art. 15.2 WS (where the same rule applies if the worker has not registered with social security).

<sup>2</sup> Regarding this principle, see R. Aguilera Izquierdo, *El Principio de «Causalidad» en la Contratación Temporal*, in *Revista del Ministerio de Trabajo e Inmigración*, 2001, No. 33, 99-122.

<sup>3</sup> J. López López, *La Contratación Temporal y el Fraude de Ley*, in *Relaciones Laborales*, 1990, No. 2, from 334 onwards.

<sup>4</sup> Art. 6.4 of the Spanish Civil Code considers fraudulent “those acts undertaken to pursue an outcome that is prohibited by or violates the law”.

<sup>5</sup> Spanish Royal Decree-Law No. 4 of 22 February 2013 concerns the promotion of young people’s employment and allows this contractual scheme to be used for unemployed and unexperienced people under the age of 30. Yet, and implicitly, this provision favours the recourse to fixed-term employment contracts, which is limited by law in the event of unemployment rates higher than 15%.

<sup>6</sup> Supreme Court 27 July 1993 (Rec. No. 2206/1992) and 6 May 2003 (Rec. No. 2941/2002).

<sup>7</sup> These employment contracts are regulated by Art. 11 WS; apprenticeships are also governed by Royal Decree 1529 of 8 November 2012, which makes provisions for dual vocational training.

“relay” contracts<sup>8</sup> and contractual schemes to promote the employment of disabled people<sup>9</sup>.

The temporary nature of each of these contracts is justified by different reasons. Training contracts have a maximum duration of two years (for in-house training) and three years (for apprenticeships), and their limited duration is justified by its training content. “Relay” contracts, which are rarely implemented, target the unemployed who can substitute those employees who have entered partial retirement. Finally, temporary jobs promoting the employment of people with a proven disability of 33% or more have a maximum duration of three years. The provisional nature of this contractual scheme is justified by the worker’s disability which thus constitutes an objective reason *per se*. They are governed by Art. 17.3 WS, which empowers the Government to establish measures to promote the employment of specific groups who struggle to access the labour market, as in the case of physically challenged people.

## **2. Unemployment and Fixed-term Employment Contracts: Two Features of the Spanish Labour Market**

Currently, two elements characterise the Spanish labour market: the high unemployment levels among the younger population, and the even higher number of fixed-term employment contracts concluded in Spain in comparison with other EU countries.

### **2.1. Spain’s Unemployment Rates**

In 2007, the economic recession affecting European countries generated rampant unemployment in Spain, which has progressively increased since then. According to the latest data of the *Labour Force Survey (LFS)*, published by the National Institute of Statistics, unemployment in Spain increased between 2012 and 2013 affecting a further 563,200 people, with the total number of unemployed people standing at 6,202, 760 (27.16% of the labour force), a new high for the Spanish economy. This figure is the

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<sup>8</sup> Regulated by Art. 12.6 and 12.7 WS in accordance with the partial retirement regime laid down in Art. 166 of Spanish Legislative Royal Decree 1 of 20 June 1994 implementing the amended text of the General Social Security Law.

<sup>9</sup> Regulated by the first additional provision of Law 43 of 29 December 2006 to increase growth and employment.

highest in the last ten years and accurately reflects a constant rising trend in unemployment since the beginning of the economic recession. If 2007 is taken as a starting point, each financial year has ended with a rise in unemployment, which has hit young people the hardest (as of April 2013, 57.22 % of young people were unemployed).

## **2.2. The Increasing Number of Fixed-term Employment Contracts in Spain**

In Spain, the recent rise in unemployment can be related to the high share of temporary jobs reported in the labour market. According to the data provided by Eurostat, 24.1% of the employed people in our country are on fixed-term contracts, making Spain the country with the highest percentage of temporary contracts in Europe after Poland (26.7%)<sup>10</sup>.

Yet temporary employment in Spain has experienced the most significant decrease in Europe since the beginning of the economic crisis. In 2006, Spain reported the highest share of temporary jobs in Europe – 34%, that is twice the EU average – before decreasing down to 25%. While not the highest rate in Europe, the share of temporary jobs in Spain is still 10 percentage points higher than the European average.

At first blush, the reduction in temporary work in Spain in the last seven years seems to be the result of the legislative reforms which have been implemented since 2006 to promote open-ended employment contracts. However, it is significant that such decrease was recorded precisely during the economic recession, when unemployment increased the most. Accordingly, rather than encouraging employment and social integration, the decrease of fixed-term contractual schemes increased the unemployment levels. Employers' first move to deal with an economic crisis or a fall in the demand of products and services is that of not extending fixed-term employment contracts. In this connection, the high costs to terminate employment contracts through dismissal must be considered (either disciplinary or due to economic reasons). Therefore,

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<sup>10</sup> Note that the rate of temporary work in Spain is 24.1%, which is ten percentage points above the EU average (14.1%, 15.6% in the Eurozone). Portugal (21.3%), the Netherlands (19.7%), Finland (17%) and Sweden (17%) follow. The lowest rates in the use of fixed-term contractual schemes can be found in Romania (1.9%), Lithuania (3.3%), Estonia (4%), Latvia (5.2%) and Bulgaria (5.5%).

the non-renewal of fixed-term contractual arrangements represents a more economical option<sup>11</sup>.

### 3. The Employers' Preference for Fixed-term Employment Contracts over Open-Ended Ones

A preliminary conclusion that could be drawn from what has been discussed so far is that a clear divergence exists in the Spanish labour relations system between the rules governing open-ended employment and the reality reported by statistics.

As seen, fixed-term contractual schemes can be entered into only in the cases expressly stated in legislation. Yet reality is different. With temporary employment reported to be at 24.1%, employers are expressing a clear and undeniable preference for hiring workers on fixed-term contractual arrangements. This is also evidenced by the abuse of different temporary work schemes, especially project contracts and those entered into to deal with fluctuating demand. Although prohibited by law, it is not unusual for employers to resort to these contracts to employ staff on a temporary basis<sup>12</sup>.

The reasons for Spanish employers to prefer fixed-term employment contracts over open-ended ones are not clear. A possible explanation is the attempt to reduce the inherent labour costs. In Spain, compensation for unfair dismissal is equal to 33 days' wage per year up to a maximum of twenty-four months (Art. 56.1 WS). Conversely, the compensation award to be paid by the employer at the time of terminating a fixed-term employment contract ranges between 8 and 12 days' wage per year (Art. 49.1 c WS and 3<sup>rd</sup> transitory provision WS). Thus, there is a natural tendency for employers to opt for fixed-term employment contracts<sup>13</sup> as a more effective and economical tool to manage the workforce.

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<sup>11</sup> On this issue, see A. Desdentado Bonete, *El Despido, la Crisis y la Reforma Laboral*, in *Diario La Ley*, 2010, No. 7337, 1-4. J.M<sup>a</sup>. Goerlich Peset, *¿Contrato Único o Reforma del Despido por Causas Empresariales?*, in *Relaciones Laborales*, 2010, No. 1, 1205-1228.

<sup>12</sup> L.R. Martínez Garrido, *Abusos en la Contratación Temporal y Control Judicial*, in *Actualidad Laboral*, 1991, No. 2, 343-352.

<sup>13</sup> More and more employers make illegal use of this contractual arrangement, although this violation is a serious administrative offence in Spain that can be fined. Furthermore, employers prefer this type of contract even though case law regards as unfair dismissal the termination of a fixed-term contract when no objective reason is provided. See,

#### 4. Legislative Initiatives against the Abuse of Fixed-term Employment Contracts

Over the last fifteen years, different labour reforms have been implemented in Spain to tackle the abuse of temporary work schemes and promote stable employment. However, we will see that these attempts have been unsuccessful.

##### 4.1. The Promotion of Open-Ended Employment Contracts in the 1997 Labour Reform

Traditionally, open-ended employment contracts have not been governed by specific regulations, nor have they been differentiated in labour legislation. Fundamentally, the first version of the Workers' Statute (Law 8/1980) and the provisions previously in force (Labour Relations Law of 1976, Work Contract Law of 1944, etc) were designed taking account of employment contracts of an open-ended type and the ensuing rights and obligations<sup>14</sup>.

Nevertheless, due to the overuse of temporary work schemes on the part of employers, more attractive forms of open-ended employment contracts were envisaged in order to promote their use. An example is the so-called “*contract to promote open-ended employment*”, introduced by the 1997 labour reform<sup>15</sup>, which was enforced alongside traditional permanent ones<sup>16</sup>.

