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# Preventing and Managing Natural and Environmental Disasters: Employment Protection, Welfare and Industrial Relations Systems

Michele Tiraboschi \*

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## 1. Framing the Issue

The media and the public at large take a different approach when dealing with natural disasters, on the one hand, and environmental and technological hazards, on the other hand. The former (earthquakes, tsunamis, floods, hurricanes and so forth) generate feelings of impotence and resignation, which in turn fuel apprehension, worry, solidarity and human pity. The latter (e.g. the case of ILVA, the Taranto-based steelmaker) stir up anger and hostility. This is because environmental and technological disasters can be prevented, and a desire emerges soon after these episodes to seek out those who hold legal and political responsibilities.

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\* Full Professor of Labour Law. Director of the Centre for International and Comparative Studies in Law, Economics, Environment and Work (DEAL) of the Marco Biagi Faculty of Economics of the University of Modena and Reggio Emilia (Italy). An earlier version of this paper was drafted following the earthquake in Emilia Romagna in May 2012 and presented for the first time on 22 November 2013 at the International Seminar “Labour Market Impacts of Natural and Environmental Disasters”, organized by the Association for International and Comparative Studies in the field of Labour Law and Industrial Relations (ADAPT), the Japan Institute for Labour Policy and Training, and Tohoku University, which took place at Tohoku University in Sendai (Japan). The findings of this research were also presented at Portland on 29 May 2014 at the yearly conference of the Industry Study Association “Sustaining Sustainability in the Face of Increasing Risk” in the session “Labour Markets and Employment Conditions in the Event of Natural (and Environmental) Disasters”. To facilitate consultation, all the documentation referred to in the session is available free of charge at the ADAPT Observatory “Natural and Environmental Disasters and the Labour Market” (<http://adapt.it/osservatori/nid/>).

In light of the above, this paper sets out to evaluate the reliability of the firmly established<sup>1</sup> distinction between natural disasters<sup>2</sup>, and environmental and technological ones<sup>3</sup>, focusing on the consequences relating to labour law and industrial relations. Due to the unpredictability of natural disasters, welfare systems traditionally support the victims and the areas affected through temporary and emergency interventions (*infra*, § 3). On the contrary, environmental and technological hazards are deemed preventable, therefore legal authorities are usually tasked with establishing their causes and determining penal, administrative or civil sanctions for those responsible<sup>4</sup>.

The question arising from the foregoing considerations and which this paper<sup>5</sup> seeks to answer is whether labour law, industrial relations and welfare systems can provide a contribution to the prevention and the proactive management of disasters. This contribution should consider the impact that these events have on people, production, incomes and employment rates.

As is widely acknowledged - also among employers and trade unions - technological and environmental disasters are ascribed to human behavior,

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(<sup>1</sup>) See, among others, D. VENN, *Helping Displaced Workers Back Into Jobs After a Natural Disaster. Recent Experience in OECD Countries*, OECD Social, Employment and Migration Working Paper, 2012, n. 142, p. 2, who speaks of «the unpredictable character of natural disasters».

(<sup>2</sup>) According to a widely accepted definition in literature, “natural disasters” are events occurring in the surrounding environment that are harmful to people and are caused by forces beyond human control. In this sense, see I. BURTON, R.W. KATES, *Perception of Natural Hazards in Resource Management*, in *Natural Resources Journal*, 1964, vol. 3, n. 3, p. 413, and I. BURTON, R.W. KATES, G.F. WHITE, *The Environment as Hazard*, Oxford University Press, 1978. The International Disaster Database of the Centre for Research on the Epidemiology Disasters classifies natural disasters considering the following subgroups: geophysical, meteorological, hydrological, climatological and biological disasters. See D. GUHA-SAPIR, P. HOYOIS, R. BELOW, *Annual Disaster Statistical Review 2012. The Numbers and Trends*, CRED, 2013, who provide detailed information on the number, scope and impact of natural disasters recorded in the last ten years and in 2012, considering the foregoing classification.

(<sup>3</sup>) Conversely, “environmental disasters” are man-made events that have an impact on the environment (pollution, chemical contamination and industrial accidents). See again I. BURTON, R.W. KATES, G.F. WHITE, *op. cit.* The International Disaster Database regards these events as “technological disasters”, which also include industrial accidents ([www.emdat.be/explanatory-notes](http://www.emdat.be/explanatory-notes)).

(<sup>4</sup>) Among the many contributions in G. ALPA, G. CONTE, V. DI GREGORIO, A. FUSARO, U. PERFETTI (a cura di), *Rischio di impresa e tutela dell'ambiente*, ESI, 2012, see I.A. NICOTRA, U. SALANITRO (a cura di), *Il danno ambientale tra prevenzione e riparazione*, Giappichelli, 2010. A theoretical and conceptual framework of the current notion of “responsibility” is provided in H. JONAS, *Il principio responsabilità. Un'etica per la civiltà tecnologica*, Einaudi, 1990, e U. BECK, *La società del rischio. Verso una seconda modernità*, Carocci, 2000.

(<sup>5</sup>) To date, no contribution has been reported in Italian labour law and industrial relations literature that discusses the issues at hand.

meaning that responsibility and culpability can be legally determined<sup>6</sup>. The same cannot be said of natural disasters, which due to their unpredictability, are the result of mere chance. This is certainly true for one-off events, for scientific knowledge and research do not allow us to predict where, how, and when natural disasters will occur. Yet this assumption can be questioned if a long-term perspective is taken<sup>7</sup>.

We are aware that some areas are more likely to experience natural disasters than others are. We also know that productive and industrial activities performed in disaster-prone areas might trigger technological accidents,<sup>8</sup> e.g. toxic gas emissions and liquid spills. An example of this is the March 2011 Fukushima nuclear disaster that was provoked by an earthquake and a tsunami. From the Industrial Revolution onwards, it is human behavior that increases, if indirectly, the likelihood of both natural and environmental disasters, by exploiting natural resources to develop and profit from productive activity<sup>9</sup>. Technological innovation, demographic changes, social developments and economic activity have a major impact on the surrounding environment and

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<sup>(6)</sup> See Directive 2004/35/EC that draws on the measures already laid down in the 2000 White Paper on Environmental Liability and makes a distinction between strict liability (damage caused by dangerous activity) and negligence (damage produced to biodiversity by non-dangerous activity).

<sup>(7)</sup> Albeit innovative, the critical perspective adopted in this paper has sound basis, as the international literature has recently highlighted the scant consideration given by economists to the prevention of natural disasters. This is even truer for labour lawyers and industrial relations scholars, who have never approached this issues for the reasons explained here. See, for all, T. BANG VU, D. HAMMES, *Dustbowls and High Water, the Economic Impact of Natural Disaster in China*, in *Asia-Pacific Journal of Social Sciences*, 2010, n. 1, special issue. Significantly, on p. 122 it is argued that «Research in both the social and natural sciences has been devoted to increasing our ability to predict, prepare for, and mitigate the costs of disasters. Curiously, despite the death, dislocation, and direct damage caused by natural disasters, few economists participate in developing this agenda. Nor have many attempted to answer the many economically relevant questions relating to natural disaster». In a similar vein, see E. CAVALLO, I. NOY, *Natural Disasters and the Economy – A Survey*, in *International Review of Environmental and Resource Economics*, 2011, vol. 5, n. 1.

<sup>(8)</sup> The expression “natech disasters” is usually employed in literature to refer to technological and environmental accidents sparked by natural events. See E. KRAUSMANN, V. COZZANI, E. SALZANO, E. RENNI, *Industrial Accidents Triggered by Natural hazards: An Emerging Risk Issue*, in *Natural Hazards and Earth System Sciences*, 2011, vol. 11, n. 3, and the bibliography therein.

<sup>(9)</sup> See also the *Report on the Hydrocarbon Exploration and Seismicity in Emilia Region* submitted on February 2014 from the Technical-Scientific Commission that was appointed on 11 December 2011 by the Head of the Department of Civil Protection of the Presidency of Council of Ministers, for evaluating the possible relationships between hydrocarbon exploration and a marked increase of seismicity in the Emilia Romagna area following the 2012 earthquakes. On p. 190 it is stressed that “Several authoritative reports describe well-studied cases where extraction and/or injection of fluids in hydrocarbon or geothermal fields has been associated with the occurrence of earthquakes, of magnitudes even higher than 5”.

on some hydro-meteorological and geophysical phenomena. To the extent that the effects of climate change on some natural processes<sup>10</sup> are a widely debated topic among the experts of social and natural sciences who deal with so-called anthropogenic disasters<sup>11</sup>.

Further, an examination of similar events in the past, along with an analysis of the areas concerned and the type of disaster, might help to predict the consequences of any natural catastrophe related to fatalities, damage to properties, the impact on the economy and the labour market.

According to a recent survey by the European Environmental Agency<sup>12</sup>, the number of natural and environmental disasters<sup>13</sup> in Italy and Europe is on the rise because of several geophysical, socio-economic, and technological changes. Some 576 disasters were reported in Europe in the 1998–2009 period due to natural hazards causing some 100,000 fatalities and €150 billion in overall losses, with serious implications on economic stability and growth. During the same period, more than 11 million people out of a population of some 590 million in the European Environmental Agency member countries were affected by disasters caused by natural hazards. A lack of uniformity can be seen across Europe that concerns the victims of natural disasters. Italy and France reported the highest number of fatalities (20,000 people) followed by Turkey (18,000 people) and Spain (15,000 people). We do not know where, when and how natural disasters will take place. Yet we know that some areas

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(<sup>10</sup>) *Climate change, impacts and vulnerability in Europe 2012. An indicator-based report*, EEA Report, 2012, n. 12. Cf. also the Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - an EU Strategy on adaptation to climate change COM(2013)216 def.

(<sup>11</sup>) Aside from the vast amount of literature on climate change, cf. again the Report on the Hydrocarbon Exploration and Seismicity in Emilia Region carried out by International Commission on Hydrocarbon Exploration and Seismicity. The report pinpoints some seismic events that can be traced to human behaviour, among others anthropogenic, induced and triggered seismicity (p. 8-9; 189-190; 196).

(<sup>12</sup>) *Mapping the impacts of natural hazards and technological accidents in Europe. An overview of the last decade*, EEA Technical report, 2010, n. 13.

(<sup>13</sup>) According to the World Disaster Report of the International Federation of Red Cross and Red Crescent Societies ([www.ifrc.org](http://www.ifrc.org)) Asia is still the area that is affected the most by these events, recording 2,900 disasters between 2000 and 2010 (40% of the world's total hazards), involving 2 million people and causing 2 million deaths and damage worth \$386 million. Cf. also M. MILCZAREK (edited by), *Emergency Services: a Literature Review on Occupational Safety and Health Risks*, EU-OSHA, 2011, 15-16. The data from 2012 confirm that Asia is highly prone to natural disasters. 40.7% of the disasters who take place globally occur here, followed by the Americas (22.2%), Europe (18.3%), Africa (15.7%) and Oceania (3.1%). Over the same year, the share of fatalities from natural disasters in Asia was equal to 64.5% of those reported at the global level, that is twice those recorded in Africa (30.4%), which ranks second in this classification. Cf. D. GUHA-SAPIR, P. HOYOIS, R. BELOW, *op. cit.*, 2.

are more likely to experience natural disasters than others are, so their impact on people's lives and security can be mitigated, as can that on employment, income and social protection.

In fact, the expression “natural disasters” is not entirely correct<sup>14</sup> and certainly outdated, for it is inappropriate to describe the events under study in this paper. This is because “human behaviour transforms natural hazards into what should really be called unnatural disasters”<sup>15</sup>.

If “natural disasters” are in some respects predictable, and if their direct and indirect consequences on people and things are further worsened by human behavior, it is no longer possible to speak of “mere chance”, as is usually done by the media, public opinion and decision-makers. This is a crucial point, as rather than focusing on emergency and extraordinary measures, emphasis must be given to the prevention of the possible consequences on people, local productive systems and labour markets in order to speed up recovery<sup>16</sup>. On close inspection, prevention strategies should be given priority also in the event of technological or environmental disasters, which cannot be dealt with only at a later stage through public demonstrations and in court, as the case of Taranto-based ILVA demonstrated<sup>17</sup>.

The recent increase<sup>18</sup> in natural disasters and technological and environmental hazards led international institutions<sup>19</sup> and social science experts<sup>20</sup> to regard

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(14) In these cases, disasters happen only from a human perspective, being them natural processes. Cf. *Mapping the impacts of natural hazards and technological accidents in Europe. An overview of the last decade*, qui 18.

(15) UNITED NATIONS, *Report of the Secretary-General on the work of the Organization*, 1999, A/54/1, 2, point 11. It is argued that «Human communities will always face natural hazards – floods, droughts, storms or earthquakes; but today's disasters are sometimes man-made, and human action – or inaction – exacerbates virtually all of them. The term “natural disaster” has become an increasingly anachronistic misnomer. In reality, human behaviour transforms natural hazards into what should really be called unnatural disasters».

(16) Cf. D. VENN, *op. cit.*, espec. 2, where it is argued that «due to the unpredictable nature of natural disasters, many of the policies implemented by labour ministries in response have been, by necessity, *ad hoc* in nature».

(17) Cf. R. CARAGNANO, M. GIOVANNONE (edited by), *ILVA: le relazioni industriali tra diritto alla salute e diritto al lavoro*, Boll. spec. ADAPT, 22 maggio 2013, n. 13.

(18) Cf. again *Mapping the impacts of natural hazards and technological accidents in Europe. An overview of the last decade*, cit.

(19) Cf. WORLD BANK, *Building Resilient Communities. Risk Management and Response to Natural Disasters through Social Funds and Community-Driven Development Operations*, 2008, and WORLD ECONOMIC FORUM, *Building Resilience to Natural Disasters: A Framework for Private Sector Engagement*, 2008.

(20) Among the many studies hailing the involvement of social sciences to prevent natural disasters considering so-called social resilience, see cf. B. WISNER, P. BLAIKIE, T. CANNON, I. DAVIS, *At Risk. Natural Hazards, People's Vulnerability and Disasters* Routledge, 2004, 11, where vulnerability is defined as «characteristics of a person or group and their situation that

reduced vulnerability as a major aspect in integrated risk management strategies<sup>21</sup> that might explain their low impact on production and the labour market<sup>22</sup>.

If this perspective is taken, industrial relations and welfare systems can play a major role in terms of prevention and pro-active management, as can the rules governing the labour market if adapted and thoroughly reviewed. This is exactly what we argue in this paper, especially if one considers that workers can be counted as among the most vulnerable groups, together with the elderly, children, people with disabilities and migrants<sup>23</sup>.

Natural disasters are still investigated taking account of geophysical risks and their management through hierarchical and mandatory provisions intended to look for the best technological solution<sup>24</sup>.

Instead, the “vulnerability” perspective is based on disasters and on their socio-economic, political and cultural determinants<sup>25</sup>, and prioritizes cooperative and decentralized forms of prevention and risk management.

This is done in an awareness that the most critical issues resulting from natural, technological and environmental disasters concern economic distress and reduced incomes, power inequalities among social groups, different educational levels, limited access to information and education, differences arising from the public systems of social protection<sup>26</sup> and the existence of weak affective bonds in the social and productive fabric<sup>27</sup>. Accordingly, the risks and the

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influence their capacity to anticipate, cope with, resist and recover from the impact of a natural hazard». Cf. also K. WARNER (a cura di), *Perspectives on Social Vulnerability*, United Nations University-Munich Re Foundation Source, 2007, n. 6, and the literature review in A. GALDERISI, F.F. FERRARA, A. CEUDECH, *Resilience and/or Vulnerability: Relationship and Roles in Risk Mitigation Strategies*, 24<sup>th</sup> AESOP Annual Conference, Helsinki, Finland, 7-10 July 2010, Track 10, *Sustainability: Climate change, risks and planning*.