The labour reform of 1997 constituted the reaction of Spanish lawmakers to rampant unemployment – which affected 22% of the working population (42% if young people are considered on an exclusive basis) – and the rising incidence of temporary work (34% of total employment, more than twice the EU average). This reform was the result of a preliminary agreement between the social partners (the *Interconfederal*

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among many others, the Supreme Court ruling of 20 February 1995 (Rec. No. 3707/1993) and 21 December 1995 (Rec. No. 1646/1995).

<sup>14</sup> Despite the high share of fixed-term employment contracts, many clauses of WS still exclusively apply to open-ended contracts. An example of this is Art 14 WS concerning the maximum duration of the probationary period in the absence of any provision in the collective agreement.

<sup>15</sup> Law 63 of 26 December 1997 on Urgent Measures to Improve the Labour Market and the Promotion of Open-ended Employment.

<sup>16</sup> A recent study on this contractual scheme before its repeal is J. Luján Alcaraz, *El Contrato para el Fomento de la Contratación Indefinida*, in R. Martín Jiménez, A.V. Sempere Navarro (eds.), *Contratos de Trabajo Temporales*, Aranzadi, Pamplona, 2011, 587-624.

*Agreements for Employment Stability*) which simply converted into law the previous agreements between trade unions and employers' associations. The contract to promote open-ended employment targeted specific groups who were particularly affected by unemployment and precarious working conditions, e.g. young people under the age of thirty, people over forty-five, people who had been unemployed for over a year, disabled people and temporary workers. Subsequent reforms extended its scope of application to people who had been unemployed for more than six months, unemployed women previously hired in professions with low levels of female participation and women who had been victims of gender-based violence.

The conclusion of contracts promoting stable employment offered two advantages to the employer. To begin with, entering into an open-ended employment contract or converting a fixed-term work scheme into an open-ended one comes along with many benefits in terms of social contributions. Further, this contractual arrangement provides for a lower compensation award in the event of dismissal for objective reasons initiated by the employer that is declared unfair by the courts. In this case, compensation amounts to 33 days' wage per year for 24 months, and not to 45 days' wage per year up to 42 months as in the case of other employment relationships. Evidently, redundancy pay was lower, as it was intended to encourage employers to hire staff on a permanent basis.

#### **4.2. The 2001 Labour Reform and the Economic Disadvantages to Hire Workers on a Temporary Basis**

The labour reform of 2001<sup>17</sup> represented a new attempt to mitigate the high incidence of fixed-term employment contracts. Importantly, this provision narrowed down the powers of collective bargaining to extend the twelve-month duration of temporary work schemes due to production peaks and the period within which this contract could be performed (eighteen months). Furthermore, Art. 15.5 WS called for collective bargaining to regulate the conclusion of multiple fixed-term employment contracts with different workers to fill the same position. It also established that collective agreements could include objective criteria for converting temporary employment contracts into permanent ones.

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<sup>17</sup> Law 12 of 9 July 2001 on Urgent Measures to Reform the Labour Market to increase Employment and Improve its Quality.

The 2001 labour reform also introduced other measures to discourage the use of temporary work. More specifically, the social security contributions to be paid by the employer for common contingencies in the case of fixed-term employment contracts lasting seven days or less were increased to 26% (save for some contractual arrangements).

For the first time in the Spanish legal system, an obligation on the part of the employer was introduced to pay compensation amounting to eight days' wage per year of service at the end of fixed-term employment contracts. Yet compensation was only established for contracts entered into for specific projects or services or to deal with periods of peak demand. It is no coincidence that this form of employment was and still is the most used in the Spanish labour market.

Several reasons justify the introduction of this form compensation. First, it is viewed as a deterrent to the recourse of fixed-term employment contracts, making them more onerous. Second, compensation protects workers who are not granted stable employment. According to case law, employers are exempt from paying such compensation when, once ended, fixed-term employment contracts are converted into open-ended ones<sup>18</sup>.

Finally, there is also a question related to equality. Law 14 of 1 June 1994 determines that once the fixed-term employment contract has expired, compensation should be paid by temporary employment agencies amounting to twelve days' wage per year of service. Given that the temporary work schemes used by the employment agencies are the same as those made available to employers, there was no reason to compensate agency workers on an exclusive basis. Yet even after the passing of the 2001 reform inequality was not completely eradicated, as compensation was set at eight days' wage, whilst it was twelve days' wage for agency workers<sup>19</sup>.

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<sup>18</sup> Decisions of the Supreme Court of 22 April 1997 (Rec. No. 3076/1996) and 7 May 1997 (Rec. No. 3571/1996).

<sup>19</sup> Subsequently, Law 35 of 17 September 2010 concerning urgent measures for reforming the labour market, dealt with this issue, raising compensation to twelve days' wage. Compensation was gradually increased (one day per year), so that it was equal to nine days' and twelve days' wage for employment contracts concluded before 1 January 2012 and 1 January 2015 respectively. Cfr., the 13 transitory disposition of WS.

### 4.3. The 2006 Labour Reform and the Attempt to Prevent the Repetitive Use of Fixed-term Contractual Arrangements (“chains” of contracts)

A new reform undertaken in 2006 represented a step further in the battle against temporary employment, with measures directed at stimulating the recourse to employment contracts of an indefinite duration and limiting the use of fixed-term ones. The reform sought to promote open-ended employment, for example by means of incentives to those employers willing to convert temporary work schemes into open-ended employment relationships. In addition, the reform incorporated some provisions of Art. 15.5 WS in Spanish legislation, particularly those limiting the repetitive use of fixed-term contractual arrangements. In this respect, an employee who, within a 2-year period, has been employed on 2 or more fixed-term contracts for more than 24 months in total shall become a permanent employee<sup>20</sup>. This provision also applies to fixed-term employment contracts, the conclusion of which is supported by a justifying reason. Indeed, Art. 15.3 WS makes provision for the fraudulent use of fixed-term contracts, laying down a non-rebuttable presumption to convert them into open-ended ones. In other words, the new provision supplements, but not replaces, those regulating the improper use of these contractual arrangements. The mere passing of time will determine the conversion of fixed-term employment contracts into open-ended ones, whether or not they have been illegally entered into.

The introduction of regulations limiting the repetitive use of fixed-term employment contracts is the result of the transposition in Spanish legislation of Council Directive 99/70/EC of 28 June 1999 concerning the Framework Agreement on fixed-term work<sup>21</sup>. Clause 1 of the Agreement explicitly refers to the achievement of two objectives: to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination, and to establish a framework to prevent

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<sup>20</sup> On the first draft of this important rule, see I. García-Perrote & J.R. Mercader Uguina, *Problemas bajo la Sombra del Artículo 15/5 del ET: Mención de Contratos Temporales, Despido y Cálculo de la Indemnización*, in *Justicia Laboral: Revista de Derecho del Trabajo y de la Seguridad Social*, 2007, No. 31, 5-10. A. Matorras Díaz-Caneja, *A Vueltas con el Encadenamiento de Contratos Temporales*, in *Aranzadi Social*, 2007, No. 5, 2039-2086. J. Lahera Forteza, *Límites Novedosos en el Encadenamiento de Contratos Temporales*, in J. Cruz Villalón (ed) *La Reforma Laboral de 2006 : (Real decreto Ley 5/2006, de 9 de junio)*, Lex Nova, Valladolid, 2006, 41-78.

<sup>21</sup> On the transposition of this Directive in UK law, and the limitations to temporary employment, see D. Montoya Medina, *La Contratación por Tiempo Determinado y la Prevención de su Abuso en el Reino Unido*, in *Relaciones Laborales*, 2012, vol. I, No. 10, 61-84.

abuse arising from the use of successive fixed-term employment contracts or relationships.

The non-discrimination principle had already been incorporated in Spanish legislation through Law 12/2001 according to the terms stipulated in the 4th clause of the Framework Agreement. Since then, Art. 15.6 WS has established a regulation to grant temporary workers the same rights as permanent ones, placing an obligation on employers to assess their seniority entitlement irrespective of their employment relationship.

In relation to assessing the requirements concerning the prevention of the use of successive fixed-term employment contracts, Art. 15.5 WS initially assigned this task to collective bargaining, in line with clause 5 of the Framework Agreement<sup>22</sup>. However, the high share of temporary jobs – more than twice the 2006 European average – required lawmakers to take a firmer stance and to make provisions giving other actors the power to deal with this question<sup>23</sup>.

#### **4.4. The 2010-2011 Labour Reform: Some Contradictory Measures to Tackle Temporary Employment**

Between 2010 and 2011 – that is in the throes of the international recession – the Spanish government tried to move forward with the reform of the labour market, prompted by the financial markets and their regulatory institutions, among others the European Central Bank and the European Commission.