(<sup>21</sup>) Cf. *Mapping The Impacts of Natural Hazards and Technological Accidents in Europe. An Overview of the Last Decade*, cit., 22.

(<sup>22</sup>) Cf., for instance, M.F. MCINTOSH, *Measuring the Labor Market Impacts of Hurricane Katrina Migration: Evidence From Houston, Texas*, in *The American Economic Review*, 2008, vol. 98, n. 2.

(<sup>23</sup>) Cf. A. ONO, *Employment of Disaster Victims Supporting the Reconstruction – Emergency Job Creation Program in Emergency Temporary Housing Support*, paper presented at the seminar *The labour market impacts of natural and environmental disasters*, cit.

(<sup>24</sup>) In a similar vein, see D.S.K. THOMAS, B.D. PHILLIPS, W.E. LOVEKAMP, A. FOTHERGILL, *Social Vulnerability to Disasters*, CRC Press, 2013, 4 (table 1.1) e 5-10.

(<sup>25</sup>) Ivi, 4 (table 1.1) e 10-20.

(<sup>26</sup>) Cf. B. WISNER, P. BLAIKIE, T. CANNON, I. DAVIS, *op. cit.*, 5, according to whom «hazard vulnerability is determined by social influences and power and not by the forces of nature». Cf. also T. CANNON, *Vulnerability Analysis and the Explanation of ‘Natural’ Disasters*, in A. VARLEY (edited by), *Disasters, Development and Environment*, Wiley, 1994, and, more recently, D.S.K. THOMAS, B.D. PHILLIPS, W.E. LOVEKAMP, A. FOTHERGILL, *op. cit.*

(<sup>27</sup>) For this last profile, see H. TOYA, M. SKIDMORE, *Do Natural Disasters Enhance Social Trust?*, CESifo Working Paper, 2013, n. 3905.

consequences of a natural disaster do not only depend on the episode itself, but also on the vulnerability<sup>28</sup> and resilience<sup>29</sup> of those involved, on whom welfare and industrial relations systems can have a major impact.

## 2. Natural Disasters and their Consequences on Industry, Incomes, and the Labour Market

The international literature has pointed out that natural disasters have a direct impact on infrastructure and people's lives, causing damage to material and non-material assets. A country's industry, revenues, and labour market dynamics are likewise affected, albeit indirectly.

By way of example, one might recall that the earthquake and the following tsunami that ravaged the Maule region in Chile in February 2010 caused the loss of 90,000 jobs and a 3% decrease in Gross Domestic Product (GDP) in the first four months of 2010<sup>30</sup>. In a similar vein, the quakes and the tsunami that hit the prefectures of Iwate, Miyagi and Fukushima (Japan) in March 2011 brought about a decrease in the number of employed people (from 2.75 to 2.60 million)<sup>31</sup>. Likewise, the string of earthquakes recorded in Christchurch (New Zealand) between 2010 and 2011 affected the national occupational levels, causing damages to properties and infrastructure worth between 10% and 20% of the country's GDP<sup>32</sup>. Even when the impact of natural disasters on the national economy is modest, demographic trends<sup>33</sup> might be affected with

(<sup>28</sup>) Again, B. WISNER, P. BLAIKIE, T. CANNON, I. DAVIS, *op. cit.*, cap. II, who formulate the theory: "Risk (disaster) = Hazard Vulnerability".

(<sup>29</sup>) Resilience is defined as an adaptation and positive trajectory following a situation of disturbance, disruption or difficulty (cf. F.H. NORRIS, S.P. STEVENS, B. PFEFFERBAUM, K.F. WYCHE, R.L. PFEFFERBAUM, *Community resilience as a metaphor, theory, set of capacities, and strategy for disaster readiness*, in *American Journal of Community Psychology*, 2008, vol. 41, n. 1, 127) and constitutes «the capacity for successful adaptation, positive functioning or competence [...] despite high-risk status, chronic distress, or following prolonged or severe traumas», cf. B. EGELAND, E. CARLSON, L.A. SROUFE, *Resilience as process*, in *Development and Psychopathology*, 1993, vol. 5, n. 4, 517.

(<sup>30</sup>) For a detailed analysis, Cf. *El impacto del terremoto sobre el empleo*, Informe de Análisis Económico y Social, Fundación Instituto de Estudios Laborales, FIEL, June 2010. See also J. DRESDNER, K. SEHNBRUCH, *El impacto del sismo 2010 sobre el mercado laboral de la Región del Biobío*, in *Sociedad Hoy*, 2010, n. 19, and UNITED NATIONS, *The Chilean earthquake of 27 February 2010: an overview*, 2010, esp. 12-18.

(<sup>31</sup>) JILPT, *Labor Situation in Japan and Its Analysis: General Overview 2013/2014*, 2014, 12.

(<sup>32</sup>) Cf. I. NOY, *The Enduring Economic Aftermath of Natural Catastrophes*, in *Vox*, 5 September 2012, and B. LAYTON, *Impact of Natural Disasters on Production Networks and Urbanization in New Zealand*, ERIA Discussion Paper, 2013, n. 13, 20-24.

(<sup>33</sup>) F. SPEROTTI, *Disastri naturali e mercato del lavoro: l'importanza del fattore demografico*, referred to in this paragraph.

serious implications on whole industries and the development of local labour markets. New Orleans is a case in point<sup>34</sup>: an analysis of the labour market following Hurricane Katrina in 2005 showed that only half of those evacuated (200,000 out of 400,000 people) returned to their homes in the two years subsequent to the disaster<sup>35</sup>, causing a 35% decrease in the employment rates.<sup>36</sup> Ten years earlier, Hurricane Andrew in Florida caused major disruption to 8,000 companies employing 123,000 workers<sup>37</sup>. In Italy, the 2014 floods in Modena received little media coverage. However, 2,000 workers and 600 companies in the manufacturing and the agriculture sectors were affected, bringing about the temporary suspension of working activities for 5,000 workers<sup>38</sup>.

Evidently, employment is affected by business closures and interruptions<sup>39</sup> – even when involving self-employed workers and other professionals – material damages, disruption from inadequate facilities, delays in energy supply, and problems with the customers hit by the disaster.

Business can shut down on a temporary or permanent basis and determine the relocation of production to other sites regarded as safer or less vulnerable, re-shaping the labour market of disaster-affected areas<sup>40</sup>.

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(<sup>34</sup>) Cf. an overview of the cities that symbolize the positive and negative effects of natural disasters is provided in F. SPEROTTI, *Demografia, economia e parti sociali: i tre fattori per prevenire e attenuare gli effetti dei disastri naturali*, in M. GIOVANNONE, E. GRAZIOLI, S. SPATTINI (a cura di), *Modena: dopo il terremoto l'alluvione. L'impatto delle calamità naturali sul sistema produttivo e sul lavoro*, Boll. spec. ADAPT, 28. Here reference is made to the cases of Chicago, ravaged by the great fire in 1871 and San Francisco, hit by the 1906 earthquake, to point out that human capital and dynamic production can speed up recovery and increase economic and labour market performance. On the contrary, Iwate, Miyagi and Fukushima in Japan reported lower performances due to the March 2011 earthquake and the following tsunami that generated a nuclear disaster, while dealing with a rapid ageing of the population and economic stagnation. Cf. Y. ZHOU, *How Will the 3.11 Earthquake Transform the Population and Labor Market in Iwate, Miyagi and Fukushima? Knowledge Gained from Existing Studies of Disasters*, in *Japan Labor Review*, 2012, vol. 9, n. 4.

(<sup>35</sup>) Cf. J.A. GROEN, A.E. POLIVKA, *The Effect of Hurricane Katrina on the Labor Market. Outcomes of Evacuees*, in *The American Economic Review*, 2008, vol. 98, n. 2; J. VIGDOR, *The Katrina Effect: Was there a Bright Side to the Evacuation of Greater New Orleans?*, in *The B.E. Journal of Economic Analysis & Policy*, 2007, vol. 7, n. 1; J. ZISSIMOPOULOS, L.A. KAROLY, *Employment and Self-Employment in the Wake of Hurricane Katrina*, in *Demography*, 2007, vol. 47, n. 2.

(<sup>36</sup>) *Ibidem*.

(<sup>37</sup>) Cf. J.I. SANCHEZ, W.P. KORBIN, D.M. VISCARRA, *Corporate Support in the Aftermath of a Natural Disaster: Effects on Employee Strains*, in *Academy of Management Journal*, 1995, vol. 38, n. 2, 504.

(<sup>38</sup>) Cf. M. GIOVANNONE, E. GRAZIOLI, S. SPATTINI (a cura di), *op. cit.*

(<sup>39</sup>) Cf. D. VENN, *op. cit.*, spec. 13-14.

(<sup>40</sup>) *Ivi*, 14-15.

Of course psychological, emotional and physical factors also need to be considered at the time of resuming work and production. They have a major impact on the workers affected by disasters<sup>41</sup>, but also on those involved in first aid (fire brigades, medical staff, ambulance care assistants, police officers and so forth)<sup>42</sup> and reconstruction (e.g. those in charge of decontamination, engineers and construction workers)<sup>43</sup>. As one might expect, the most vulnerable groups include women and young people<sup>44</sup>. Migration flows usually follow a natural disaster<sup>45</sup>, along with a significant mismatch between labour supply and demand because of a shortage of the expertise needed for reconstruction (e.g. engineers, bricklayers, electricians, OHS professionals, IT experts)<sup>46</sup>.

Significantly, only a few economists<sup>47</sup> have attempted to estimate the negative impact of natural disasters on the economy and the labour market in the short

(<sup>41</sup>) A.E. JIMÉNEZ, R.A. CUBILLOS, *Estrés Percibido y Satisfacción Laboral después del Terremoto Ocurrido el 27 de Febrero de 2010 en la Zona Centro-Sur de Chile*, in *Terapia Psicológica*, 2010, vol. 28, n. 2, and the bibliography therein.

(<sup>42</sup>) Cf. M. MILCZAREK (edited by), *op. cit.*

(<sup>43</sup>) See also ILO, *Public emergency services: Social dialogue in a changing environment*, 2002, 56-65. Cf. also: S.-C. LIAO, M.-B. LEE, Y.J. LEE, T. WENG, F.-Y. SHIH, M.H.M. MA, *Association of psychological distress with psychological factors in rescue workers within two months after a major earthquake*, in *Journal of the Formosan Medical Association*, 2002, vol. 101, n. 3; T. HERING, I. BEERLAGE, *Arbeitsbelastungen und Gesundheit im Rettungsdienst. Aus einer Ressourcen-Perspektive betrachtet*, in *Trauma & Gewalt*, 2007, vol. 1, n. 4; C. KIRCHSTEIGER, *Trends in accidents, disasters and risk sources in Europe*, in *Journal of Loss Prevention in the Process Industries*, 1999, vol. 12, n. 1; C. KOOPMAN, C. CLASSEN, E. CARDENA, D. SPIEGEL, *When disaster strikes, acute stress disorder may follow*, in *Journal of Traumatic Stress*, 1995, vol. 8, n. 1. Sulla esposizione alla contaminazione da sostanze nocive si veda D.K. HORTON, Z. BERKOWITZ, W.E. KAYE, *Secondary contamination of ED personnel from hazardous materials events, 1995-2001*, in *The American Journal of Emergency Medicine*, 2003, vol. 21, n. 3.

(<sup>44</sup>) Cf. E. ENARSON, *Gender and Natural Disasters*, In Focus Programme on Crisis Response and Reconstruction Working Paper, 2000, n. 1, esp. chapter 3. D.A. FARBER, *Disaster Law and Inequality*, in *Law and Inequality*, 2007, vol. 25, n. 2, especially chapter 3. 305-308.

(<sup>45</sup>) Cf. Y. HIGUCI, T. INUI, T. HOSOI, I. TAKABE, A. KAWAKAMI, *The Impact of the Great East Japan Earthquake on the Labor Market – Need to Resolve the Employment Mismatch in the Disaster-Stricken Areas*, in *Japan Labor Review*, 2012, vol. 9, n. 4, espec. 6-10; A. DRABO, L.M. MBAYE, *Climate Change, Natural Disasters and Migration: An Empirical Analysis in Developing Countries*, IZA Discussion Paper, 2011, n. 5927. Migrations following natural disasters can be seen as related to the notion of “environmental migrants” that has been defined by IOM, *Discussion Note: Migration and the Environment*, 1<sup>o</sup> November 2007, MC/INF/288, 1.

(<sup>46</sup>) Cf. Y. HIGUCI, T. INUI, T. HOSOI, I. TAKABE, A. KAWAKAMI, *op. cit.*, spec. 10-18. Cf. altresì M. KIRCHBERGER, *Natural Disasters and Labor Markets*, Centre for the Study of African Economies, 2014, e D. VENN, *op. cit.*, 14-15.

(<sup>47</sup>) Among the economic studies aimed at evaluating the consequences of natural disasters on the economy and the labour market, see A.R. BELASEN, S.W. POLACHEK, *How Disasters Affect Local Labor Markets: The Effects of Hurricanes in Florida*, IZA Discussion Paper, 2007, n. 2976; S.

term, but their research outcomes can be questioned in terms of reliability<sup>48</sup>. Even less consideration is given to the consequences of natural hazards in the medium and long term<sup>49</sup> that might depend on the vulnerability and resilience of those affected, as we have seen in par. 1<sup>50</sup>. Likewise limited is the attention paid to the changes in the occupational levels and the labour market (i.e. remuneration, productivity, working conditions) after natural disasters<sup>51</sup>. Therefore, it should come as no surprise that today's measures to aid workers and plants hit by disasters are often piecemeal, temporary and emergency ones<sup>52</sup>.

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HOCHRAINER, *Assessing the Macroeconomic Impacts of Natural Disasters. Are there Any?*, World Bank Policy Research Working Paper, 2009, n. 4968; C.R.H. JARAMILLO, J.R. JR. HINES, *The Impact of Large Natural Disasters on National Economies*, 2006; N. LOAYZA, E. OLABERRÍA, J. RIGOLINI, L. CHRISTIAENSEN, *Natural Disasters and Growth. Going beyond the Averages*, World Bank Policy Research Working Paper, 2009, n. 4980; T.N. RASMUSSEN, *Macroeconomic Implications of Natural Disasters in the Caribbean*, IMF Working Paper, 2004, n. 224; E. STROBL, *The Economic Growth Impact of Hurricanes: Evidence from US Coastal Counties*, IZA Discussion Paper, 2008, n. 3619.

<sup>48</sup> S. HALLEGATTE, V. PRZYLUKI, *The Economics of Natural Disaster. Concepts and Methods*, World Bank Policy Research Working Paper, 2010, n. 5507, argue that the many impact analyses carried out so far have produced contradictory results, for the indicators used in the estimation of the direct and indirect costs of disasters are often unclear. For an evaluation of the macroeconomic impact of natural disasters, see also UNITED NATIONS, *Handbook for Disaster Assessment*, 2014, especially 240-242 for indications concerning the evaluation of the impact on the labour market and earnings.

<sup>49</sup> Cf. A. POPP, *The Effects of Natural Disasters on Long Run Growth*, in *Major Themes in Economics*, 2006, vol. 8; E. CAVALLO, I. NOY, *The Economics of Natural Disasters – A Survey*, IDB Working Paper, 2010, n. 124; C.-K. KIM, *The Effects of Natural Disasters on Long-Run Economic Growth*, in *Michigan Journal of Business*, 2011, vol. 4, n. 1; M. COFFMAN, I. NOY, *Hurricane Iniki: measuring the long-term economic impact of natural disaster using synthetic control*, in *Environment and Development Economics*, 2011, vol. 17, 187-205.