A first attempt was the passing of Law 35 of 17 September 2010 concerning urgent measures for reforming the labour market. Taking into account the 25% share of temporary jobs out of total employment, the aim of Law 35/2010 was twofold: limiting the unjustified use of fixed-work employment contracts and favouring the recourse to open-ended ones. However, the provision was not stringent enough and was rendered

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<sup>22</sup> In accordance with clause 5: «To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States [...] shall [...] introduce [...] one or more of the following measures: a) objective reasons justifying the renewal of such contracts or relationships;

b) the maximum total duration of successive fixed-term employment contracts or relationships;

c) the number of renewals of such contracts or relationships».

<sup>23</sup> For the scope of Art. 15.5 WS before and after the 2006 labour reform, see cf. A.V. Sempere Navarro *Limitaciones a la Contratación Temporal*, in A.V Sempere Navarro (ed.) *La Reforma Laboral de 2006 (Análisis de la Ley 43/2006, de 29 de diciembre)*, Thomson-Aranzadi, Pamplona, 2007, 121-154.

partly ineffective by subsequent measures. We shall go back to this point later.

In order to promote the use of open-ended employment contracts, Law 35/2010 introduced two measures which are worthy of mention. On the one hand, it extended the categories of those who can be hired on permanent contracts; on the other hand, it introduces a new timeframe for converting fixed-term contracts into those promoting stable employment<sup>24</sup>. The objective of this reform was to widen the use of this type of contract which provides lower compensation awards for unfair dismissal. As a result, an increasing number of workers, either employed or unemployed, fell within the scope of application of Law 35/2010<sup>25</sup>. In reality, the provision did not produce the expected results, notwithstanding a 31% increase in the use of this contractual arrangement in the first 6 months following the reform. To the extent that Law 35/2010 was subsequently repealed by the 2012 reform. The same reform amended the regulation of economic redundancies, clarifying the ambiguity concerning its legal assessment, which indirectly encouraged the use of fixed-term employment contracts to avoid the costs for terminating workers in salaried employment. Aside from easing the procedures to initiate dismissal for economic reasons, the 2012 reform redesigned the requirements to provide the reason causing the dismissal – whether related to economic, technical, or organisational reasons – relaxing judicial control<sup>26</sup>.

In reference to the limitation to the use of fixed-term employment contracts, Law 35/2012 introduced three measures which are worth investigating<sup>27</sup>:

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<sup>24</sup> Art. 3 of Law 35/2010, which is referred to in the 1 additional provision of Law 12/2001, will benefit workers hired through a fixed-term contract (including training contracts) concluded prior to 18 June 2010 and then converted into a contract to promote stable employment before 31 December 2010 or 31 December 2011.

<sup>25</sup> An example of this is provided in L.E. De la Villa, *La Reforma Laboral Intempestiva, Provisional, Anodina y Nebulosa: Comentario de Urgencia al Real Decreto-Ley 10/2010, de 16 de junio, de Medidas Urgentes para la Reforma del Mercado de Trabajo*, in *Revista General de Derecho del Trabajo y de la Seguridad Social*, 2010, No. 22. A consequence of widening the scope of application of these employment contracts is that they include workers predominantly hired on open-ended employment contracts – especially those between 30 and 45 years old – who were only required to register as unemployed for one month.

<sup>26</sup> M. Bellido Aspas, *La Reforma Laboral Efectuada por la Ley 35/2010: Modificaciones en las Extinciones de los Contratos de Trabajo*, in *Aranzadi Social*, 2011, No. 6-11, 59-78.

<sup>27</sup> An overall view of this issue is provided by C.L Alfonso Mellado, *Lo viejo y lo Nuevo de la Temporalidad y su Retórica*, in A. Baylos Grau (ed.) *Garantías de Empleo y Derechos Laborales en la Ley 35/2010 de Reforma Laboral*, Bomarzo, Albacete, 2011, 88-108. C.L Alfonso

First, the amount of compensation for terminating a fixed-term contract was raised from eight days' to twelve day's wage. The increase was intended to align the costs of termination for fixed-term contracts with those for open-ended ones. Indeed, Law 35/2010 also established that a part of the compensation award should be paid by the Wage Guarantee Fund in the event of dismissal for objective reasons (Art. 53.1 b) WS)<sup>28</sup>.

Due to the impact that this measure could have in terms of job creation, the increase in compensation was intended to be gradual (a one-day-per-year increase)<sup>29</sup>, with the twelve day's wage provision applying to the employment contracts concluded from 1 January 2015 onwards. In many respects, the caution in applying this measure seems excessive. This is because of the irrelevant increase in compensation – which does not even have a retroactive effect – and because of the principle of equality laid down in Art. 14 of the Spanish Constitution. In other words, compensation paid to terminate fixed-term contracts should be equal to that granted to workers hired through temporary employment agencies (twelve day's wage)<sup>30</sup>.

Second, the reform reinforced Art. 15.5 WS which limits the use of successive fixed-term contracts, providing more flexible conditions to transform them into open-ended ones<sup>31</sup>. The amended version of the provision stipulates that workers can access a permanent job even though they have been temporarily employed in different positions. Given these new conditions, employers cannot circumvent the law by changing the workers' qualification<sup>32</sup>. This also applies to workers who concluded fixed-

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Mellado, *Las Actuaciones para Reducir la Temporalidad en los Contratos Temporales*, in *Temas Laborales*, 2010, No. 107, 87 onwards.

<sup>28</sup> See J. Lahera Forteza *La Reforma de la Contratación Laboral*, in M. Rodríguez-Piñero (ed.), *La Reforma del Mercado de Trabajo y la Ley 35/2010*, La Ley, Madrid, 2010, 101.

<sup>29</sup> Law 35/2010 added the 13 transitory provision WS, whereby compensation will progressively increase from eight days' to twelve days' wage considering the following calendar:

a) Eight days' wage for each year of service for fixed-term contracts concluded prior to 31 December 2011; b) Nine days' wage for each year of service for fixed-term contracts concluded after 1 January 2012; c) Ten days' wage for each year of service for fixed-term contracts concluded from 1 January 2013; d) Eleven days' wage of wages for each year of service for fixed-term contracts concluded from 1 January 2014; e) Twelve days' wage for each year of service for fixed-term contracts concluded from 1 January 2015.

<sup>30</sup> These criticisms can be found in D. Montoya Medina, *La Reforma de la Contratación Temporal en la Ley 35/2010*, in *Aranzadi Social*, 2011, No. 1, 6.

<sup>31</sup> See C.L. Alfonso Mellado, *op. cit.*, from 88 onwards.

<sup>32</sup> However, a part of case law provides a looser interpretation of this rule, allowing its application when the worker has undertaken different jobs yet maintaining the same employment grade or qualification. *Cfr.* The Andalusia Supreme Court ruling of 5 March

term contracts and who operate in companies within the same business group. Yet in this case a problem arises about which company in the same business group should hire the worker on a permanent basis, an aspect on which the law remained silent. However, it seems reasonable that the foregoing company should be the last one for which the worker provided his services. The 2010 reform also applies in the event of new ownership whether laid down in relevant legislation (Art. 44 WS) or agreed upon in collective bargaining. In other words, the new undertaking must be subrogated to the employment relationship between the worker and the previous undertaking with which the contract has been concluded. Yet this aspect might appear of little significance since – even before the reform – the employer terminating the employment contract with temporary workers is still under the obligation to comply with requirements concerning their seniority (Art. 15.5 WS). On close inspection, the reference to cases of subrogation is an effective move to provide more stability to workers, especially those hired on project contracts by service contractors<sup>33</sup>.

Yet the government soon reviewed the rule laid down in Art. 15.5 WS limiting the use of successive fixed-term employment contracts. This time, and somehow paradoxically, lawmakers suspended its implementation for two years<sup>34</sup>, which is striking if one considers that Art. 15.5 WS was amended just twelve months earlier to promote its application<sup>35</sup>. In order

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2008 (Rec. No. 293/2008), which allows the repetitive use of contracts for specific projects or services with Scientific Research Board (CSIC for developing different research projects). Similar cases are contemplated in Rulings of the Supreme Court of the Region of Valencia of 3 November 2009, (Rec. No. 95/2009), Supreme Court of Madrid of 29 June 2009 (Rec. No. 2645/2009) and 2 November 2009 (Rec. No. 3907/2009).

<sup>33</sup> Sentence TS of 14 June 2007 (Rec. No. 2301/2006). However, relevant case law also provides that the termination of the employment contract cannot take place when services are no longer provided due to the contractor's will (Sentence TS, 2 July 2009, Rec. No. 77/2007), when he/she renews the contract (Sentence TS, 28 April 2009, Rec. No. 1419/2008) or when, at the end of the contract, the activity of the worker in the company continues under the same terms (Sentence TS, 14 June 2010, Rec. No. 361/2009).

<sup>34</sup> This measure was introduced by Royal Decree-Law 10 of 26 August 2011 regarding some urgent measures for the promotion of young people's employment, job stability, and the right to retraining for people no longer covered by unemployment benefits. As a result of this suspension, Art. 15.5 WS was no longer applicable from 31 August 2011 to 31 August 2013.

<sup>35</sup> It should be taken into account that the reform of Art. 15.5 was introduced for the first time by the government by way of Royal Decree-Law 10 of 16 June 2010 regarding urgent measures to reform the labour market that preceded Law 35/2010 which came into force on 18 June.

to justify this initiative, the government referred to the worrying unemployment rates which at the time were close to 20%. More specifically, the suspension sought to limit the deterring effect of this rule on employers. This action was paradoxical and reprehensible, as it supported temporary contracts as an instrument of creating employment when only a few months earlier action had been taken to restrict this type of employment<sup>36</sup>.

The last measure discouraging the use of temporary work schemes was introduced by law 35/2010 setting a maximum duration for the contracts for specific projects or services. A statutory time-limit was introduced by the 2010 reform which corresponds to three years, which could be extended for a further twelve months by collective bargaining. The reform also provided that, after this time-period, fixed-term employment contracts should be converted into open-ended ones<sup>37</sup>. This amendment was welcomed, since contracts for specific projects and services are the most commonly used tools to employ workers in the Spanish labour market<sup>38</sup>. Yet doubts arise about the practical implementation of this measure in relation to the limitations placed in the use temporary work schemes<sup>39</sup>. To begin with, the new three-year limit allows the employer to easily circumvent the law related to the conversion of the fixed-term contract into an open-ended one, by simply terminating the contract before its end. Further, the three-year maximum duration set for fixed-term employment contracts seems unrealistic and might only benefit a limited number of workers, since statistics show that their average duration is less than one year. Additionally, the time-limit provision has no retroactive effect and only applies to project contracts concluded following the passing of Law 35/2010. Another point is that the provision does not affect the decisions taken in collective bargaining at sectoral level

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<sup>36</sup> On this measure, see R. Martín Jiménez, *Dudas Acerca de la Suspensión Temporal del Encadenamiento de Contratos Temporales*, in *Actualidad Jurídica Aranzadi*, 2011, No. 828, 5.

<sup>37</sup> On the new regulation of this contract, cf. A. Blasco Pellicer, *La Duración Máxima del Contrato para Obra o Servicio Determinado*, in *Actualidad Laboral*, 2011, No. 2, from page 2 onwards. A. Fernández Díez, *El Contrato de Trabajo Temporal de Obra o Servicio Determinado, Duración Máxima y Vinculación con las Contratas tras la Reforma Laboral del Año 2010*, in *Tres Años de Cambio Laboral*, vol. II, Lex Nova, Valladolid, 2013, 1585-1590.

<sup>38</sup> In accordance with the statistical data provided by the Public State Employment Service, out of the total number of employment contracts registered in 2012, 38.7% were contracts for specific projects and services and 39.7% were fixed-term employment contracts concluded to deal with production peaks. *Cfr.* [http://www.sepe.es/contenido/estadisticas/otros\\_informes/pdf/ANUAL2012.pdf](http://www.sepe.es/contenido/estadisticas/otros_informes/pdf/ANUAL2012.pdf)

<sup>39</sup> See L.E. De la Villa, *op. cit.*, 11 onwards.

especially in the construction sector<sup>40</sup>, therefore the time-limit for these contractual arrangements does not apply if other conditions have been agreed upon during negotiations<sup>41</sup>. Finally, the conversion of fixed-term contracts into open-ended ones comes along with exceptions and limitations in the public sector, being that public sector careers are merit-based<sup>42</sup>.

#### **4.5. The 2012 Labour Reform: Flexibility in Dismissal to Promote Stable Employment**

In November 2011, after the new government took office and in the face of rampant unemployment, a new reform of the labour market was put forward after the unsuccessful attempt to collaborate with the social partners. Law 3/2012 of 6 July concerning urgent measures to reform the labour market was passed, which thoroughly reviewed the labour relations system.

In 2012, the legislator expressed concern over the high share of temporary jobs in Spain in comparison with other EU countries, also in consideration of the fact that employers reacted to the crisis by terminating or not renewing fixed-term employment contracts. Consequently, the reform introduced by Law 3/2012 sought to encourage the use of open-ended employment contracts and contain some controversial and unprecedented measures (e.g. the reduction in compensation resulting from unfair dismissal). In this sense, the 2012 labour reform provided different formulae to obtain higher flexibility in dismissal and to promote stable employment. Among others the reduction of the costs associated with unfair dismissal resulting from:

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<sup>40</sup> On this sector, see L.M. Camps Ruiz, *El Contrato de Trabajo Fijo de Obra del Sector de la Construcción y Disposiciones Adicionales 1.ª.2 de la Ley 35/2010 y 3.ª de la Ley 23/2006*, in *Revista General de Derecho del Trabajo y de la Seguridad Social*, 2013, No. 33.

<sup>41</sup> This is precisely the case of the 4 collective agreement concluded in the construction sector. Article 20 establishes a three-year maximum duration of the contract for projects or services typically used in this sector, after which the contract is terminated. Alternatively, the worker can extend the contract with the construction company for the time necessary to conclude his/her tasks.

<sup>42</sup> These limitations apply to universities and public research institutions, save for contracts for a specific project or service where research or investment projects last more than three years. Cfr. Additional provision 15.2 WS.

- The abolition of the obligation on the part of employers to pay wage arrears<sup>43</sup> in the event of unfair dismissal when they decide to pay compensation instead of reinstating the dismissed employee.
- The significant reduction in the compensation award in the event of unfair dismissal: 33 days' wage in lieu of 45 days' wage per year of service for a maximum of 24 months.

This new provision has no retroactive effect in order not to affect the workers with more seniority. To this end a two-tier system was introduced for the employment contracts concluded prior to the reform. The 45 day's wage compensation award was granted for the years worked before the passing of the new reform, whereas the 33 days rule applied for the period of time served after the introduction of the reform. This was done to encourage employers to conclude open-ended employment contracts, balancing the costs of compensation for unfair dismissal with those arising from terminating fixed-term contracts. This measure attracted criticism, since significantly and unprecedentedly reduces the amount of compensation granted to Spanish workers who are unfairly dismissed. However, it is based on certain theories suggesting that the employers' reluctance to conclude employment contracts of an indefinite duration stems from their inherent costs<sup>44</sup> and that stable employment could benefit from lower compensation awards<sup>45</sup>.

The overall reduction of compensation for unfair dismissal established by the 2012 labour reform gave rise to the derogation of the contracts promoting stable employment, which resulted in little compensation in the event of dismissal for objective reasons declared unfair by the courts. One might note that in spite of the efforts to boost the recourse to open-ended employment contracts, this contractual arrangement was rarely implemented<sup>46</sup>. Further, following the 2012 labour reform, compensation for unfair dismissal was set at 33 days' wage irrespective of the

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<sup>43</sup> Here "wages arrears" refers to remuneration due to workers from the day they were dismissed to that of the court decision declaring such dismissal unfair. Alternatively, wage arrears should be paid to workers until they find a new job, if the recruitment takes place before the court ruling (Art. 56.2 WS).

<sup>44</sup> T. Sala Franco, *Puntos Críticos de la Contratación Temporal*, in *Revista General de Derecho del Trabajo y de la Seguridad Social*, 2003, No. 3, 6.

<sup>45</sup> L.E De la Villa Gil, *La Peripécia de la Reforma Laboral*, in *El Cronista del Estado Social y Democrático de Derecho*, 2010, No. 16, 22.

<sup>46</sup> This work scheme represented 0.7% of all the employment contracts concluded in 2011, a rate that is even lower than that of traditional open-ended employment contracts (3.8%).

Cfr. [http://www.sepe.es/contenido/estadisticas/otros\\_informes/pdf/ANUAL2011.pdf](http://www.sepe.es/contenido/estadisticas/otros_informes/pdf/ANUAL2011.pdf).

employment contract, thus entering into contracts to promote stable employment was no longer as beneficial as before.