<sup>50</sup> The relevant literature shares the view that underdeveloped countries are affected the most by natural disasters. Some 99% of the people hit by natural catastrophes between 1970 and 2008 were based in Latin America, Asia, Africa and the Caribbean. Cf. E. CAVALLO, I. NOY, *The Economics of Natural Disasters – A Survey*, cit., 11

<sup>51</sup> Among the few contributions on this subject, see: S. JAYACHANDRAN, *Selling Labor Low: Wage Responses to Productivity Shocks in Developing Countries*, in *Journal of Political Economy*, 2006, vol. 114, n. 3; B. LAYTON, *op. cit.*; M. ANDO, *Impact of Recent Crises and Disasters on Regional Production/Distribution Networks and Trade in Japan*, ERIA Discussion Paper, 2013, n. 12; L.D. TRUNG, *Economic and Welfare Impacts of Disasters in East Asia and Policy Responses: The Case of Vietnam*, ERIA Discussion Paper, 2013, n. 11; S. VATHANA, S. OUM, P. KAN, C. CHERVIER, *Impact of Disasters and Role of Social Protection in Natural Disaster Risk Management in Cambodia*, ERIA Discussion Paper, 2013, n. 10; V. MUELLER, A. QUISUMBING, *How Resilient are Labour Markets to Natural Disasters? The Case of the 1998 Bangladesh Flood*, in *The Journal of Development Studies*, 2011, vol. 47, n. 12.

<sup>52</sup> Among the rare contributions on the topic, see D. VENN, *op. cit.*, spec. 15-16.

### 3. The Passive Approach of Public Welfare

According to our comparative analysis, the complex set of initiatives in place to support those affected by natural disasters might depend on the welfare system of each country surveyed. However, a gradual convergence emerges towards the provision of social protection<sup>53</sup>. In legal terms, natural disasters can be regarded as “unforeseeable circumstances or force majeure”<sup>54</sup>. For this reason, the legislation of some countries (e.g. Italy) makes provision for the suspension of tax obligations and social security contributions<sup>55</sup>. While maintaining their jobs, the workers affected by natural disasters are also entitled to time off from work and, in some cases, income support<sup>56</sup>. In other countries, for example in Australia, New Zealand, Turkey and the USA, no measures are in place to reduce or temporarily suspend one’s working activity, yet ordinary and extraordinary<sup>57</sup> unemployment benefits are granted, and complex entitlement procedures are exceptionally streamlined by acting on duration and eligibility criteria (Chile’s and Japan’s case). This second group of countries might also

(<sup>53</sup>) In relation to anti-crisis measures, see S. SPATTINI, M. TIRABOSCHI, *Labor Market Measures in the Crisis and the Convergence of Social Models*, in L.D. APPELBAUM (a cura di), *Reconnecting to Work. Policies to Mitigate Long-Term Unemployment and Its Consequences*, W.E. Upjohn Institute for Employment Research, 2012, 137-166.

(<sup>54</sup>) By way of example, Cf. Gobierno de Chile, Dirección del Trabajo, ord. 19 marzo 2010, n. 1412/021, in [www.dt.gob.cl/1601/w3-article-97663.html](http://www.dt.gob.cl/1601/w3-article-97663.html), e BCN, *Derechos laborales ante catástrofes naturales*, April 2014, in [www.bcn.cl](http://www.bcn.cl). Pursuant to the Chilean Civil and Labour Codes, earthquakes, tsunamis, floods and hurricanes are unforeseeable circumstances that fall outside the notion of work accidents. Consequently, workers can be dismissed without any compensation for early termination.

(<sup>55</sup>) This measure has a wide scope of application.

(<sup>56</sup>) With reference to the Italian case, see M. TIRABOSCHI (a cura di), *Managing and Preventing Natural (and Environmental) Disasters: The Role of Industrial Relations. Some Reflections on the Italian Case*, Working Paper ADAPT, 2013, n. 142. A detailed list of the measures in place in Italy in the event of an earthquake is provided in la *Nota informativa sulle prime misure regionali e nazionali a favore delle popolazioni colpite dal sisma della Regione Emilia Romagna*, 2012, which contains a summary of Decree-Law No. 74/2012, *Interventi urgenti in favore delle popolazioni colpite dagli eventi sismici che hanno interessato il territorio delle province di Bologna, Modena, Ferrara, Mantova, Reggio Emilia e Rovigo, il 20 e il 29 maggio 2012* subsequently amended, converted into Act No. 122/2012, and published in GU, 3 agosto 2012, n. 180 and of other regional, national and European initiatives in force since 13 June 2012.

(<sup>57</sup>) An example of this is the Disaster Unemployment Assistance (DUA), a fund supporting those who are not, or no longer, eligible for unemployment benefits. DUA provides a 26-week benefit that can be extended depending on the circumstances and the seriousness of the situation, as was the case with Hurricane Katrina. Cf. [workforcesecurity.doleta.gov/unemploy/disaster.asp](http://workforcesecurity.doleta.gov/unemploy/disaster.asp). With special reference to measures supporting employment in case of damages caused by hurricanes, cf. INTERNATIONAL HUMAN RIGHTS LAW CLINIC, *When Disaster Strikes: A Human Rights Analysis of the 2005 Gulf Coast Hurricanes*, 2006, especially 40-43.

envisage extraordinary forms of income support to prevent workers' dismissal<sup>58</sup>. Further measures concern placement services for workers who have lost their job following a natural disaster, along with special job creation programmes, tax incentives and engagement in community service<sup>59</sup>. The effectiveness of these measures relies on the financial resources available, the matching between labour demand and supply<sup>60</sup> in the private and public sector, the quality of training and retraining programmes and ultimately on their compatibility with income support policies according to eligibility criteria. There is a serious concern that overly generous benefit systems might act as a disincentive to job searching and favour the growth of the informal economy in disaster-prone areas.

Although laudable, many policies concerning income and employment support show some major shortcomings that are ascribed to their passive approach and the lack of risk management strategies<sup>61</sup>. In other words, they do not consider human error – for example when building facilities and choosing production – nor do they promote the involvement and the empowerment of workers, employers and their representatives on these aspects. In keeping with the idea that natural disasters are the result of unforeseeable events, the foregoing initiatives fail to consider the need to limit those risks that might produce a veritable natural hazard<sup>62</sup>.

The same argument can be made for the piecemeal measures devised following a natural disaster and intended to promote employment and reconstruction in the affected areas<sup>63</sup>. Not only do they report low levels of effectiveness and financial sustainability<sup>64</sup>, but they also show certain limitations, as they are

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(<sup>58</sup>) Still with reference to Australia, Chile, Japan, New Zealand and Turkey, cf. D. VENN, *op. cit.*, 17.

(<sup>59</sup>) p. 18-19.

(<sup>60</sup>) The efficiency of the matching system can be undermined by the impact of natural disasters that can smash the buildings hosting public employment services and private work agencies. This might make it difficult to provide information about the eligibility for subsidies to those who have lost their houses and cannot be reached easily, putting a strain on public services, which are unable to identify those who qualify for placement and training programmes. A considerable number of case studies are available in D. VENN, *op. cit.*, 20-22.

(<sup>61</sup>) On this topic see L. PELHAM, E. CLAY, T. BRAUNHOLZ, *Natural Disasters: What is the Role for Social Safety Nets?*, World Bank SP Discussion Paper, 2011, n. 1102, especially page 14, where social protection measure are said to be important aspects also in terms of prevention.

(<sup>62</sup>) p. 23.

(<sup>63</sup>) For a series of case studies, see D. VENN, *op. cit.*, 20-22.

(<sup>64</sup>) See in particular Chapter III, *Public finance and disasters*, di C. BENSON, E. CLAY, *Economic and Financial Impacts of Natural Disasters: an Assessment of Their Effects and Options for Mitigation: Synthesis Report*, Overseas Development Institute, 2003, 35-54.

emergency measures imposed from on high without envisaging any prevention plan or link with local communities<sup>65</sup>.

#### 4. Occupational Health and Safety Legislation: Current Shortcomings

In some respects, the prevention issues discussed above can be also found in the occupational health and safety (OHS) system, which according to the relevant literature should consider specific types of risks<sup>66</sup>. In Europe, OHS initiatives build on two main principles: prevention and safety, with the latter that should be ensured to the maximum extent possible in technological terms. No special legislation at a European level focuses on natural and environmental disasters. It is the EU directives concerning OHS that lay down the organizational and technical strategies to tackle these events. An example of this is the Workplace Health and Safety Directive 89/391/EEC<sup>67</sup>, which lists a set of guidelines that also address the issues under examination in this paper:

- avoiding risks;
- evaluating the risks;
- combating the risks at source;
- adapting the work to the individual;
- adapting to technical progress;
- replacing the dangerous by those less dangerous;
- developing a coherent overall prevention policy;
- prioritizing collective protective measures (over individual protective measures);

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<sup>(65)</sup> It might be important to point out the positive experience of the United Nations Development Program (UNDP), and its cooperation with the private sector and the local communities following the Haiti earthquake of 12 January 2010, as it has been described by UNDP in *Haiti Rebuilds*, 2011.

<sup>(66)</sup> A general overview of the health and safety risks faced by workers in the event of disasters and emergencies is provided in M. MILCZAREK (a cura di), *op. cit.* More detailed information concerning the impact of disasters on workers' and people's health and safety is provided in the papers presented at the seminar *The labour market impacts of natural and environmental disasters*, especially H. YOSHIDA, *Results of an Analysis of Personal Questionnaire Surveys on the Great East Japan Earthquake: Income, workplace, daily living, and health*, and S. UMEZAWA, *The Great East Japan Earthquake: Its Damages, Impacts on the Labor-economy and Restoration Measures of the Government*.

<sup>(67)</sup> Cf. Article 6 of Directive 89/391/EEC of 12 June 1989 concerning the implementation of measures necessary for the safety and health protection of workers at the workplace. For a recent analysis concerning the evolution of European occupational health and safety and the principles laid down in the directive, cf. L. ANGELINI, *La sicurezza del lavoro nell'ordinamento europeo*, Working Paper di Olympus, 2013, n. 29.

- giving appropriate instructions to the workers.

The framework directive has long since been implemented by EU Member States<sup>68</sup> and lays down a series of obligations for both employers and employees. These duties involve all industries and have many practical implications on the prevention and management of ordinary and extraordinary emergency situations resulting from natural and environmental disasters. Examples include the obligation to establish prevention and protective measures<sup>69</sup> to promote individual and collective protection<sup>70</sup>, to inform and train workers on the general and specific risks related to their working activity and on protection equipment<sup>71</sup>. Regarding the management of emergencies, workers are under the obligation to take the necessary measures for first aid, fire-fighting and evacuation of workers to be adopted in the event of imminent danger<sup>72</sup>. Further, they must also arrange any necessary contacts with external services, particularly as regards first aid, emergency medical care, rescue work and fire-fighting<sup>73</sup>. In case of serious or imminent dangers, employers must also:

a) as soon as possible, inform all workers who are, or may be, exposed to serious and imminent danger of the risk involved and of the steps taken or to be taken as regards protection;

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(<sup>68</sup>) For an institutional analysis of the implementation of Directive 89/391/EEC, cf. Communication (COM [2004] 62) of the Commission on the practical implementation of the provisions of directive 89/391 EEC (framework directive), 89/654 EEC (workplaces), 89/655 EEC (work equipment), 89/656 EEC (personal protective equipment), 90/269 EEC (manual handling of loads) and 90/270 EEC (display screen equipment). Regarding the overall structure of the directive and its impact in Member States, cf. the comparative analysis of J.E. KINEKE, *The EEC Framework Directive for Health and Safety at Work*, in *Boston College International and Comparative Law Review*, 1991, vol. 14, n. 1, 213 and following. On the implementation strategies and issues in Member States, see the comparison provided in L. VOGEL, *Prevention at the workplace. An initial review of how the 1989 Community Framework Directive is being implemented*, European Trade Union Technical Bureau for Health and Safety, 1993. Another comparison is supplied in B. VALDÉS DE LA VEGA, *Occupational Health and Safety: An EU Law Perspective*, in E. ALES (edited by), *Health and Safety At Work. European and Comparative Perspective*, Kluwer Law International, 2013, 1, and *Seminario internazionale di Diritto comparato del lavoro – Pontignano XXVII*, in AA.VV., *Il diritto del lavoro nel sistema giuridico privatistico. Atti delle giornate di studio di diritto del lavoro. Parma, 4-5 giugno 2010*, Giuffrè, 2011, 356.

(<sup>69</sup>) Cf. Art. 7 of Directive 89/391/EEC.

(<sup>70</sup>) Cf. Art. 8 of Directive 89/391/EEC.

(<sup>71</sup>) Articles 10 e 12 of Directive 89/391/EEC.

(<sup>72</sup>) Article 8 of Directive 89/391/EEC.

(<sup>73</sup>) Cf. Art. 8 of Directive 89/391/EEC.

b) take action and give instructions to enable workers in the event of serious, imminent and unavoidable danger to stop work and/or immediately to leave the workplace and proceed to a place of safety;

c) save in exceptional cases for reasons duly substantiated, refrain from asking workers to resume work in a working situation where there is still a possibility of serious and imminent danger.

Conversely, workers who, in the event of serious, imminent and unavoidable danger, leave their workstation and/or a dangerous area may not be placed at any disadvantage because of their action and must be protected against any harmful and unjustified consequences, in accordance with national laws and/or practices<sup>74</sup>. Overall, one might argue that the radical change imposed by EU legislation represents a move away from the technology-based approach to promote prevention, paving the way to occupational health and safety policies centered on workers, active involvement and social dialogue.

It should be pointed out that, unlike other countries<sup>75</sup>, the Italian provisions transposing EU norms do not deal with the management of daily and emergency risks intended to reduce the impact of natural, technological and environmental disasters.

In the absence of a comprehensive set of rules at the European level, special reference should be made to the four Seveso Directives that have been long regulating the issue of industrial plants exposed to so-called “relevant accident risks”<sup>(76)</sup>. These four directives were issued following a number of industrial accidents occurred in Europe, particularly the 1976 Seveso disaster involving ICMESA, a chemical plant based in Italy. According to the directives, it is down to Member States to set forth protection measures supplementing the ones discussed above that have a more general character.

Initially implemented only in certain industries, these safeguards were extended to all those sectors that might be potentially affected by similar industrial accidents. Examples include a major emission, fire or explosion resulting from uncontrolled developments in the course of an industrial activity, leading to a

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<sup>(74)</sup> Art. 8 of Directive 89/391/EEC.

<sup>(75)</sup> Cf., current legislation in Japan – a country with many disaster-prone areas – and particularly the latest version of the 1972 *Safety and Health Act*. Cf. the documentation collected on the website of the Japan International Center for Occupational Health and Safety, [www.jniosh.co.jp](http://www.jniosh.co.jp).

<sup>(76)</sup> Cf. Directive 82/501/EEC (so-called Seveso Directive); Directive 96/82/EC (so-called Seveso Directive II); Directive 2003/105/EC (so-called Seveso Directive II-*bis*) and Directive 2012/18/EC (known as Seveso Directive III) that will enter into force from 1 June 2015 and will replace the previous three.

serious danger to man, immediate or delayed, inside or outside the establishment, and/or to the environment, and involving one or more dangerous substances<sup>(77)</sup>. The directives lay down more stringent requirements concerning risk evaluation that add to further obligations on the part of employers to provide information to environmental and public security officers, and additional monitoring and sanctioning mechanisms (e.g. the temporary suspension of production)<sup>78</sup>. The significance of the regulations laid down by these directives cannot be questioned. Nevertheless, their scope of application is limited if compared to the general principles outlined above and is dependent upon some special circumstances concerning certain industrial activities (e.g. the use of dangerous substances that might cause emissions, fires, or explosions). Accordingly, natural disasters and the wider range of environmental and technological ones do not fall within the “special circumstances” referred to above.