The 2012 labour reform introduced further measures concerning flexibility on dismissal, mainly related to economic redundancies. Drawing on the 2010 reform, the attempt was at watering down the criteria to assess the justifying reasons and the procedures to initiate dismissal for economic reasons, as an incentive to promote the conclusion of open-ended employment contracts.

Regretfully, no limits were introduced in relation to fixed-term employment contracts, and no amendments were made to Art. 15 WS either. An imbalance followed; the promotion of higher levels of flexibility in dismissal was not accompanied by a review of the criteria justifying the conclusion of fixed-term employment contracts. In this respect, the reform simply established that the suspension of the provisions laid down in Art. 15.5 WS concerning the use of successive fixed-term employment contracts should be reduced to eight months from 1 January 2013. Evidently, this action is of little relevance if compared with previous regulations on dismissal<sup>47</sup>.

The 2012 labour reform also laid down incentive measures (e.g. social security benefits) to promote stable employment, targeting the employers who are willing to convert fixed-term contracts into open-ended ones. More specifically, employers transforming training and apprenticeship contracts into contracts of an indefinite duration are supported in the payment of social security contributions up to a maximum of three years. The same applies for employers with less than fifty workers who agree to provide stable employment to employees recruited on different employment contracts.

Yet the most innovative measure envisaged by the 2012 labour reform is the introduction of an “open-ended employment contract supporting

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<sup>47</sup> F.J. Gómez Abelleira, *Medidas para Favorecer el Empleo Estable: el Contrato de Apoyo a los Emprendedores y la Recuperación de la Conversión en Indefinido por Reiteración de Contratos Temporales*, in I. García-Perrote and J.R. Mercader Uguina (eds.), *Reforma Laboral 2012. Análisis Práctico*, Lex Nova, Valladolid, 2012, 74; L.M. Camps Ruiz, *Contratación, Formación y Empleo en el RDL 3/2012*, in A. Blasco Pellicer (ed.), *La Reforma Laboral en el Real Decreto-Ley 3/2012*, Tirant lo Blanch, Valencia, 2012, 98; B. Lleó Casanova, *Incidencia de las Reformas de 2012 en la Contratación Laboral y en la Formación Profesional*, in C.L. Alfonso Mellado, G.E. Rodríguez Pastor (eds.) *Reforma Laboral 2012. Últimas Reformas Laborales y de la Seguridad Social*, Tirant lo Blanch, Valencia, 2013, 59. An overall view about Art. 15.5 WS reforms in J. A. Nicolás Bernard, *Más de una Década de Cambios en la Sucesión de Contratos Temporales: de la Estabilidad en el Empleo a la Flexibilidad (2001-2012)*, in *Relaciones Laborales*, 2013, No. 3, 63-88.

entrepreneurs<sup>47</sup>, which can only be utilised in companies with less than fifty workers<sup>48</sup> and grant employers different forms of tax relief and social security benefits<sup>49</sup>. This new contractual arrangement is viewed as an emergency tool, since its use is possible only when unemployment rates are equal to or lower than 15% (Law No. 3/2012). Others think it favours unstable employment, above all because of its one-year probationary period; employers can terminate the contract in the first year without providing a justifying reason and compensation. The excessive duration of the probationary period has also been criticised since it distorts the genuine function of this work scheme. The risk is that employers make use of it as a one-year contract for which no compensation is due in case of dismissal<sup>50</sup>.

Furthermore, Art. 4 of Law No. 3/2012 specifies that the one-year rule applies in all cases without collective bargaining being able to negotiate a shorter period. Finally, the regulation of the probationary period has raised doubts in relation to its constitutionality and its possible violation of the right to work acknowledged in Art. 35.1 of the Spanish Constitution<sup>51</sup>.

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<sup>48</sup> Companies with less than fifty workers constitute 99.23% of all firms in Spain (Source: National Institute of Statistics).

<sup>49</sup> The tax incentives are provided pursuant to Art. 43 of Spanish Corporate Tax Law (Royal Decree-Law 4 of 5 March 2004). Two types of fiscal benefits exist which are compatible with one another: those applying to employers hiring employees for the first time, which are intended to support entrepreneurs, and those targeting employers who hire recipients of employment benefits. Social security benefits can be claimed when employment contracts are concluded with young people between 16 and 30 or with workers over 45.

J.V. López Gandía, *El Ingreso del Trabajador en la Empresa*, in L.M. Camps Ruiz, J.M. Ramírez Martínez, *Derecho del Trabajo*, Tirant lo Blanch, Valencia, (3 ed), 2013, 220.

<sup>51</sup> This and other criticisms can be found in F.J. Calvo Gallego, *Modalidades Contractuales, Dualidad en el Mercado y Reformas Laborales en el Bienio 2010 a 2012 (II): la Ley 3/2012*, in *Documentación Laboral*, 2012, No. 95/96, 145-150. Concerning this new open-ended contract, see also J. García Blasco, *La Contratación Laboral en la Reforma Legal de 2012: entre el Estímulo de la Contratación Indefinida y la Preocupación por el Empleo*, in *Temas Laborales*, 2012, No. 95-96, from page 10 onwards; B. LLeó Casanova, *op. cit.*, 62-76; L.M. Camps Ruiz, *op. cit.*, 71-74; A. Benavides Vico, *El Marco de la Contratación Laboral tras la Ley de Medidas Urgentes para la Reforma del Mercado Laboral*, in *Tres Años de Cambio Laboral*, vol. II, Lex Nova, Valladolid, 2013, 1676-1682.

### **5. By way of Conclusion: The Excessive Recourse to Fixed-term Employment Contracts and Some Proposals to Reduce it.**

Explaining the exact causes of the high shares of temporary jobs in Spain is arduous, all the more so considering the numerous provisions to promote stable employment.

As seen, a significant decline was reported in the 2006-2010 period in the conclusion of fixed-term employment contracts (from 34% to 24%). Rather than to labour reform, the drop in the use of temporary work schemes should be attributed to lower termination costs and, more generally, to the lower employment rates reported during that period.

Today, with the share of temporary jobs which is 10% higher than the EU average, doubts arise about the efficiency of the reforms of the labour market. Measures such as those relating to severance pay and social security benefits, albeit promising, have not been implemented with determination. The little impact of the reforms on the contractual arrangements utilised to employ staff is also the consequence of the peculiarity of the Spanish labour market, with the abuse of fixed-term employment contracts which appears to be a permanent feature of national labour law. Accordingly, the fluctuation in unemployment and the incidence of temporary work are universally attributed to some permanent features in the Spanish labour market. Some sectors – e.g. the construction, catering and tourism industry – employ many seasonal workers favouring job rotation. Yet the economic crisis caused a decrease in the job opportunities particularly in the foregoing sectors. Meanwhile, those industries more likely to provide stable employment (e.g. the IT sector) have shrunk, indicating an opposing trend in comparison with those countries (Germany, the Czech Republic and Slovakia) which reported a decrease in the use of temporary staff.

In the author's view, the main contributing factor to the high shares of temporary jobs is the Spanish production model. Yet other aspects might come into play, such as the tendency of Spanish employers to hire workers on fixed-term employment contracts, also taking account of their lower termination costs. Statistics further confirm this trend: out of the total number of employment contracts recorded each month by the Public Employment Service, 90% are fixed-term contracts and only 10% are open-ended ones<sup>52</sup>.

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<sup>52</sup> T. Sala Franco, *op. cit.*, 3.

While labour reform might prove inefficient to amend the well-established Spanish production model, a cultural change on the part of employers who prefer to recruit staff on a temporary basis is certainly possible and can be promoted through adequate labour laws. A starting point could be the provision of measures narrowing down the costs associated with the conclusion of open-ended employment contracts, while the recourse to fixed-term contracts should be limited to the cases established by the law. The 2012 labour reform, and the reduction of the compensation award for unfair dismissal therein, might once for all ascertain the possible direct relation between the costs for terminating open-ended employment contracts and the rise in the share of temporary jobs.

However, as previously mentioned, the lower levels of stable employment, which also caused a reduction in compensation for unfair dismissal, were not offset by a parallel increase in the cost of hiring temporary staff to discourage employers from using fixed-term contracts. The author of this paper is of the opinion that this increase is a necessary move and can be practiced in several ways (e.g. setting compensation at 12 days' wage, or increasing the amount of the social contributions for fixed-term employment contracts lasting less than one year).

In parallel, measures should be introduced to prevent the fraudulent use of temporary work schemes, for which unfortunately no statistics are available. Yet the significant number of disputes arising from the improper use of fixed-term contracts and the high shares of temporary jobs might hint at many attempts to circumvent the law. The measures contemplated in Spanish labour law appear to be insufficient to stem the problem. For instance, although administrative sanctions apply in the event of non-compliance with regulations on fixed-term contracts, the monitoring and the inspection system is inadequate. The launch of awareness-raising campaigns might be an effective, albeit temporary, solution. Ensuring more judicial protection might offset the inadequate number of inspectors. In general, the author welcomes the introduction of additional sanctions, for example in terms of compensation, the amount of which is left to the discretion of the courts if fixed-term employment contracts have been concluded against the law<sup>53</sup>.

Further measures should also be taken in relation to the reason justifying the conclusion of fixed-term employment contracts – particularly contracts for a specific project or service. The 2010 labour reform adopted too soft an approach, emphasizing some less relevant aspects

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<sup>53</sup> This proposal was already put forward by F.J. Calvo Gallego, *op. cit.*, 163-165.

(duration)<sup>54</sup> and leaving to collective bargaining and case law ample room to manoeuvre.

Par. a) of Art. 15.1 WS empowers collective bargaining to identify the tasks for which fixed-term employment contracts can be concluded, with their use that in many cases was also extended to assignments other than temporary<sup>55</sup>. A more decisive intervention on the part of lawmakers might help to limit the power of collective bargaining.

As for case law, Spanish courts have long recognised the widespread practice of contractors to hire workers on project contracts, the duration of which is adjusted considering the commercial contract with the outsourcing company. Case law regards this practice as a legal one, since the contract for a specific project or service is issued by the contractor and outsourced services are temporary (e.g. cleaning, surveillance and so forth). We should not forget that project or service contracts are the most widespread forms of employment in Spain, so some limitations should be implemented in their use. In this sense, a more determined effort to reduce the share of temporary jobs would require some amendments to their legal framework preventing their use in the business main activities.

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<sup>54</sup> On this issue, see. W. Sanguinetti Raymond, *El Contrato Temporal para Obra o Servicio Determinado y su Causalidad en la Negociación Colectiva*, in *Revista General de Derecho del Trabajo y de la Seguridad Social*, 2003, No. 3, 1 onwards.

<sup>55</sup> *Cfr.*, for example, Art. 17.2 b) of the Collective Agreement of the Plastic Transformation Industry of Valencia (Resolution of 9 March 2010, Provincial Gazette No. 75, of 30/03/2010), which identifies «*clearly laid-out programmes to launch new products*» in the form of projects or services.







***Australian Workplace Relations,***  
**edited by Julian Teicher, Peter Holland,**  
**and Richard Gough**

John Martin \*

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This review contemplates Australian Workplace Relations (AWR) and attempts to assess it by comparison to other similar text books within the broader discipline of industrial relations, however that might be named<sup>1</sup>. Constraints on the number of words that can be permitted in this exercise prevent a lengthy discussion on all of the chapters. Rather this review will focus on those chapters that set this text apart (in positive sense) from comparators. In addition, those aspects of the text that can be critiqued in the context of other scholarly literature are also the subject of the review. For the sake of totality, AWR in Part I covers the foundations of Australian Workplace Relations which includes external impacts on the internal actors in an historical context. In Part II the evolving nature of the workplace is examined and specific issues such as anti-discrimination and occupational health and safety are afforded chapters in this framework. Finally Part III provides some relevant case studies that are briefly discussed toward the end of this review.

AWR provides a more critical analysis than some other text books on the same topic. Critical in that it contextualises changes to the Australian system of industrial relations to the broader social, economic and political vicissitudes. The impact of the nebulous concept of “globalisation” and the associated introduction of neo-liberal policies is delivered in the first chapter of AWR<sup>2</sup> which distinguishes it from some other texts of a similar

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<sup>1</sup> Constraints prevent any debate about the use or interchangeability of terms such as workplace relations, employment relations or industrial relations.

<sup>2</sup> J. Teicher, D. Bryan, *Globalsiation, Economic Policy and the Labour Market*, in J. Teicher, P. Holland, R. Gough (eds.) *Australian Workplace Relations*, Cambridge University Press, Melbourne, 2013.

nature<sup>3</sup>. That is not to say that such other texts do not mention the causes of dramatic changes to labour markets and related institutions, however the primacy given to the impact of global influences by a leading and specific chapter contextualises the remainder of the analysis. It is also self-evident that AWR was written following and in full knowledge of the global financial crisis in 2008 where the international nature of the Australian economy was so profoundly palpable.

The second chapter places the Australian employment model in an international context<sup>4</sup>. This is not only important for comparative purposes but it is the logical next step from the more critical analysis described above. Much of the rhetoric about the inflexibility of Australian labour markets and the demonization of Australian labour market institutions does not stand an international comparison. This chapter also highlights some of the causes of instability for the Australian workforce such as precarious employment and income inequality.

AWR attributes Human Resource Management (HRM) with much of the changes to the Australian Labour Market<sup>5</sup>. According to proponents of HRM as a discipline, its strategic use has contributed to the replacement of unions (and other labour market institutions) with a sympathetic group of professionals within the organisation. Such an approach is at odds with an emerging and more critical body of literature that concludes that HRM has failed at being a strategic “heavy hitter” in a corporate context<sup>6</sup>. The suggestion that HRM was in any way concerned with the welfare of employees was belied by the unitarist approach that was dominated by a

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<sup>3</sup> For example N. Balnave, J. Brown, G. Maconachie, R. Stone, *Employment Relations in Australia*, John Wiley and Sons Australia Ltd, Milton, 2009, 2 edition; M. Bray, S. Deery, J. Walsh, P. Waring, *Industrial Relations: a Contemporary Approach*, McGraw-Hill Irwin, North Ryde, 2005, 3 Edition; R. Sappey, J. Burgess, M. Lyons, J. Buultjens, *Industrial Relations in Australia: Work and Workplaces*, Pearson Education Australia, Frenchs Forrest, 2006.

<sup>4</sup> R. Gough, *The Australian Employment Model in an International Context*, in J. Teicher, P. Holland, R. Gough (eds.) *Australian Workplace Relations*, Cambridge University Press, Melbourne, 2013.

<sup>5</sup> C. Sheehan, H. De Cieri, S. Le Queux, *Australian Trade Unions and international Labour Movements*, in J. Teicher, P. Holland, R. Gough (eds.) *Australian Workplace Relations*, Cambridge University Press, Melbourne, 2013; J. Teicher, D. Bryan, *op. cit.*, 17 & 20; B. Van Gramberg, *Changing patterns of workplace conflict and dispute resolution*, in J. Teicher, P. Holland, R. Gough (eds.) *Australian Workplace Relations*, Cambridge University Press, Melbourne, 2013, 140.

<sup>6</sup> P. Thompson, *The Trouble with HRM*, in *Human Resource Management Journal*, 2011, vol. 21, No. 4.

shareholder focus<sup>7</sup>. Rather, it could well be argued that HRM in Australia (much like the US and UK) has been concentrated on transactional functions and relegated to well behind other management functions and that attributing much of the changes to workplace relations to HRM clearly overstates its relevance and influence.

Another critique might be the treatment of unions and, in particular, whilst the third chapter provides a good explanation of the Australian trade union movement it is somewhat surprising that Peetz<sup>8</sup> is not cited in the explanation of the decline in union membership. Whilst many of the explanations that have been provided for a decline in union membership are traversed in chapter 3, perhaps one of the most significant in the Australian context has been the changing attitude of employers to union membership and collective bargaining<sup>9</sup>. In addition the discussion concerning the amalgamation process of Australian unions fails to adequately identify the unique and strategic nature of amalgamations in Australia<sup>10</sup>. If one is to criticise the amalgamation process there is an ample body of literature from which to choose<sup>11</sup>. Moreover a suggestion that unions have grown apart from the working class could be better attributed to academic critiques of the corporatist era of the Accord<sup>12</sup> rather than relying upon the Institute of Public Affairs<sup>13</sup>. The unmet

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<sup>7</sup> T. Kochan, *Social Legitimacy of the HRM Profession: a US Perspective*, in P. Boxall, J. Purcell, P. Wright (eds.) *The Oxford Handbook of Human Resource Management*, Oxford University Press, Oxford, 2007.

<sup>8</sup> D. Peetz, *Unions in a Contrary World*, University Press Melbourne, Melbourne, 1998.