Things are slightly different in the USA; the 9/11 attacks<sup>79</sup> and their consequences on the workers engaged in the rescue operations prompted the US government to review the National Response Plan and develop a *Worker Safety and Health Support Annex*<sup>80</sup> to protect them and prevent similar risks and possible disasters<sup>81</sup>.

Besides the above procedures and formal obligations, the Occupational Safety and Health Administration (OSHA) published documentation and organised training programmes on the prevention and management of occupational health and safety risks resulting from environmental and natural disasters for each industry and hazard. While increasing the levels of resilience of employers and employees facing these disasters, these initiatives provided practical tools

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(77) On the Italian perspective, Cf. D. DEL DUCA, M. GIOVANNONE, *Disastri naturali e lavoro: misure prevenzionistiche e di protezione sociale*, che segue in *g. Sezione*.

(78) On the measures laid down by the Seveso Directive, cf. C. KIRCHSTEIGER (edited by), *Risk Assessment and Management in the Context of the Seveso II Directive*, Elsevier, 1998, and N. MITCHISON, G. PAPADAKIS, *Safety Management Systems under Seveso II: Implementation and Assessment*, in *Journal of Loss Prevention in the Process Industries*, 1999, vol. 12, n. 1.

(79) Cf. K.M. WALLINGFORD, E.M. SYNDE, *Occupational Exposures During the World Trade Center Disaster Response*, in *Toxicology and Industrial Health*, 2001, vol. 17, n. 5-10; S.I. BERRIOS-TORRES, J.A. GREENKO, M. PHILLIPS, J.R. MILLER, T. TREADWEL, R.M. IKEDA, *World Trade Center Rescue Worker Injury and Illness Surveillance, New York, 2001*, in *American Journal of Preventive Medicine*, 2003, vol. 25, n. 2, and Various Authors, *Exposure, probable PTSD and lower respiratory illness among World Trade Center Rescue, Recovery and Clean-up workers*, in *Psychological Medicine*, 2012, vol. 42, n. 5.

(80) [www.fema.gov/pdf/emergency/nrf/nrf-support-wsh.pdf](http://www.fema.gov/pdf/emergency/nrf/nrf-support-wsh.pdf), 2008.

(81) Cf. M.A. CRANE, D.J. MILEK, Y. GLOBINA, L. SEIFU, P.J. LANDRIGN, *The Lessons of September 11*, in *Industrial Health*, 2011, vol. 49, n. 6, and D.B. REISSMAN, J. HOWARD, *Responder Safety and Health: Preparing for Future Disasters*, in *Mount Sinai Journal of Medicine*, 2008, vol. 75, n. 2.

to prevent them through cooperation between business and public authorities<sup>82</sup>.

Along similar lines, the Centers for Disease Control and Prevention of The National Institute of Occupational Safety and Health (NIOSH) made available on its website papers, recommendations, guidelines and information organized by type of disaster and industry<sup>83</sup>. One might note that legal formalism and mere compliance with norms usually prevail over integrated risk management at the time of implementing safety and preventive measures. This adds to the low effectiveness of such regulations especially when involving workers in small-sized businesses, atypical workers, those engaged in subcontract work or hired on fixed-term employment contracts.

Not surprisingly, the enormous number of provisions are not swiftly applicable in the event of natural hazards, as the 2011 earthquake and the nuclear disaster of Fukushima clearly demonstrated<sup>84</sup>.

Overstressing technical and engineering aspects led those concerned to disregard another important aspect. As a rule, the prevention and management of the actual risks, not just the potential ones, are not the direct consequence of the interaction between human beings, and technology and safety procedures, but originate from the behaviors of groups<sup>85</sup> of people that cannot be rationally determined, especially when top-down management, sanctions and monitoring activities are in place.

Overall, OHS legislation fails to properly consider those factors increasing the levels of vulnerability in the “business community” (i.e. people, machinery, equipment and facilities). This should be the actual response of any organization to the different risks (either environmental or natural) that are likely to emerge in dangerous activities, e.g. the production of certain goods and services.

Scant consideration has been given to this issue by the international literature, which however shares the view that the adoption of ad-hoc measures – even where supplemented with specific legislation and innovative technologies – is not sufficient to ensure effective protection, particularly when these incidents

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(<sup>82</sup>) See the ad-hoc section of the OSHA website [www.osha.gov/SLTC/emergencypreparedness/index.html](http://www.osha.gov/SLTC/emergencypreparedness/index.html).

(<sup>83</sup>) See the ad-hoc section of the NIOSH website, [www.cdc.gov/niosh/topics/emergency.html](http://www.cdc.gov/niosh/topics/emergency.html).

(<sup>84</sup>) Cf. K. MORI, S. TATEISHI, K. HIRAOKA, T. KUBO, R. OKAZAKI, K. SUZUKI, Y. KOBAYASH, K. KOHNO, *How Occupational Health can Contribute in a Disaster and What We should Prepare for the Future. Lessons Learned through Support Activities of a Medical School at the Fukushima Daiichi Nuclear Power Plant in Summer 2011*, in *Journal of Occupational Health*, 2013, vol. 55, n. 1. Cf. also M.R. SIM, *Disaster Response Workers: Are we Doing Enough to Protect Them?*, in *Occupational Environmental Medicine*, 2011, vol. 68, n. 5.

(<sup>85</sup>) On this point, Cf. K. FARA, *How Natural are ‘Natural Disasters’? Vulnerability to Drought of Communal Areas in Southern Namibia*, in *Risk Management*, 2001, vol. 3, n. 3.

affect human rationality. It is thus suggested that practical tools should be devised aimed at preventing rather than managing the effects of these disasters. Such initiatives ought to be fine-tuned by building on past experience<sup>86</sup> and by involving both workers and management<sup>87</sup>. In this sense, one serious issue is the absence of professionals trained to deal with safety procedures at work during exceptional events like those described in this paper<sup>88</sup>.

### 5. The Possible Role of Industrial Relations and Local Welfare Systems

The violent earthquake that hit the Emilia Romagna region between May and June 2012 gives us the opportunity to reflect on the role played by industrial relations and labour law in the prevention and management of natural disasters. What was striking about that tragedy was that the fatalities were mostly workers who survived the earthquake but died after returning to work, because of the collapse of the building that was previously declared structurally safe<sup>89</sup>.

This tragedy clearly indicates<sup>90</sup> some shortcomings of the legal system that is well developed in terms of formal safeguards, but presents some limits concerning their practical implementation and some resistance to incorporate a wider and dynamic notion of “risk”. This is because workers’ safety trumps that of businesses and the area affected. They are still treated as two different domains, yet a more effective dialogue between employers and trade unions to reconcile these two aspects would have perhaps avoided these fatalities.

In this sense, another earthquake that took place in the Umbria region between 1997 and 1998 highlights the major role of the industrial relations system in warding off and dealing with natural disasters. On that occasion, the “Single Insurance Contribution Payment Certificate” (*Documento Unico di Regolarità Contributiva - DURC*) was issued to ensure that only employers who comply

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(<sup>86</sup>) On the positive outcomes of the strategy based on an analysis of earthquake precursors, Cf. D.L. COOKE, T.R. ROHLER, *Learning from incidents: from normal accidents to high reliability*, in *System Dynamics Review*, 2006, vol. 22, n. 3.

(<sup>87</sup>) Cf. R. SCHOUTEN, M.V. CALLAHAN, S. BRYANT, *Community Response to Disaster: The Role of the Workplace*, in *Harvard Review of Psychiatry*, 2004, vol. 12, n. 4.

(<sup>88</sup>) Again, see K. MORI, S. TATEISHI, K. HIRAOKA, T. KUBO, R. OKAZAKI, K. SUZUKI, Y. KOBAYASHI, K. KOHNO, *op. cit.*, 9.

(<sup>89</sup>) Cf. M. GIOVANNONE, *Calamità naturali e sicurezza dei lavoratori: un binomio che fa tremare*, in E. MASSAGLI, S. SPATTINI, M. TIRABOSCHI (a cura di), *Il mondo del lavoro alla prova del terremoto*, Boll. spec. ADAPT, 4 giugno 2012, n. 15.

(<sup>90</sup>) By way of example, one might recall the 1999 earthquakes in Turkey and Taiwan, where thousands of workers passed away because of the employers’ failure to comply with anti-seismic legislation. Cf. T. CANNON, *Reducing People’s Vulnerability to Natural Hazards. Communities and Resilience*, WIDER Research Paper, 2008, n. 34, 7.

with anti-seismic regulations were involved in rebuilding. DURC was created to select compliant employers to be engaged in reconstruction and indirectly safeguard workers and all those operating in the areas hit by the disaster.

Originally an industrial relations practice, DURC was implemented through national legislation<sup>91</sup> and emerged as a major tool against irregular work, especially in those industries where contracting and subcontracting were the norm<sup>92</sup>.

Arguably, national and international institutions and the relevant literature have paid little attention to the prevention and the management of natural disasters from an industrial relations perspective. Notions such as “resilience” and “vulnerability”<sup>93</sup> are examined in literature when discussing management and prevention strategies, yet they are not part of a common theoretical framework. Therefore, no practical initiatives can be devised allowing one to move beyond merely theoretical abstractions<sup>94</sup>.

Industrial relations and welfare systems might contribute to emphasizing the role of business communities and strengthening the link between the notions of resilience and vulnerability. On the one hand, they can promote a practical approach to increasing community resilience. On the other hand, they can help tackle people’s vulnerability in the long run, acting on incomes, expertise and social security.

While acknowledging the peculiarities of national industrial relations and welfare systems, the involvement of the social partners, employers and employees in the planning and implementation of prevention, mitigation and reconstruction initiatives might produce significant results, among others:

- 1) increased effectiveness of health and safety rules at the workplace and emergency measures in the event of a natural disaster;
- 2) increased ability to prevent situations of risk<sup>95</sup> and, after the disaster, to devise initiatives that consider the needs of the industry, the area and the business affected;

<sup>(91)</sup> Act No. 266/2002 and Legislative Decree 276/2003.

<sup>(92)</sup> On this point, see Cf. K. FARA, *op. cit.*, 47-63.

<sup>(93)</sup> Cf. D. DE SANCTIS, *L’edilizia trasparente. Il Durc contro il sommerso: da un’idea Filca alla riforma Biagi*, Edizioni Lavoro, 2003, and R. BONANNI, *Il contributo alla nascita del DURC il Documento Unico di Regolarità Contributiva*, Guida, 2014.

<sup>(94)</sup> In this sense, see Cf. A. GALDERISI, F.F. FERRARA, A. CEUDECH, *op. cit.* Cf. also A. ROSE, *Economic Resilience to Natural and Man-Made Disasters: Multidisciplinary Origins and Contextual Dimensions*, in *Environmental Hazards*, 2007, vol. 7, n. 4, according to whom «due to the heterogeneity of approaches and to the different disciplinary perspectives, the concepts of resilience is in danger of becoming a vacuous buzzword from overuse and ambiguity».

<sup>(95)</sup> Cf. UNEP, *Labour and the Environment: A Natural Synergy*, 2007, 8.

- 3) An overall reduction of factors of economic and social vulnerability that affect in important respects the population hit by the disaster;
- 4) An increase in the levels of resilience in a given area or at the individual level, by involving existing firms and facilities. In this sense, the network of businesses operating in the disaster-affected area should provide professional and managerial expertise, promoting reconstruction in financial, logistic, and technological terms<sup>96</sup>;
- 5) A genuine contribution to reconstruction, through the implementation of job-creation policies and the pro-active management of the mismatch of labour demand and supply following the natural disaster, also taking into account other aspects (e.g. remuneration).
- 6) The responsible management of social protection and welfare measures, which might take place also through decentralization, as demanded of international institutions.<sup>97</sup>

Not surprisingly, the effectiveness of welfare systems has been questioned also in consideration of the increasing number of natural disasters caused by human behavior and climate change. The discussion concerns the impact of disasters on public expenditure and calls for the involvement of private insurance companies and semi-public institutions, along the lines of what happened<sup>98</sup> in other pension and social security systems<sup>99</sup>. This is the perspective adopted by some international institutions, among others the International Monetary Fund<sup>100</sup>, the World Bank<sup>101</sup>, the OECD<sup>102</sup>, and the European Union, which has

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<sup>(96)</sup> See the empirical study carried out by J.I. SANCHEZ, W.P. KORBIN, D.M. VISCARRA, *op. cit.*, that is one of the few contributions providing some insight into this issue.

<sup>(97)</sup> Cf. L. PELHAM, E. CLAY, T. BRAUNHOLZ, *op. cit.*, especially 99. Cf. also T. CANNON, *Reducing People's Vulnerability to Natural Hazards. Communities and Resilience*, cit.

<sup>(98)</sup> Cf. M. MELECKY, C. RADDATZ, *How do Governments Respond after Catastrophes? Natural-Disaster Shocks and the Fiscal Stance*, World Bank Policy Research Working Paper, 2011, n. 5564, and J.D. POLLNER, *Catastrophe Risk Management. Using Alternative Risk Financing and Insurance Pooling Mechanisms*, World Bank Policy Research Working Paper, 2001, n. 2560.

<sup>(99)</sup> In this perspective, Cf. A. COVIELLO, *Calamità naturali e coperture assicurative. Il risk management nel governo dei rischi catastrofali*, Dario Flaccovio, 2013.

<sup>(100)</sup> In this sense, see D. HOFMAN, P. BRUKOFF, *Insuring Public Finances Against Natural Disasters – A Survey of Options and Recent Initiatives*, IMF Working Paper, 2006, n. 199.

<sup>(101)</sup> In this sense, see F. GHESQUIERE, O. MAHUL, *Financial Protection of the State against Natural Disasters. A Primer*, World Bank Policy Research Working Paper, 2010, n. 5429.

recently issued the Green Paper on the Insurance of Natural and Man-made Disasters<sup>103</sup>.

Although limited in number, some Italian cases are noteworthy, especially because of the involvement of certain joint systems known as “bilateral bodies” that provide social protection and income support while putting forward specific measures to mitigate the impact of a natural disaster<sup>104</sup>. By way of example, it is worth recalling the agreement concluded by the bilateral bodies of Confesercenti and Unicredit operating at a national level, by virtue of which the employers and the employees affected by the 2012 earthquake in Emilia Romagna had access to funds at favorable conditions to financially help them to resume work. Specifically, the agreement provides 12-month interest-free loan schemes with no arrangement fees that will be paid off in a single payment by the bilateral bodies of Confesercenti.

Still examining the 2012 earthquake in the Emilia Romagna region, the Italian institution Fondartigianato, (which includes the Interprofessional Fund for lifelong learning set up by Confartigianato, Can, Casartigiani, Claii, Cgil, Cisl and Uil) in September 2012<sup>105</sup> allocated €1.700.000 to devise specific training in disaster-affected areas according to a document issued by the Head of Department of the Italian Civil Protection appended to Decree-Law No. 74/2012. This initiative intends to fulfill a number of objectives:

- support the resumption of business activity and promote the importance of lifelong learning especially in small and medium-sized firms;
- strengthen the levels of expertise and competitiveness of businesses to promote local development and that of specific industries and production;
- create employment opportunities and promote human capital. The intention is to prioritize vocational training in order to form staff specialized in the restoration and maintenance of production sites and architectural and artistic

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(102) Cf. OECD Recommendation, *Good practices for mitigating and financing catastrophic risks*, 16 dicembre 2010; OECD, *Disaster Risk Assessment and Risk Financing. A G20/OECD Methodological Framework*, 2012.

(103) EUROPEAN COMMISSION, *Green Paper on the insurance of natural and man-made disasters*, 16 April 2013, COM(2013)213 final. Cf. S. MACCAFERRI, F. CARIBONI, F. CAMPOLONGO, *Natural Catastrophes: Risk relevance and Insurance Coverage in the EU*, JRC Scientific and Technical Report, Publications Office of the European Union, 2012.

(104) Cf. again M. TIRABOSCHI (edited by), *op. cit.*

(105) Cf. FONDARTIGIANATO, *Invito per la realizzazione di attività di formazione continua per la ripresa economica e produttiva delle zone colpite dal sisma del maggio 2012*, 2012.

complexes, so as to produce high-impact and innovative processes and products;

- widen the base of training recipients and increase the activity of the Fund especially in emergency situations resulting from the earthquake.

More to the point, in the event of suspension of work resulting from exceptional weather conditions or natural disasters, the Lazio-based bilateral body for artisans provides a wage subsidy amounting to 40% of the net hourly rate for the first 4 weeks up to a maximum of 160 hours per year.

Also, the bilateral bodies in Varese provide a one-off contribution for employers who have incurred expenses as a result of the damages caused by exceptional events and arising from “natural causes” that brought about a partial or total suspension of production in the six months following the event. This money is intended to help to immediately resume the production cycle and to make up for damages caused to property, plants, equipment, materials and products. A subsidy is granted up to a maximum of €1,000,00.

The bilateral body of the Artisan Sector of Tuscany has allocated €1,200,00 to support an emergency intervention in favour of businesses and self-employed artisans affected by the floods that have plagued many areas in the municipalities of Grosseto, Massa Carrara, Lucca and Siena. In addition, a further €300,000 were allocated at the initiative of trade unions CGIL, CISL and UIL for interventions in favor of employees of small-sized businesses affected by the flooding.

Clearly, the development of bilateralism can only be positively evaluated as an out-of-company channel of communication favouring consultation and participation at the workplace – ensuring an immediate response to crises, and enabling medium to long-term solutions to events that may affect workplace safety as well as labour market stability in the afflicted areas.

Finally, the industrial relations system can help to cast light on the consequences that climate change and the increasing number of natural disasters might have on employment. An example of this is the plan devised in Italy by Cgil to tackle the disturbances of the hydrological cycle. The objective is to envisage effective land management initiatives to limit the number of fatalities and the damages to houses and businesses resulting from floods and landslides, while training skilled workers and providing them with stable employment <sup>(106)</sup>.

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<sup>(106)</sup> An overview of the plan is available at [www.cgil.it/Archivio/Ambiente-Territorio/SicurezzaAmbientale/Sintesi\\_reports.pdf](http://www.cgil.it/Archivio/Ambiente-Territorio/SicurezzaAmbientale/Sintesi_reports.pdf).

## 6. The Central Role of Labour Market Institutions in Mitigation and Reconstruction Strategies: Conversion of Production and Workers' Retraining

In par. 2 reference has been made to the mismatch between labour supply and demand following a natural disaster. This involves either the need for a qualified workforce to be employed in post-disasters activities or contractual and pay conditions, more generally. While the latter are dependent upon the characteristics of national industrial relations systems (see par. 5), the former rest on the promotion of mitigation and reconstruction strategies on the part of labour market institutions.

Aside from causing fatalities, natural and environmental disasters have serious economic consequences, either in terms of direct costs (e.g. rebuilding) or indirect costs (e.g. a lower contribution to the economy and the production of goods and services, the suspension of activity following the earthquake, and a loss of production during reconstruction).

The strategies to mitigate the effects of natural disasters might give rise to production reconversion in the direction of environmental sustainability (e.g. the green economy)<sup>107</sup> – which might contribute to creating new productive processes and retraining workers. In this sense, the notion of “ecological conversion” is making inroads in Italy and elsewhere as a process to help to overcome environmental issues, namely climatic changes, droughts, water shortages, resource depletion, and natural disasters. Arguably, this process will also boost employment, favouring the hiring of new personnel and disseminating technical skills<sup>108</sup>.

Post-disaster reconstruction can favour this ecological conversion through the establishment of renewable energy plants (wind energy, solar energy, geothermic energy, biomass energy, water energy and so forth), the provision of mechanical and electronic tools to promote efficiency in the use of energy, the recourse to sustainable and shared methods of transport and systems of resource recovery (waste recycling). Further benefits include developing the know-how to protect and regenerate the areas affected, promoting environmental-friendly farming for which high-qualified workers are needed, as well as restoring decommissioned facilities<sup>109</sup> and providing technical and maintenance skills to make full use of goods, also by means of informative

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<sup>(107)</sup> Cf. L. RUSTICO, M. TIRABOSCHI, *Le prospettive occupazionali della green economy tra mito e realtà*, in *Rivista*, 2010, n. 4, and the bibliography therein. Cf. also UNEP, *op. cit.*

<sup>(108)</sup> Cf. M. SCOTT, *Climate Change: Implications for Employment*, ETUI, 2014.

<sup>(109)</sup> An example of this is Rutgers University that was awarded funding to conduct sustainable reconstruction in 54 towns in the Raritan river Basin. Cf. [www.doi.gov/hurricanesandy/index.cfm](http://www.doi.gov/hurricanesandy/index.cfm).

initiatives. Through recycling, the lifecycle of numerous goods and items can be rescheduled in order to recoup efficiency in terms of resources and energy. A shortening of the productive cycle (involving raw materials, transformation, manufacturing, and the use of final product) could decrease energy waste and minimize the impact on environment. It is not a coincidence that a rise has been reported in green jobs, that is in “those occupations that contribute to a large extent to preserving or restoring the quality of environment in agriculture, industry, services or administration”<sup>110</sup>. The green economy can affect different sectors and aspects in our lives (transport, renewables, communications, finance, waste management, agriculture), with important implications on the labour market.

Identifying new occupations and reviewing existing ones considering an ecological perspective call for different and more defined skills that are closely related to the organisation and different stages of production. Once these new professions are defined, a qualitative evaluation is necessary concerning aspects such as work organisation, remuneration, and professional growth considering emerging factors like health and safety issues, therefore ensuring that any *green job* will also be a *decent job*<sup>111</sup>.

In order to generate new green jobs and make existing ones more sustainable in different industries, it is pivotal to fill the skills gap concerning the green economy that hampers technological progress and sustainable behavior, concurrently promoting carbon low emission strategies.

Arguably, inadequate competences and the disregard for the foregoing issues on the part of many industrial relations actors can be seen as the underlying causes of a vicious cycle of low productivity and incomes that excludes workers from active participation in economic and growth.

## **7. The Qualification System for Businesses and the Prevention of Risks related to Natural, Environmental and Technological Disasters: Considerations and Future Prospects**

The “Single Insurance Contribution Payment Certificate” (DURC)<sup>112</sup> laid down by Italian legislation brings to the fore the major role of industrial relations and labour law in preventing and mitigating the impact of natural disasters. Through DURC, a special mechanism has been introduced to select the businesses allowed to operate in certain key markets (construction, transports,

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<sup>(110)</sup> Cf. WORLDWATCH INSTITUTE, *Green Jobs: Towards decent work in a sustainable, low-carbon world*, UNEP, 2008, 3.

<sup>(111)</sup> p. 4.

<sup>(112)</sup> *Supra*, § 5. Cf. D. DEL DUCA, M. GIOVANNONE, *op. cit.*

sterilization services for hotels and hospitals, and so forth), in consideration of the main environmental issues and the occupational health and safety of those workers involved in these activities. This is the rationale behind the idea of “a qualification system for employers and self-employed workers”<sup>113</sup>, a regulatory tool which at first addressed only public works contracts<sup>114</sup>, and then it was enhanced and reviewed to ensure occupational health and safety as dictated by the 2008 Consolidated Act, especially in light of the amendments made in 2009<sup>115</sup>.

This system is in keeping with the idea to promote the resilience and reduce the vulnerability of local communities. This should take place through the active involvement of employers<sup>116</sup>, and the provision of social protection and support for most vulnerable groups. In this sense, the businesses allowed to operate in certain markets are selected considering the recommendation of joint bodies, the possession of required expertise, the implementation of certified training, and contractual and organizational standards, also in flexible forms of work<sup>117</sup>.

The qualification system for businesses and employers might become a connecting link between theory and practice, helping to implement resilience initiatives and tackling vulnerability through the creation of infrastructure especially in disaster-prone areas. Similar measures might include the establishment of a wide network of technology and professional institutions in order to avoid that the initiative laid down in rules and preventive plans remain on paper.

In defining the concept of resilience, the literature has long made the point that this notion is in many respects similar to that of “capacity”<sup>118</sup>, for it refers to aspects like expertise, training and professionalism that also characterize the qualification system for businesses and workers laid down in the Consolidation

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(<sup>113</sup>) Cf. M. TIRABOSCHI, *Il sistema di qualificazione delle imprese e dei lavoratori autonomi*, in M. TIRABOSCHI, L. FANTINI (a cura di), *Il Testo Unico della salute e sicurezza sul lavoro dopo il correttivo (d.lgs. n. 106/2009). Commentario al decreto legislativo n. 81/2008 come modificato e integrato dal decreto legislativo n. 106/2009*, Giuffrè, 2009.

(<sup>114</sup>) This also concerned the certification, supervision and verification procedures introduced by Law No. 109 of 1994 and Legislative Decree No. 163 of 2006, as amended and supplemented by Legislative Decree No. 152 of 2008 laying down the Code of public works contracts, public supply contracts, and public service contracts implementing Directives No. 2004/17/EC and No. 2004/18/EC.

(<sup>115</sup>) Legislative Decree n. 106/2009, amending Legislative Decree n. 81/2008.

(<sup>116</sup>) Cf. T. CANNON, *Reducing People's Vulnerability to Natural Hazards. Communities and Resilience*, cit.

(<sup>117</sup>) According to Title VIII, par. I of Legislative Decree No. 276/2003.

(<sup>118</sup>) Cf. T. CANNON, *Reducing People's Vulnerability to Natural Hazards. Communities and Resilience*, cit., 9.

Act on Occupational Health and Safety. In other words, these features allow people to tackle and react to potential and actual risks because they are prepared and trained properly.

# Indirect Discrimination 15 Years on

Erica Howard \*

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## 1. Introduction

European Union anti-discrimination law<sup>1</sup> prohibits direct and indirect discrimination, harassment and victimization on the grounds of gender, racial or ethnic origin, religion or belief, disability, age and sexual orientation. The focus of this article is on indirect discrimination, but the concept of direct discrimination and some of its distinctions from indirect discrimination will also be touched upon. Direct discrimination occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation on a prohibited ground. Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons with a particular protected characteristic at a particular disadvantage compared with other persons, unless this is objectively justified by a legitimate aim and the means used to achieve that aim are proportionate and necessary.<sup>2</sup>

In this article, an overview of the development of the concept of indirect discrimination and the rationale for this development will be given. This is

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<sup>1</sup> The main Directives are: Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin [2000] OJ L 180/22; Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L 303/16; Directive 2004/113/EC Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services [2004] OJ L 373/37; and, Directive 2006/54/EC on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast) [2006] OJ L 204/23. The latter Directive repealed a number of earlier Directives prohibiting sex discrimination.

<sup>2</sup> See for the definition: Article 2(2)(a) (direct discrimination) and (b) (indirect discrimination) of Directives 2000/43/EC and 2000/78/EC, Article 2(a) and (b) of Directive 2004/113/EC and Article 2(1)(a) and (b) of Directive 2006/54/EC.

followed by an analysis of the elements of indirect discrimination which can be deduced from the definition: particular disadvantage and objective justification. The analysis of the term ‘particular disadvantage’ will include an examination of the question whether evidence is needed of actual group disadvantage and will conclude that this is not required. The examination of objective justification also discusses that the test for objective justification can be said to come close to imposing a duty of reasonable accommodation. The differences between direct and indirect discrimination as regards to justification will be addressed as well as the question whether objective justification of direct discrimination should be permitted.

## 2. Development of Indirect Discrimination

The origins of the concept of indirect discrimination can be traced to the US case of *Griggs v Duke Power*,<sup>3</sup> where the Duke Power Company required all employees applying for other than the lowest paid jobs to score well in two separate aptitude tests and to have a high school leaving certificate. These requirements, which were not directly related to the nature of the jobs, in effect almost fully excluded Afro-Americans from the higher paid jobs because they were less likely to pass the tests or have a high school leaving certificate. So, although the test appeared neutral and applicable in the same way to all employees, Afro-Americans were significantly disadvantaged. When the case reached the US Supreme Court, it held that the prohibition of racial discrimination in the Civil Rights Act 1964 did include the situation where neutral practices, procedures or tests were discriminatory in operation. The Court considered that, ‘the touch stone is business necessity. If an employment practice, which operates to exclude negroes cannot be shown to be related to job performance, the practice is prohibited’.<sup>4</sup> The Court also held that it was up to the employer to show the relationship with the job performance ability. Therefore, it can be said that the US Supreme Court in this case established that the Civil Rights Act 1964 prohibited indirect discrimination. From then onwards, the US law on indirect discrimination developed and, in 1991, the concept was laid down in the Civil Rights Act 1991. This determines that a person establishes a prima facie breach of the Act’s anti-discrimination provisions if they can show that an employer uses ‘a particular employment practice that causes disparate impact on the basis of race, color, religion, sex, or national origin’. The employer can then defend themselves against this by showing ‘that the challenged practice is job related for the position in question

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<sup>3</sup> *Griggs v Duke Power Co* 401 US 424 (1971).

<sup>4</sup> *Ibid*, 431.

and consistent with business necessity’, but, this defence will not succeed if the employee demonstrates that there is an alternative practice with less disparate impact which serves the employer’s legitimate needs and the employer has refused to adopt this alternative practice.<sup>5</sup>

*Griggs v Duke Power* and the subsequent developments in the US influenced the inclusion of indirect discrimination provisions in the British Sex Discrimination Act 1975 (SDA 1975) and Race Relations Act 1976 (RRA 1976). Under the SDA 1975, the complainant had to show that ‘considerable fewer women than men’ could comply with a requirement and the RRA 1976 contained a similar provision on indirect race discrimination. This meant that statistical evidence was required to prove indirect discrimination and this led to difficulties for a complainant, not only because statistics might not be available, but also because, even if they were available, they might be difficult to obtain.<sup>6</sup>

US and UK anti-discrimination law and the concept of indirect discrimination influenced the development of the concept in the EU through the case law of the Court of Justice of the European Union (CJEU) on equal pay rules and gender discrimination. Barnard and Hepple write that ‘the introduction of the concept of indirect discrimination into Community law is a remarkable example of judicial creativity’.<sup>7</sup> In 1981, in *Jenkins v Kingsgate (Clothing Productions) Ltd*,<sup>8</sup> the CJEU was asked whether lower hourly rates for part-time work constituted sex discrimination as women were more likely to work part-time than men. The CJEU held that this would not offend against the principle of equal pay ‘in so far as the difference in pay between part-time work and full-time work is attributable to factors which are objectively justified and are in no way related to any discrimination based on sex’.<sup>9</sup>

*Bilka Kaufhaus*<sup>10</sup> concerned part-time workers who were excluded from a pension scheme. This affected a far greater number of women than men. The CJEU established that indirect discrimination was prohibited by EU law and developed a test for justification of indirect discrimination: ‘the employer must ... put forward objective economic grounds relating to the management of the undertaking. It is also necessary to ascertain whether the pay practice in

<sup>5</sup> Civil Rights Act 1991, 105 Stat 1071, 42 USC 2000e-2(k)(1)(A)(i) and (ii).