<sup>9</sup> D. Peetz, *op. cit.*

<sup>10</sup> M. Davis, *Is Bigger Better? Union Size and Expenditure on Members*, in *Journal of Industrial Relations*, 1999, vol. 41 (4); G. Griffin, *Union Mergers in Australia: Top-Down Strategic Restructuring*, National Key Centre in Industrial Relations, Monash University, Melbourne, 2002, Working Paper No. 80; K. Hose, M. Rimmer, *The Australian Union Merger Wave Revisited*, in *Journal of Industrial Relations*, 2002, vol. 44 (4); M. Tomkins, *Trade Union Amalgamations: Explaining the Recent Spate of Mergers in Australia*, in *Labour and Industry*, 1999, vol. 9 (3).

<sup>11</sup> H. Gill, G. Griffin, *The Fetish of Order: Reform in Australian Union Structure*, in *Journal of Industrial Relations* 1981, vol. 23 (3), 371; G. Griffin, *op. cit.*, 13; K. Hose, M. Rimmer, *op. cit.*, 538; J. Waddington, *Trade Union Mergers: A Study of Trade Union Structural Dynamics*, in *British Journal of Industrial Relations* 1988, vol. 26 (3), 414.

<sup>12</sup> T. Bramble, *Australian Union Strategies since 1945*, in *Labour and Industry*, April 2001, vol. 11, No. 3; Keynon and Lewis (1998) as cited in M. Alexander, R. Green, A. Wilson, *Delegate Structures and Strategic Unionism: Analysis of Factors in Union Resilience*, in *Journal of Industrial Relations*, 1998, vol. 40, 664.

<sup>13</sup> C.R. Sheehan, H.L. De Cieri, P. J. Holland, *The Changing Role of Human Resources Management in the Employment Relationship*, in J. Teicher, P. Holland, R. Gough (eds.),

demand for union membership in Australia is discussed in the chapter concerning employee voice<sup>14</sup>, but does not find its way into the chapter concerning unions.

Chapter 9 is concerned with monitoring and surveillance in the employment relationship. The devotion of a chapter to monitoring and surveillance demonstrates the prominence that the issue has for employment into the future. Rapid and intrusive technological change has enabled employers to observe the conduct of employees and potential employees inside and outside the workplace. The question to be answered is to what extent an employer has the right to interfere in the personal affairs of the workforce (or potential workforce) is rightly the subject of discussion. Matters such as to what extent an employer can discipline an employee for their use of social media<sup>15</sup> and drug testing<sup>16</sup> have provided fertile grounds for litigation and ideological debate. In addition, the extent to which technology (such as smart phones) enables employers to interfere with an employee's supposed non-work times are also the subject of growing interest<sup>17</sup>.

The final chapters provide some very good case studies and thereby assist the reader to contextualise the main themes that are explored in the preceding chapters. Chapter 12 uses the retail and hospitality industries, themselves substantial employers of minimum wage employees in Australian terms, as an example of precarious employment and the pursuit of "flexibility" by employers perhaps to the detriment of the workforce<sup>18</sup>.

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*Australian Workplace Relations*, Cambridge University Press, Port Melbourne Vic Australia, 2013, 103-117.

<sup>14</sup> A. Pyman, P. Holland, J. Teicher, B. Cooper, *The Dynamics of Employee Voice in Australia*, in J. Teicher, P. Holland, R. Gough (eds.) *Australian Workplace Relations*, Cambridge University Press, Melbourne, 2013, 125.

<sup>15</sup> Linfox Australia Pty Ltd v Fair Work Australia & Anor FCA NSD1623/2012. Workplace Express, *Federal Court to hear Linfox Facebook Appeal*, 1<sup>o</sup> November 2012, downloaded from [www.workpalceexpress.com.au](http://www.workpalceexpress.com.au).

<sup>16</sup> Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; Australian Municipal, Administrative, Clerical and Services Union; Association of Professional Engineers, Scientists and Managers, Australia (C2012/3396) [2012] FWAFB 4998. Workplace Express, *On-site saliva drug testing in doubt after specialist body ruling*, 29 October 2013, downloaded from [www.workpalceexpress.com.au](http://www.workpalceexpress.com.au).

<sup>17</sup> D. Stacey, *What a modern union should fight for*, in *Daily Life*, 18 November 2013, downloaded from [www.dailylife.com.au/news-and-views/dl-opinion/what-a-modern-union-should-fight-for-20131118-2xpnf.html](http://www.dailylife.com.au/news-and-views/dl-opinion/what-a-modern-union-should-fight-for-20131118-2xpnf.html).

<sup>18</sup> G. Lafferty, *From Reactive Flexibility to Strategic Flexibility in Retail and Hospitality*, in J. Teicher, P. Holland, R. Gough (eds.) *Australian Workplace Relations*, Cambridge University Press, Melbourne, 2013.

The aggressive privatisation of essential services such as health that has been practiced by state Governments in Australia and is the subject of an excellent case study of the restructuring of Victorian public hospitals in Chapter 13<sup>19</sup>. The global control of capital over production processes is well demonstrated by chapter 14 that provides the automotive component industry in Australia as an example of how global supply chains impact upon a local labour market and its institutions<sup>20</sup>. Finally the case of the Australian Public Service is traversed in chapter 15 that chronicles the changing nature of public sector employment<sup>21</sup>.

To summarise AWR, it is possible to conclude that it takes the field of industrial relations in Australia one step further towards the illusive theoretical framework although the authors do not make this claim. By placing industrial relations in the broader context of an international political economy AWR provides a critical analysis of the history and recent events associated with Australian industrial relations. This review may be considered by some as a pedantic critique of the influence of HRM, however the arguments relied upon to suggest that its influence has been overstated are academically credible and intuitively known by those who have witnessed the failures of HRM.

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<sup>19</sup> R. Gough, P. Brewer, *Restructuring Victorian Public Hospitals and the Implications for Work and Work Organisation*, in J. Teicher, P. Holland, R. Gough (eds.) *Australian Workplace Relations*, Cambridge University Press, Melbourne, 2013.

<sup>20</sup> M. McIntosh, *Global Supply Chains and Workforce Flexibility in Automotive Components*, in J. Teicher, P. Holland, R. Gough (eds.) *Australian Workplace Relations*, Cambridge University Press, Melbourne, 2013.

<sup>21</sup> J. Teicher, P. Holland, R. Gough (eds.) *Australian Workplace Relations*, Cambridge University Press, Melbourne, 2013.



***Solidarity Transformed:  
Labor Responses to Globalization  
and Crisis in Latin America  
edited by Mark S. Anner***

Francesca Sperotti \*

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*Solidarity Transformed: Labour Responses to Globalization and Crisis in Latin America* (from here on *Solidarity Transformed*) is a product of both lived experiences and careful academic research carried out by Mark S. Anner, Assistant Professor of Labour Studies and Political Science at The Pennsylvania State University (USA), in the field of unions organizing and solidarity in Central America.

Mark Anner developed his interest for labour unions and Latin America during his college years, when he took Latin American history courses and Spanish classes. After graduation, he collaborated first with a local union in the Boston area, and then with unionists in El Salvador looking for some form of solidarity with international labour unions and human rights organizations. Since then, the author has spent several years working with unions in communicating with foreign activists and raising funds internationally to maintain local strikes and other union activities. This was a long period during which the author had the opportunity to directly experience unions' lives and above all meet the representatives for Latin America of the Norwegian Confederation of Trade Unions (from here on LO-Norway), who after 1991 gave him the chance to oversee Norwegian-

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\* Francesca Sperotti is ADAPT Research Fellow and Ph.D. Candidate at the International Doctoral School in *Human Capital Formation and Labour Relations*, University of Bergamo.

The present review refers to Mark S. Anner *Solidarity Transformed: Labor Responses to Globalization and Crisis in Latin America*, Cornell University Press, New York, 2011, ISBN 978-0-8014-4959-8.

funded programs focusing on labour union growth, capacity building for tasks and international campaigns in El Salvador, Honduras, Nicaragua, Guatemala, the Dominican Republic, Peru, Bolivia, and Brazil. It was in that period that the author focused on documenting labour rights abuses in the apparel export factories producing North American brands for North American consumers. Through countless visits to the factory, numerous interviews and lengthy negotiations, Mark Anner learned how certain dynamics – such as the complexities of supply-chain management, production order cycles, the role of suppliers consortiums and the impact of complex trade rules – influence working conditions, employment relations and union organizing.

This short premise about the ten years experience in Central America is fundamental to the origins of this book and the foundations of the author's ideas and arguments that were further enriched by several years of academic study.