<sup>6</sup> See, for example, C. Tobler, *Limits and Potential of the Concept of Indirect Discrimination*, European Commission, Office for Official Publications of the European Communities, Luxembourg, 2008, 40-41; and, D. Schiek, *Indirect Discrimination* in D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Hart Publishing, Oxford/Portland, Oregon, 2007, 397-422.

<sup>7</sup> C. Barnard and B. Hepple, *Indirect Discrimination: Interpreting Seymour-Smith*, in *Cambridge Law Journal*, 1999, vol. 58, n. 4, 400.

<sup>8</sup> C-96/80 *Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] ECR 911.

<sup>9</sup> *Ibid*, para 11.

<sup>10</sup> C-170/84 *Bilka Kaufhaus GMBH v Karin Weber von Hartz* [1986] ECR 1607.

question is necessary and in proportion to the objectives pursued by the employer'.<sup>11</sup>

In 1997, this was laid down in law via Article 2(2) of Directive 97/80/EC, which determined that

indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex,<sup>12</sup>

So, here again, 'a considerable higher proportion' was required, which meant the need for statistical evidence. However, in 2000, when the EU adopted legislation against racial and ethnic origin, religion or belief, disability, age and sexual orientation discrimination, a different definition was chosen.<sup>13</sup> For example, Article 2(2)(b) of Directive 2000/43/EC determines:

indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary

The reason for the new definition was that the EU Commission wanted to remove the need for statistical evidence as such evidence in sex discrimination cases is generally available in all Member States, but this is not the case for some of the other grounds of discrimination, like sexual orientation or racial or ethnic origin.<sup>14</sup> Rather than following the definition provided in Directive 97/80/EC, the 2000 Directives followed the definition derived from EU law on the free movement of workers, where discrimination on the grounds of nationality is prohibited. In *O'Flynn v Adjudication Officer*,<sup>15</sup> the CJEU held that

... unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage. It is not necessary in this respect to find that the provision in question does in practice

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<sup>11</sup> Ibid, para 36.

<sup>12</sup> Directive 97/80/EC of 15 December 1997 on the Burden of Proof in Cases of Discrimination based on Sex.

<sup>13</sup> See Article 2(2)(b) of both Directives 2000/43/EC and 2000/78/EC.

<sup>14</sup> A. Tyson, *The Negotiation of the European Community Directive on Racial Discrimination*, in *European Journal of Migration and the Law*, 2001, vol. 3, 201-203.

<sup>15</sup> C- 237/94 *O'Flynn v Adjudication Officer* [1996] 3 CMLR 103.

affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect<sup>16</sup>

As Fredman concludes, ‘this approach is based on the risk or liability of disparate impact, rather than requiring proof that such impact has in fact occurred’.<sup>17</sup> This new definition was subsequently adopted in the EU Directives against sex discrimination and now applies to all protected grounds of discrimination.<sup>18</sup> EU law then influenced changes to the definition of indirect discrimination in British law and the present definition in S19 of the Equality Act 2010 contains a very similar definition to the one in the EU anti-discrimination Directives.

### 3. Rationale for Prohibiting Indirect Discrimination

The above examined how the concept of indirect discrimination developed, but it did not provide an answer to the question why it was developed. From the definitions discussed, it will be clear that indirect discrimination focuses on impact rather than on treatment, as direct discrimination does. Direct discrimination is concerned with unequal treatment, but indirect discrimination concerns equal treatment of everyone, it treats everyone in the same way, but this same treatment leads to ‘particular disadvantage’ or ‘disparate impact’ on certain groups. Schiek gives two rationales for the introduction of a concept of indirect discrimination in anti-discrimination law. The first is ‘to prevent circumvention of one or several specific prohibitions to discriminate’<sup>19</sup> or, as Tobler puts it, ‘the Court of Justice [CJEU] developed this concept [indirect discrimination] with the aim of enhancing the effectiveness of the prohibition of discrimination’.<sup>20</sup> The second rationale given by Schiek is ‘to aid the attainment of the wider goals of discrimination law in social reality’.<sup>21</sup> Tobler puts the latter as follows: ‘the concept of indirect discrimination can be seen as a tool to make visible and challenge the underlying causes of discrimination, which are often of a structural nature’.<sup>22</sup>

A good example of the first rationale is the already mentioned US case of *Griggs v Duke Power*. The Duke Power Company had always had a racially

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<sup>16</sup> Ibid, paras 20 and 21.

<sup>17</sup> S. Fredman, *Discrimination Law* (2<sup>nd</sup> ed.), Oxford University Press, Oxford, 2011, 187.

<sup>18</sup> See: Article 2(b) of Directive 2004/113/EC and Article 1(b) Directive 2006/54/EC. The latter Directive repealed Directive 97/80/EC.

<sup>19</sup> Schiek, *Indirect Discrimination*, *op. cit.*, 6, 324.

<sup>20</sup> Tobler, *Limits and Potential of the Concept of Indirect Discrimination*, *op. cit.*, 6, 24.

<sup>21</sup> Schiek, *Indirect Discrimination*, *op. cit.*, 6, 324.

<sup>22</sup> Tobler, *Limits and Potential of the Concept of Indirect Discrimination*, *op. cit.*, 6, 24.

discriminatory employment policy and employed Afro-Americans only in low paid jobs but, when Title VII Civil Rights Act 1964 prohibited overt racial discrimination, the requirements and test as set out above were introduced. The US Supreme Court considered that the objective of Congress with Title VII:

was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. *Under the Act, practices, procedures, or tests neutral on their face or even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices* [my italics].<sup>23</sup>

This, therefore, strongly suggests that indirect discrimination was partly introduced to avoid people using neutral provisions or rules to circumvent the prohibition of direct discrimination.

The second rationale mentioned above refers to the aim which indirect discrimination, or anti-discrimination law more generally, is trying to achieve. Is anti-discrimination law aiming to achieve a more equal society? In this respect, a distinction can be made between formal and substantive equality. The principle of formal equality requires that like should be treated alike, that people in the same situation should be treated in the same way. This form of equality can be seen in the definition of direct discrimination in the EU Directives: direct discrimination takes place where one person is treated less favourably than another is, has been or would be treated in a comparable situation on a prohibited ground. But this does not recognize that people are often in different situations.

In contrast to this, the concept of substantive equality takes these material differences between individuals or groups into account. Substantive equality is often referred to as 'de facto equality' because it aims at establishing factual equality, while formal equality is then referred to as 'legal equality' or 'equality before the law'. Substantive equality takes into account the reality of the position of disadvantage that some groups are in because of past and ongoing discrimination and recognizes that persons are discriminated against as members of a particular group (like, for example, ethnic minorities, religious groups, women or disabled persons). Therefore, laws aiming to establish substantive equality aim to compensate for the social inequalities and disadvantages suffered by certain groups and are more sensitive to group aspects of discrimination. There are extra burdens and barriers to achieving equality for members of disadvantaged groups and laws aiming at substantive equality will take this into account.

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<sup>23</sup> *Griggs v Duke Power, op. cit.*, 3, 429-430.

As is clear from the definition, indirect discrimination focuses on the impact of a provision, criterion or practice on a group of people sharing a protected characteristic and can thus be said to aim at substantive equality. In *Homer*, the UK Supreme Court explained that ‘the law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected ground’.<sup>24</sup>

Therefore, indirect discrimination focuses on the impact of a provision, criterion or practice and recognizes that an apparently neutral rule, which is applied to everyone equally, can put certain people at a particular disadvantage. It acknowledges that treating everyone equally, that simply prohibiting direct discrimination, might not be enough to achieve factual equality in society because some people are not in the same situation, are not at the same starting point. As Fredman writes, ‘the whole point of indirect discrimination is to recognize that equal treatment may itself be discriminatory’.<sup>25</sup> So indirect discrimination would fit in with the substantive concept of equality as it aims at a more de facto equality and can thus be seen as aiding ‘the attainment of the wider social goals of discrimination law in social reality’, as Schiek expresses it.<sup>26</sup>

#### 4. Elements of Indirect Discrimination

After analyzing how and why the concept of indirect discrimination was developed, the concept itself will now be examined. The main elements of the definition in EU law are particular disadvantage and objective justification. However, before these are scrutinized, two other aspects will be discussed briefly: the meaning of ‘provision, criterion or practice’ and the need for a comparator.

##### 4.1. Provision, Criterion or Practice

The expression ‘provision, criterion or practice’ appears to be interpreted widely. Bamforth *et al.* write that “Provisions, criteria or practices” can be written or unwritten, formal or informal, explicit or implicit. What is required is that some differentiating fact is applied that has an impact upon the complainant’.<sup>27</sup> Although they write about British anti-discrimination law, there

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<sup>24</sup> *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, para 17.

<sup>25</sup> Fredman, *Discrimination Law*, *op. cit.*, 17, 189.

<sup>26</sup> Schiek, *Indirect Discrimination*, *op. cit.*, 6, 324.

<sup>27</sup> N. Bamforth, M. Malik and C. O’Cineide, *Discrimination Law: Theory and Context*, Sweet and Maxwell, London, 2008, 310. For examples, see: 310-312.

does not appear to be any reason why this should not be equally applicable to the same terms in the EU anti-discrimination Directives. This suggests that it is not necessary to identify which of the three terms applies to a rule or differentiating fact which is challenged. This is also clear from the Handbook on European Non-discrimination Law which states that ‘there must be some form of requirement that is applied to everybody’.<sup>28</sup> The term certainly does not appear to create any difficulties for the CJEU. It is submitted that a wide interpretation of the term ‘provision, criterion or practice’ is preferable because it would mean that a challenge to an indirectly discriminatory practice would not fall at the first hurdle, but that the CJEU can examine it under objective justification where there is more room for considering a number of issues, as will become clear below. This is indeed the path the CJEU seems to take in cases of indirect discrimination.

#### 4.2. Comparators

The definition of indirect discrimination also states that the provision, criterion or practice would put persons with a protected ground ‘at a particular disadvantage *compared with* other persons ...’ [my italics]. This suggests that a comparison must be made. The same is the case for direct discrimination, which is defined as when a person ‘is treated less favourably than another is, has been or would be treated *in a comparable situation* ...’ [my italics]. Under the EU anti-discrimination Directives a comparator can be real or hypothetical. Fredman writes that ‘the need for a comparator has been one of the most problematic aspects of direct discrimination’. This is because ‘the choice of comparator itself requires a value judgement as to which aspects of the comparator are relevant and which are irrelevant’.<sup>29</sup> And, as McColgan points out, ‘it is difficult to do comparison without explicitly or implicitly accepting one of the persons or things compared as the “norm”, and assessing the other’s entitlement to equal treatment, respect, outcomes etc, on the basis of the degree of fit they exhibit to the norm...’.<sup>30</sup> So, subjective and even prejudicial considerations might play a role in the choice of comparator and, even if a hypothetical comparator can be used, the choice can influence the

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<sup>28</sup> Fundamental Rights Agency and European Court of Human Rights, Council of Europe, *Handbook on European Non-discrimination Law*, Publications Office of the European Union, Luxembourg, 2011, 29.

<sup>29</sup> Fredman, *Discrimination Law*, *op. cit.*, 17, 168.

<sup>30</sup> A. McColgan, *Discrimination, Equality and the Law*, Hart Publishing, Oxford/Portland, Oregon, 2014, 101.

outcome of a case, or can even, as Fredman points out, ‘empty anti-discrimination law of any real impact’.<sup>31</sup>

In relation to indirect discrimination, where, as mentioned, a comparison is also required, this means that the rationale for introducing this concept, especially the aim of introducing a more substantive, de facto equality, could be undermined. Although the comparison here is with a group of persons, the same problem applies because ‘the selection of the comparator group is an issue over which courts possess an important element of discretion’, as Ellis and Watson write.<sup>32</sup> They also link this to substantive equality, as they continue that ‘the extent to which they [the courts] take a sensitive approach to it bears directly upon the capacity of the concept of indirect discrimination to intervene to produce effective equality’.<sup>33</sup>

A good example to illustrate this is the *Österreichischer Gewerkschaftsbund* case<sup>34</sup> discussed by, amongst others, Tobler.<sup>35</sup> In this case, redundancy payments were calculated taking into account certain periods of absence: absence due to military service (mostly taken by men) was taken into account, but absence for voluntary parental leave (mostly taken by women) was not. The CJEU held that there was no indirect discrimination because men and women were not in a comparable situation. The periods of absence were not comparable, because parental leave was voluntary and taken in the interest of the individual, while national service was a civic obligation and was in the public interest, even if it was extended voluntarily.<sup>36</sup> As Tobler writes, ‘had the Court looked at the activities behind the two types of absence in the light of their usefulness to society as a whole, it might well have arrived at a different conclusion’.<sup>37</sup> And, Ellis and Watson submit that ‘the correct comparator group would have been all workers otherwise eligible for termination payments whose employment was temporarily interrupted in order to discharge an important responsibility’.<sup>38</sup> Schiek opines that, because, with indirect discrimination, the emphasis is on effects and thus ‘there is no place to introduce comparator arguments’. She

<sup>31</sup> Ibid, 171.

<sup>32</sup> E. Ellis and P. Watson, (2012) *EU Anti-Discrimination Law* (2<sup>nd</sup> ed.), Oxford University Press, Oxford, 2012, 152.

<sup>33</sup> Ibid.

<sup>34</sup> Case C-220/02 *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschaftskammer Österreich*, [2004] ECR I-5907.

<sup>35</sup> Tobler, *Limits and Potential of the Concept of Indirect Discrimination*, *op. cit.*, 6, 40; see also: Schiek, *Indirect Discrimination*, *op. cit.*, 6, 468-469; and, M. Bell, *The Principle of Equal Treatment: Widening and Deepening*, in P Craig and G de Búrca, (Eds) *The Evolution of EU Law*, Oxford University Press, Oxford, 2011, 632.

<sup>36</sup> *Österreichischer Gewerkschaftsbund*, *op. cit.*, 34.

<sup>37</sup> Tobler, *Limits and Potential of the Concept of Indirect Discrimination*, *op. cit.*, 6, 40.

<sup>38</sup> Ellis and Watson, *EU Anti-Discrimination Law*, *op. cit.*, 32, 153, footnote 53.

states that introducing the category of comparability into the indirect discrimination test is ‘dogmatically unsound’.<sup>39</sup> Waaldijk also argues that the comparability requirement does not apply to indirect discrimination.<sup>40</sup> However, Tobler, Waaldijk’s co-author, does not agree and states that comparability remains ‘an essential precondition’ for both direct and indirect discrimination in EU law.<sup>41</sup> It is submitted, that the latter fits with the definition of indirect discrimination in the anti-discrimination Directives, which does contain the words ‘compared with other persons’. With Tobler, author would suggest that comparability is required for indirect discrimination as well, but national courts and the CJEU, when called upon to decide on cases of indirect discrimination, should be ‘very careful about the issue of comparability’ and ‘should be careful not to assume non-comparability too easily’. They should ‘remember that the comparison should always be between the groups of people relevant in the context of the type of discrimination at issue’.<sup>42</sup> Bell writes that ‘the focus on the search for a comparator can often obscure a more penetrating inquiry about the cause or effects of the measure under scrutiny’ and uses the *Österreichischer Gewerkschaftsbund* case to illustrate this.<sup>43</sup> His conclusion is that

Cases such as the above illustrate how the requirement of comparability can constitute a preliminary hurdle, a means of obfuscating the issues at the heart of the dispute. In *Österreichischer Gewerkschaftsbund*, the underlying question concerned the State’s prioritizing of military service over child-raising, but the Court of Justice avoided stepping into such sensitive terrain by its precursor finding about the comparator.<sup>44</sup>

It is submitted that to avoid this, the CJEU and the national courts should readily accept that there is comparability and then move on to scrutinize the issue in more detail to decide whether the provision, criterion or practice is objectively justified.<sup>45</sup> The next parts discuss the two main elements of the concept of indirect discrimination: particular disadvantage and objective justification.

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<sup>39</sup> Schiek, *Indirect Discrimination*, *op. cit.*, 6, 471.

<sup>40</sup> C. Tobler and K. Waaldijk, *Case C-267-06, Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, *Judgment of the Grand Chamber of the Court of Justice of 1 April 2008, not yet reported*, in *Common Market Law Review*, 2009, vol. 46, 745.

<sup>41</sup> *Ibid.*

<sup>42</sup> Tobler, *Limits and Potential of the Concept of Indirect Discrimination*, *op. cit.*, 6, 40.

<sup>43</sup> Bell, *The Principle of Equal Treatment: Widening and Deepening*, *op. cit.*, 35, 632.

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

<sup>45</sup> For further reading on the comparator requirement see, for example, Fredman, *Discrimination Law*, *op. cit.*, 17, 168-175; and, McColgan, *Discrimination, Equality and the Law*, *op. cit.*, 30, 101-134.

### 4.3. Particular Disadvantage

The definitions of indirect discrimination in the EU anti-discrimination Directives state that the complainant needs to show that the provision, criterion or practice would put persons with whom he/she shares a protected ground at a particular disadvantage. As seen above, indirect discrimination requires a comparison to be made between groups: the complainant's protected group must be compared with a group that does not have that protected ground. It can thus be argued that indirect discrimination is defined by group disadvantage. But does it also require evidence that there is a factual group that is disadvantaged? In other words, does the complainant have to show that someone else is disadvantaged through the provision, criterion or practice? The lower courts and the Court of Appeal (CA) in the British case of *Eweida v British Airways Plc* appears to read this into Article 2(2)(b) of Directive 2000/78/EC.<sup>46</sup> Eweida worked for British Airways as a member of their check-in staff. She was a devout Christian and wanted to wear a small silver cross with her uniform in a visible manner, but this went against the employer's uniform policy. Both the Employment Tribunal (ET) and the Employment Appeal Tribunal (EAT) rejected the claim of indirect discrimination because Eweida had not shown that the uniform requirement put persons of the same religion at a disadvantage. Therefore, as there was no evidence of group discrimination, it was held that there was no indirect discrimination.<sup>47</sup>

Regulation 3(1)(b) of the Employment Equality (Religion or Belief) Regulations 2003<sup>48</sup> prohibited, amongst other conduct, the following:

For the purposes of this Regulation, a person (2A") discriminates against another person ("B"), if ... A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same religion or belief as B, but — which puts or would put persons of the same religion or belief as B at a particular disadvantage when compared with other persons, which puts B at that disadvantage, and which A cannot show to be a proportionate means of achieving a legitimate aim.

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<sup>46</sup> *Eweida v British Airways Plc* [2009] IRLR 78 (EAT); [2010] IRLR 322 (CA). Eweida took her case to the European Court of Human Rights in Strasbourg, where it was heard with 3 other cases against the UK, see: *Eweida, Chaplin, Ladele and McFarlane v. the United Kingdom*; (2013) 57 EHRR 8.

<sup>47</sup> *Eweida* (EAT), *op. cit.*, 46, paras 61-64.

<sup>48</sup> These were the Regulations in force at the time. Section 19 of the Equality Act 2010, which repealed these Regulations, describes indirect discrimination in the same way.

Eweida's appeal against the decision of the EAT was rejected by the Court of Appeal which held that the term 'persons', both in the British Employment Equality (Religion or Belief) Regulations 2003 and in Directive 2000/78/EC, could not be read as including a single person.<sup>49</sup> The detriment in this case, according to the court, was suffered by Eweida alone: neither evidentially nor inferentially was anyone else similarly disadvantaged.<sup>50</sup> The same decision was reached in *Chaplin v Royal Devon & Exeter NHS Foundation Trust*,<sup>51</sup> where a nurse wanted to wear a crucifix on a chain around her neck while at work. There was another nurse who had also been asked not to wear a cross in this way, but she had complied with the rules, while Chaplin refused to do so. The majority of the ET held that this other nurse had not been put at a particular disadvantage since her religious views were not so strong as to lead her to refuse to comply with the rule. So there was no indirect discrimination because the rule did not put 'persons' at a particular disadvantage.<sup>52</sup> These cases suggest that actual, factual group disadvantage needs to be shown for a finding of indirect discrimination.

Under Section 19(2)(c) of the British Equality Act 2010, the complainant will also have to prove that he/she suffered a particular disadvantage. Recently, the Court of Appeal, in *Home Office v Essop*, confirmed both requirements and held that it is 'necessary in indirect discrimination claims for the claimant to show *why* the PCP [provision, criterion or practice] has disadvantaged the group and the individual claimant' [italics in original]<sup>53</sup> and that 'group disadvantage cannot be proved in the abstract'.<sup>54</sup>

However, it is submitted that this is not the correct reading of Article 2(2)(b) of Directive 2000/78/EC and that neither actual group disadvantage nor actual individual disadvantage is required under this article. The wording of Directive 2000/78/EC differs from the wording in the Employment Equality (Religion or Belief) Regulations 2003 and the Equality Act 2010. The latter two instruments use the words 'puts or would put persons ... at a particular disadvantage...', while the Directive only states: 'would put persons...'. This could suggest, as Bamforth *et al.* argue,<sup>55</sup> that:

the new UK definition is more restrictive by appearing to require evidence that there is a *group* defined by a particular characteristic which is disadvantaged,

<sup>49</sup> *Eweida (CA)*, *op. cit.*, 46, para 15.

<sup>50</sup> *Ibid*, para 28.

<sup>51</sup> *Chaplin v Royal Devon & Exeter NHS Foundation Trust* [2010] ET, Case Number: 17288862009, 6 April 2010.

<sup>52</sup> *Ibid*, paras 27-28.

<sup>53</sup> *Home Office (UK Border Agency) v Essop and Others* [2015] EWCA Civ 609, para 57.

<sup>54</sup> *Ibid*, para 59.

<sup>55</sup> Bamforth, Malik and O'Cineide, *Discrimination Law: Theory and Context*, *op. cit.*, 27, 307-308.

while under the wording of the Directives, indirect discrimination could potentially occur when only *one person* defined by the particular characteristic was put at a disadvantage [italics in original].

The same authors also point out that:

It is worth noting that the post-2000 Directives do not appear to contain this requirement of individual exposure to disadvantage: it may be the case that the Directives permit an action to be brought if one is simply a member of a group that is subject to disadvantage, without requiring any additional evidence of specific individual impact.<sup>56</sup>

The submission of the British Equality and Human Rights Commission to the European Court of Human Rights in *Eweida and Chaplin v the United Kingdom*, supports the view that there is no requirement for group disadvantage where it states that the definition of indirect discrimination in Directive 2000/78/EC ‘does not require a person to show that others who share the religion are actually put at a disadvantage by the employer’s actions’.<sup>57</sup> Therefore, it is submitted that neither actual group disadvantage nor actual individual disadvantage are required for indirect discrimination under EU law.<sup>58</sup> Support for this can also be found in the already mentioned fact that the definition of indirect discrimination in Directives 2000/43/EC and 2000/78/EC was derived from *O’Flynn v Adjudication Officer*, which showed that, for indirect discrimination to be established, it was sufficient that the provision, criterion or practice ‘is liable to have such an effect’.<sup>59</sup> In other words, is liable to lead to particular disadvantage, or, as Fredman expresses it, this approach does not require ‘that such impact has, in fact, occurred’.<sup>60</sup>

This suggests that the definition of indirect discrimination in Section 19(2)(b) of the British Equality Act 2010 is too restrictive, and that the requirements of both actual group disadvantage and actual individual disadvantage do not conform to the EU anti-discrimination Directives. Moreover, the recent CJEU

<sup>56</sup> Ibid, 321.

<sup>57</sup> Submission Equality and Human Rights Commission in the European Court of Human Rights, *Eweida and Chaplin v the United Kingdom*, App. Nos 48420/10 and 59842/10, (2012), [http://www.equalityhumanrights.com/uploaded\\_files/legal/ehrc\\_submission\\_to\\_ecthr\\_sep\\_2\\_011.pdf](http://www.equalityhumanrights.com/uploaded_files/legal/ehrc_submission_to_ecthr_sep_2_011.pdf), para 28.

<sup>58</sup> Author has argued that the Court of Appeal in *Eweida* should have referred the question whether actual group disadvantage is required for indirect discrimination under Directive 2000/78/EC, to the CJEU, see: E. Howard, *Protecting Freedom to Manifest One’s Religion or Belief: Strasbourg or Luxembourg?* in *Netherlands Quarterly of Human Rights*, 2014, vol. 32, n. 2, 161-163.

<sup>59</sup> *O’Flynn*, *op. cit.*, 15, para 21.

<sup>60</sup> Fredman, *Discrimination Law*, *op. cit.*, 17, 187.

case of *CHEZ RB*<sup>61</sup> suggests that the British Court of Appeal decision in *Essop*<sup>62</sup> does not conform to EU law in another way. In *CHEZ RB*, an electricity company in Bulgaria installed electricity meters in districts with predominantly Roma inhabitants at about 6 to 7 metres above the ground, while in other districts these meters were put at a height of about 1.7 metres. The reason given for the difference by the electricity company was that this was to prevent tampering and unlawful connections to the electricity network. A shop keeper in one of these Roma neighbourhoods, Ms Nikolova, who was herself not of Roma ethnic origin, complained that she had been discriminated against on the ground of racial or ethnic origin because she suffered the same disadvantage as her Roma neighbours. The CJEU held that the concept of discrimination on the grounds of ethnic origin must be interpreted as being intended to apply irrespective of whether that collective measure affects persons who have a certain ethnic origin or those who, without possessing that origin, suffer, together with the former, the less favourable treatment (*i.e.* direct discrimination) or particular disadvantage (*i.e.* indirect discrimination) resulting from that measure.<sup>63</sup> The CJEU decision thus means that a person can claim direct or indirect discrimination on one of the protected characteristics even if they do not themselves possess that protected characteristic. The CJEU also held that the concept of ‘particular disadvantage’ in the EU measure against racial or ethnic origin discrimination does not refer to serious, obvious or particularly significant cases of inequality, but denotes that it is particularly persons of a given racial or ethnic origin who are at a disadvantage because of the provision, criterion or practice at issue.<sup>64</sup> Therefore, the test used by the CJEU is much less strict than the test given by the British Court of Appeal in *Essop*<sup>65</sup> and it is submitted that the latter does not conform to EU law in this regard as well.

#### 4.4. Objective Justification of Indirect Discrimination

The definition of indirect discrimination in the EU anti-discrimination Directives makes clear that indirect discrimination can be objectively justified if the provision, criterion or practice has a legitimate aim and the means used to achieve that aim are appropriate and necessary. The burden of proving this is

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<sup>61</sup> Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za Zastita ot Diskriminatsia*, 16 July 2015 [2015] ECLI:EU:C:480.

<sup>62</sup> *Op. cit.* 53.

<sup>63</sup> *Chez RP, op. cit.*, 61, para. 129 under 1.

<sup>64</sup> *Ibid*, para. 129, under 4.

<sup>65</sup> *Op. cit.*, 53.

on the person applying the provision, criterion or practice.<sup>66</sup> The CJEU has explained, in *Bilka Kaufhaus*,<sup>67</sup> that there are three parts to the objective justification test for indirect discrimination: first of all, the means chosen must correspond to a real need; secondly they must be appropriate with a view to achieving the objective pursued; and, thirdly, they must be necessary to that end.

The term ‘must be necessary to that end’ also indicates that the test includes a consideration of the question whether there is an alternative, less far-reaching and less discriminatory way of achieving the aim pursued. If there is an alternative which affects the individual less, than that should be chosen. Schiek concludes that ‘from this one can conclude that, where there is a less discriminatory alternative, the measure is not objectively justified’.<sup>68</sup> This is supported by case law of the CJEU, for example, in *HK Danmark v Dansk Almennyttigt Boligselskab and HK Danmark v Danske Arbejdsgiverforening*, Advocate General Kokott opined that the provision, criterion or practice ‘must also be necessary, which is to say that the legitimate aim pursued must not be capable of being achieved by more moderate but equally appropriate means’,<sup>69</sup> while the CJEU considered that ‘it must be examined whether that difference of treatment is objectively justified by a legitimate aim and whether the means used to achieve that aim are appropriate and *do not go beyond what is necessary* to achieve the aim pursued by the Danish legislature’ [my italics].<sup>70</sup> And, in *Danske Jurist*, Kokott stated that ‘a measure is “necessary” where the legitimate aim pursued cannot be achieved by an equally suitable but more benign means’.<sup>71</sup> As discussed above, the provisions on indirect discrimination were influenced by the disparate impact case law in the US and there, too, less discriminatory alternatives are very much part of the justification test.<sup>72</sup>

#### 4.5. Duty of Reasonable Accommodation as Part of the Justification Test

All this is summed up well by Fredman who writes that ‘the Court of Justice [CJEU] has consistently stressed that the standard of necessity requires an

<sup>66</sup> See Fundamental Rights Agency and European Court of Human Rights, *Handbook on European Non-discrimination Law*, *op. cit.*, 28, 126.

<sup>67</sup> *Bilka Kaufhaus*, *op. cit.*, 10, paras 36-37.

<sup>68</sup> Schiek, *Indirect Discrimination*, *op. cit.*, 6, 357.

<sup>69</sup> C-335/11 and C-337/11 *HK Danmark v Dansk Almennyttigt Boligselskab and HK Danmark v Danske Arbejdsgiverforening*, AG, [2013] 3 CMLR 21, para 70.

<sup>70</sup> *Ibid*, para 77.

<sup>71</sup> C-546/11 *Danske Jurist- og Økonomforbund v Indenrigs- og Sundhedsministeriet*, AG, [2014] 1 CMLR 41, para 38.

<sup>72</sup> See: Civil Rights Act 1991, 105 Stat 1071, 42 USC 2000e-2(k)(1)(A)(i) and (ii), mentioned *op. cit.*, 5.

investigation of alternative measures that are less invasive of the right'.<sup>73</sup> Therefore, alternative measures need to be considered and it is suggested that this comes close to a duty to make reasonable accommodation as laid down for disabled people in Article 5 Directive 2000/78/EC. According to this Article, employers must 'take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer'.

It has been suggested that EU law and national law in European countries should contain a duty of reasonable accommodation for all the grounds covered by anti-discrimination law. This duty would be subject to the proviso that this should not impose a disproportionate burden on employers or service providers.<sup>74</sup> Such a duty could be useful in relation to other protected grounds in EU law as well. For example, it could be useful where an employee requests time off work to perform a religious duty. It can be said that EU law itself makes certain accommodations in relation to sex, for example, in the regulations protecting pregnant and breast feeding women, and in relation to age, where it protects younger workers. However, it can be argued that it is not necessary to expand the duty in Article 5 Directive 2000/78/EC to include all other grounds of discrimination covered, because such a duty can be seen as part of the justification test for indirect discrimination: considering whether there are less discriminatory alternatives comes very close to such a duty.

Waddington writes that 'the obligation not to discriminate indirectly against a worker or other individual can, on occasions, result in positive duties to accommodate difference'.<sup>75</sup> Rorive states that 'the question is nowadays whether an indirect discrimination could be justified where reasonable accommodation is conceivable'<sup>76</sup> and argues that EU anti-discrimination law has developed with 'the emergence of the concept of reasonable accommodation to test whether an indirect discrimination is objectively and

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<sup>73</sup> S. Fredman, *Addressing Disparate Impact: Indirect Discrimination and the Public Sector Equality Duty*, in *Industrial Law Journal*, 2014, vol. 43, n. 3, 349. 356.