By departing from his two main research questions – why union organizing has been so difficult following authoritarian regimes in Latin America, and what strategies unionists have adopted ahead of a stateless and globalized scenario – his research strategy combined in-depth case studies with an analysis of a large number of campaigns. He selected one buyer-driven commodity chain, the garment manufacture, and one producer-driven commodity chain, automobile assembly. He chose two countries, El Salvador and Honduras, where garment manufacture was the main industry and, two countries, Brazil and Argentina, where auto production was the main industry. In each country, he selected the main left-oriented labour unions and the main moderate one.

*Solidarity Transformed* begins by examining the transformation of labour solidarity – defined as “how workers and their organizations support each other in pursuit of common goals” – since the end of the Cold War in Latin America. Two changes have contributed to this transformation: the decline in state labour protection and the international restructuring of the industries. Chapter 2 maps the impact of these two changes in the garment manufacture and automobile assembly industries and the four countries. In particular, it illustrates how the creation of export processing zones – industrial parks in which imported materials are processed and re-exported – and modular production – a process in which the production is divided into autonomous subsystems, modules, which are developed and preassembled separately by independent firms located inside the final assembly facility – did not lead to higher wages and stronger collective representation. On the contrary, on average wages were 38.58 per cent lower in segmented production regimes than in traditional production

regimes and unionization rates were 61.25 per cent lower in the segmented production regimes. In other words, these production changes fragmented labour solidarity and reduced labour's ability to pressure for higher wages and stronger unions. All this happened despite the fact that these countries were emerging from decades of authoritarian rule and beginning a process of democratization.

As Mark Anner argues that to respond effectively to these changes, no one or predetermined path for labour can be discerned, but rather a range of different responses shaped by economic and institutional structures and by labour identities, political threats and opportunities. Evidence from the countries observed suggests that where states are able to provide labour with at least some of the protections it needs from the challenges of economic globalization, the desire to pursue new strategies is mitigated. And where industry is centralized and controlled by producers (as in automobile assembly), labour activity will tend to be sustained. Where industry is decentralized and controlled by retailers (as in garment manufacture), labour is more likely to pursue NGO alliances and sporadic campaigns. Combined, these interacting influences result in two major types of transnational labour response to political and economic transformation: transnational activist campaigns (TACs), which are built on shorter-term labour and NGO cross-border alliances, and transnational labour networks (TLNs) which are characterized by stable, class-based solidarity.

TACs have been observed in El Salvador and Honduras (Chapters 3 and 4), where the issue of transforming labour strategies in the face of industrial restructuring began with modifying local tactics. Unions realized that, to be successful, they had to target each point of the "triangle of power" in which the new industry (in this case the garment manufacture) was embedded: multinational corporations, local suppliers, and the state. The aim was, on the one hand, to get corporations to agree to transparent and meaningful global standards and not to move to other regions where labour laws are more lax; and, on the other hand, to organize local factories and pressure the state into improving labour regulations. Political inclination played a role too. While left-wing unions turned to new forms of local organizing and transnational activism to target multinational corporations through consumer awareness campaign and local organizing efforts, moderate unions shunned transnationalism in favour of pacts with employers at the plant level.

Like garment workers in El Salvador and Honduras, autoworkers in Brazil (Chapter 5) have found that the restructuring of their global production has forced a rethinking of labour strategies: they gradually turned to

transnationalism (TLNs) in order to complement domestic strategies. Unlike in the experience of TACs, here the node of power was mainly on the headquarters of the multinational auto producer. For this reason local unions looked for support from transnational allies. Some of the most effective transnational auto activities resulted in stronger works councils, a higher level of job protection, and the negotiation of international framework agreements.

However, transnationalism has not been the sole response. In Brazil and Argentina moderate unions, having their roots in corporatist labour traditions where labour was seen as a partner with the state and employers' organizations, started to collaborate to enhance national development and present more flexible alternatives to those of their main rival unions (Chapter 6). This resulted in micro corporatist labour-employer pacts based on new management ideas – such as flexible worker-employer relationships, flexible working hours and jobs assignments linking salaries to productivity – that well fitted the new global economic scenario.

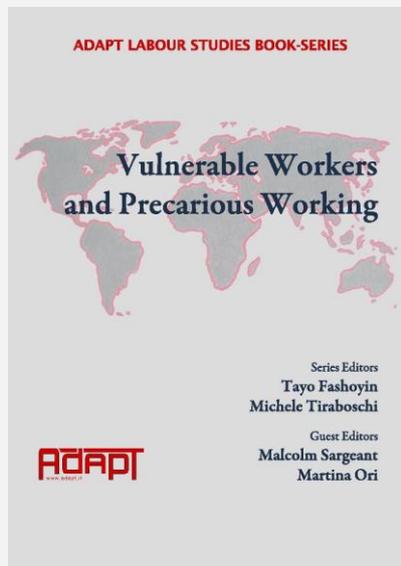
Therefore, new labour strategies have emerged and matured in the new context of global supply chains and weak states. The transformation of labour solidarity, however, can have different forms according to labour identities, sector of production and state. Furthermore, evidence suggests that there is no one best strategy, but when successful, unions and their allies have the potential to intervene in the restructuring processes and improve working conditions.

*Solidarity Transformed* is a valuable contribution to research on how industrial relations and labour movements evolve with globalization and the changed role of the state that continue to shape the world of work and workers. The data collection and presentation the main arguments plus Anner's personal experience make *Solidarity Transformed* a “must-read” book for anyone wanting to understand contemporary industrial and labour relations in Central and Latin America from an international and comparative perspective.

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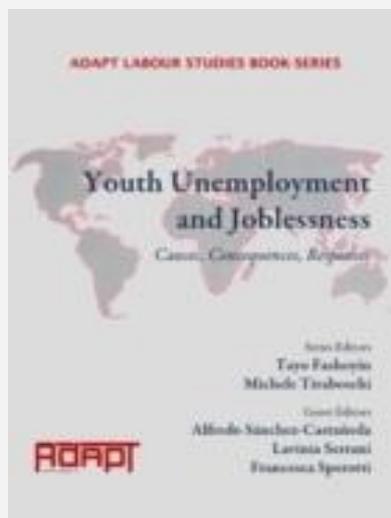
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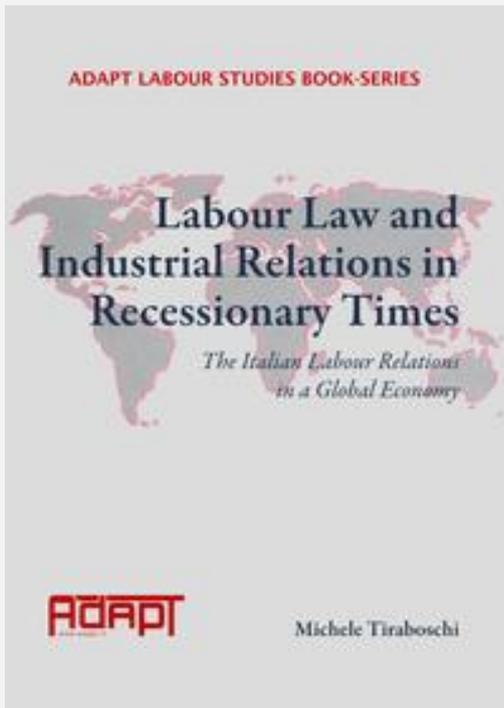


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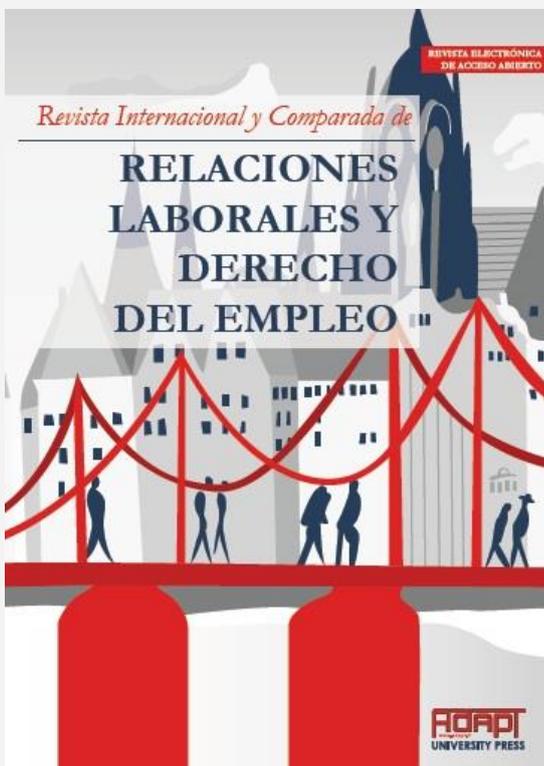
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