<sup>74</sup> See, for example, Council of Europe, Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality, CommDH(2011)2, under 6.1, point 2, [https://wcd.coe.int/ViewDoc.jsp?id=1761031#P66\\_5638](https://wcd.coe.int/ViewDoc.jsp?id=1761031#P66_5638); and, Equinet (2008) *Beyond the Labour Market New Initiatives to Prevent and Combat Discrimination*, Equinet, Brussels, at 8, [http://www.equineteurope.org/IMG/pdf/EN - Beyond the Labour Market - Opinion\\_2008.pdf](http://www.equineteurope.org/IMG/pdf/EN_-_Beyond_the_Labour_Market_-_Opinion_2008.pdf).

<sup>75</sup> L. Waddington, *Reasonable Accommodation*, in Schiek, Waddington and Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, op. cit., 6, 754.

<sup>76</sup> I. Rorive, *Religious Symbols in the Public Space: in Search of an European Answer*, in *Cardozo Law Review*, 2009, vol. 30, 2693.

reasonably justified'.<sup>77</sup> Vickers writes that 'it is arguable that the Directive [2000/78/EC] creates an indirect duty to make reasonable accommodation',<sup>78</sup> as 'a failure to accommodate a request for different treatment by religious employees may amount to indirect discrimination, unless the refusal to accommodate is justified'.<sup>79</sup> All this suggests that an implicit duty of reasonable accommodation could be read in the EU provisions against indirect discrimination.

Support for the above can be found in the case law of the CJEU and of some national courts, where the courts hold that alternative ways should have been explored and even sometimes suggest alternative, less discriminatory means. For example, in *Danske Jurist*, the CJEU did not accept the justification brought forward because it considered that 'the legitimate objectives pursued by the legislation at issue in the main proceedings may be attained by less restrictive, but equally appropriate, measures'.<sup>80</sup> Advocate General Kokott went even further and opined that:

even considering the legitimate interest of the administration to avoid excessive expenditure, there would have been less restrictive means. A more benign means which would also spare the employer from excessive administrative costs would in this connection be to impose on civil servants the burden of demonstrating and proving their availability.<sup>81</sup>

And, in *Napoli*, the CJEU considered that:

it seems possible to conceive of measures which would interfere less with the principle of equal treatment between men and women than the measure at issue in the main proceedings. Thus, as the referring court has itself observed, the national authorities could, if appropriate, contemplate reconciling the requirement to train candidates fully with the rights of female workers by providing, for a female worker who returns from maternity leave, parallel remedial courses equivalent to the initial training course so that that female worker may be admitted within the prescribed period to the examination enabling her to be promoted, without delay, to a higher grade and also meaning that the development of her career is not less favourable than that of the career of a male colleague who has been successful in the same competition and admitted to the same initial training course.<sup>82</sup>

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<sup>77</sup> Ibid, 2695.

<sup>78</sup> L. Vickers, *Religion and Belief Discrimination in Employment – EU Law*, Office for Official Publications of the European Communities, Luxembourg, 2006, 22.

<sup>79</sup> Ibid, 21.

<sup>80</sup> *Danske Jurist*, CJEU, *op. cit.*, 71, para 69.

<sup>81</sup> Ibid, AG, para 58.

<sup>82</sup> C-595/12 *Napoli v Ministero della Giustizia, Dipartimento dell'Amministrazione penitenziaria*, [2014] ICR 486, para 38.

Some national courts and tribunals in the Member States have found that a provision, criterion or practice was not objectively justified because alternative means to achieve the legitimate aim were not explored and, in some cases, alternatives were suggested by the Courts.<sup>83</sup> This is a clear way of saying that the practice can be accommodated. An example can be found in a case of the Dutch Equal Treatment Commission concerning two Muslim women who refused to take off their headscarves and were then denied access to a restaurant. The restaurant had a policy of excluding anyone wearing anything on their head. The aim of the policy was to attract smarter and more mature customers and to avoid people with baseball caps and similar attire. The Commission considered that the restaurant could achieve their aim by specifying what they did not consider to be smart dress, like sports attire. In this way, smartly dressed women with headscarves, which the women in this case were and which was never contested by the restaurant, could be allowed access. The policy was held not to be proportionate and necessary and thus indirectly discriminatory.<sup>84</sup>

Therefore, it is submitted that the three part test to establish whether indirect discrimination is justified and proportionate can be seen as including a duty to reasonably accommodate a request for exemption from a generally rule applicable to everyone equally. The question whether the defendant in an indirect discrimination case has considered ways of accommodating a request for exemption of a neutral and general applicable provision, criterion or practice for reasons based on one of the protected grounds would thus be one of the issues to be taken into account to establish whether the means used to achieve a legitimate aim are appropriate and necessary and thus whether the indirectly discriminatory rule is objectively justified.<sup>85</sup> This would fit in with the description Fredman gives of indirect discrimination as an ‘invitation to forward-looking and pre-emptive remedial action’.<sup>86</sup> She also writes that ‘it is strongly arguable that indirect discrimination includes a duty to take pre-emptive action to address a pattern of disparate impact, even in the absence of litigation’ because ‘it is now well established that the justification defence [for

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<sup>83</sup> See: E. Howard, *Reasonable Accommodation of Religion and other Discrimination Grounds in EU Law*, in *European Law Review*, 2013, vol. 38, n. 3, 360-375 and the cases referred to in there.

<sup>84</sup> *Commissie Gelijke Behandeling* (Equal Treatment Commission), Judgment 2004-112. Since 2 October 2012 this Commission has become part of the *College voor de Rechten van de Mens* (Netherlands Institute for Human Rights). All judgments of the Commission are available (in Dutch) from the Institute’s website: [www.mensenrechten.nl](http://www.mensenrechten.nl).

<sup>85</sup> See further for this argument: Howard, *Reasonable Accommodation of Religion and other Discrimination Grounds in EU Law*, *op. cit.*, 83.

<sup>86</sup> Fredman, *Addressing Disparate Impact: Indirect Discrimination and the Public Sector Equality Duty*, *op. cit.*, 73, 349.

indirect discrimination] cannot be made out if there are alternative, less discriminatory means to achieve the stated purpose'.<sup>87</sup>

#### 4.6. *Justification of Direct Discrimination*

It appears to be generally accepted that the EU anti-discrimination Directives do not allow for justification of direct discrimination, except in situations prescribed in the Directives itself, like for example, for genuine occupational requirements<sup>88</sup> or for positive action.<sup>89</sup> As Bell writes:

EC anti-discrimination Directives, like most national legislation, do not expressly declare that direct discrimination cannot be justified. Rather this is implicit from the absence of any textual reference to justification (unlike indirect discrimination, where objective justification is specifically mentioned).<sup>90</sup>

The question can be asked, as Bell also does, 'why direct discrimination should be subject to a restrictive scheme of narrow exceptions in contrast to indirect discrimination'.<sup>91</sup> A justification defence for direct discrimination is certainly not unknown. Directive 2000/78/EC itself allows for justification of direct age discrimination, because Article 6(1) determines that Member States may provide that age discrimination is not unlawful if it is objectively and reasonably justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. This justification defence of direct age discrimination is thus the same as for indirect discrimination under the EU anti-discrimination Directives.

Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) prohibits discrimination in the enjoyment of the rights and freedoms in the Convention on a large and open-ended number of grounds, - open-ended because it contains the terms 'or other status' and thus allows for the recognition of grounds which are not mentioned. But Article 14 can only be invoked in conjunction with another right and thus does not provide a free-standing right to non-discrimination. Protocol 12 to the ECHR does provide such a free-standing right, as it prohibits discrimination on the same, open-ended list of grounds in the

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<sup>87</sup> Ibid.

<sup>88</sup> See for example, Articles 4 in both Directives 2000/43/EC and 2000/78/EC and Article 14(2) Directive 2006/54/EC

<sup>89</sup> See Article 5 Directive 2000/43/EC, Article 7 Directive 2000/78/EC and Article 3 Directive 2006/54/EC.

<sup>90</sup> M. Bell, *Direct Discrimination*, in Schiek, Waddington and Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, *op. cit.*, 6, 273.

<sup>91</sup> Ibid, 269.

enjoyment of any right set forth by law.<sup>92</sup> However, neither Article 14 nor Protocol 12 makes a distinction between direct and indirect discrimination and both allow for justification. In the *Belgian Linguistics* case, the European Court of Human Rights (ECtHR), the Court overseeing the Convention, held that the principle of equal treatment is violated if the distinction made has no objective and reasonable justification. To be justified, a difference in treatment must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized.<sup>93</sup>

So there are instances where a justification defence is also available for direct discrimination. Some authors have suggested that such a defence should be applicable to direct discrimination in EU and/or the national laws of the EU Member States as well, although those in favour are generally stressing that this should only be done in very limited circumstances and that the standard of proving such justifications should be very high.<sup>94</sup> Lady Hale, the vice-president of the UK Supreme Court, stated in a speech that ‘one problem is that, under EU law, there is no general defence of justification for direct discrimination, whereas there is such a defence for discrimination which is merely indirect. ... But the distinction is by no means easy to draw’.<sup>95</sup> Lady Hale seems to suggest

<sup>92</sup> All EU Member States have signed and ratified the Convention, but Protocol 12 has been signed and ratified by only a small number of these states.

<sup>93</sup> See: *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v Belgium* App. Nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (1979-1980) 1 EHRR 252, under THE LAW, B para 10. This also applies to Protocol 12, as the ECtHR in *Sejdic and Finci v Bosnia and Herzegovina* stated that Protocol 12 should be interpreted in the same way as Article 14 ECHR (*Sejdic and Finci v Bosnia and Herzegovina* App. Nos 27996/06 and 34836/06, 22 December 2009, para 55).

<sup>94</sup> See, for a discussion on this a series of three articles in the *Industrial Law Journal*: J. Bowers and E. Moran, *Justification in Direct Sex Discrimination Law: Breaking the Taboo*, in *Industrial Law Journal*, 2002, vol. 31, n. 4, 307-320. For a reply which disagrees, see: T. Gill and K. Monaghan, *Justification in Direct Sex Discrimination Law: Taboo Upheld*, in *Industrial Law Journal*, 2003, vol. 32, n. 2, 115-122. A reply to this by the original authors, who adhere to their opinion that justification of direct sex discrimination should be made available: J. Bowers, E. Moran and S. Honeyball, *Justification of Direct Sex Discrimination: A Reply*, in *Industrial Law Journal*, 2003, vol. 32, no. 3, 185-187. Another author who advocates introducing a general justification for direct discrimination is J. Gerards, *Nieuwe Ronde, Nieuwe Kansen: naar een Semi-open Systeem van Gelijkebehandelingswetgeving? (New Round, New Chances: towards a Semi-open System of Equal Treatment Law?)*, in *Nederlands Tijdschrift voor de Mensenrechten (Netherlands Journal of Human Rights)*, 2011, vol. 36, n. 2, 133-158.

<sup>95</sup> *Lady Hale gives the Annual Human Rights Lecture for the Law Society of Ireland Freedom of Religion and Belief*, 13 June 2014, < [www.supremecourt.uk/docs/speech-140613.pdf](http://www.supremecourt.uk/docs/speech-140613.pdf). See also Bell, *Direct Discrimination*, *op. cit.*, 90, 270, where it is stated that ‘the boundary between direct and indirect discrimination can be rather thin on occasions’.

that a justification defence for direct discrimination could be useful in cases of clashing rights, an opinion which Gerards echoes.<sup>96</sup>

But should justification of direct discrimination be allowed because the distinction is not easy to make? Even if there are some cases in which it is not easy to distinguish the two forms of discrimination, in many cases there does not appear to be a problem. It has been suggested that courts and other adjudicating bodies sometimes opt for one form or the other because they want to include or exclude justification or, as Bowers *et al.* write, the distinction ‘can be one of convenience and judicial interpretation’.<sup>97</sup> For example, Gerards mentions the strategy of the Dutch equality body to formulate a distinction which is fairly clearly based on a protected ground as indirect discrimination, so it can consider justification.<sup>98</sup> And, Tobler and Waaldijk write that ‘it has been suggested that the CJEU (in *Maruko*) ‘opted for a finding of direct discrimination in order to exclude the objective justification argument’.<sup>99</sup> It can therefore be argued that, if the courts and other adjudicating bodies ‘manipulate’ the distinction to allow them to consider or avoid justification, maybe justifications of both forms of discrimination should be allowed. This would provide flexibility and leave room for a proportionality test and the balancing of interests in each case.

The other argument for allowing justification of direct discrimination, mentioned above, was that this could be useful in situations of competing rights, for example where the right to freedom to manifest your religion or belief and to be free from religious discrimination clashes with someone else’s right not to be discriminated against on the ground of their sexual orientation. Here, again, this would provide flexibility for adjudicating bodies and courts and would allow for a balancing of interests where necessity and proportionality can be taken into account. Both Gerards and Bell mention that Directive 2000/78/EC already contains a provision, in Article 2(5), that allows this.<sup>100</sup> Article 2(5) reads as follows:

This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the

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<sup>96</sup> Gerards, *Nieuwe Ronde, Nieuwe Kansen: naar een Semi-open Systeem van Gelijkebehandelingswetgeving?* *op. cit.*, 94, 154-155.

<sup>97</sup> Bowers, Moran and Honeyball, *Justification of Direct Sex Discrimination: A Reply*, *op. cit.*, 94, 186.

<sup>98</sup> Gerards, *Nieuwe Ronde, Nieuwe Kansen: naar een Semi-open Systeem van Gelijkebehandelingswetgeving?* *op. cit.*, 94, 149-150.

<sup>99</sup> Tobler and Waaldijk, *Case C-267-06, Tadao Maruko v Versorgungsanstalt der deutschen Bühnen, Judgment of the Grand Chamber of the Court of Justice of 1 April 2008, not yet reported*, *op. cit.*, 40, 736.

<sup>100</sup> Gerards, *Nieuwe Ronde, Nieuwe Kansen: naar een Semi-open Systeem van Gelijkebehandelingswetgeving?* *op. cit.*, 94, 155; Bell, *Direct Discrimination*, *op. cit.*, 90, 289-290. Bell discusses some examples.

maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others

Gerards points out that, although there are no equivalent provisions in the Directives against racial and ethnic origin or sex discrimination, all Directives contain in their preambles references to fundamental rights and stress the importance of respect for these rights.<sup>101</sup> Therefore, Gerards argues, the starting point of all anti-discrimination Directives is that the principle of equal treatment cannot force acting against other fundamental rights and thus all Directives appear to leave room for a general exception along the lines of Article 2(5) Directive 2000/78/EC in national law.<sup>102</sup>

However, this does not seem to align with the fact that the CJEU has consistently held that restrictions and limitations to individual rights in EU law, including the right not to be discriminated against, should be interpreted strictly.<sup>103</sup> In *Petersen*, the CJEU held in relation to Article 2(5) Directive 2000/78/EC that, as it is an exception to the principle of the prohibition of discrimination, it must be interpreted strictly. The terms used in Article 2(5) also suggest such an approach.<sup>104</sup> Moreover, the CJEU has clearly rejected justification of direct sex discrimination. In two recent cases, *Kleist* and in *Kuso*, the CJEU clearly stated that direct sex discrimination cannot be justified.<sup>105</sup> There appears to be no reason why this should not also apply to indirect discrimination on the other grounds of discrimination covered by the EU anti-discrimination Directives and, as the CJEU is generally concerned with a uniform application of EU law, it is expected that it will apply the same rule to all grounds.

As already mentioned, the EU has implicitly rejected a justification defence for direct discrimination and has only made an exception for direct age discrimination. If it wanted to make justification of direct discrimination

<sup>101</sup> See Recitals 2, 3 and 4 Preamble Directive 2000/43/EC; 1, 2 and 3 Preamble Directive 2004/113/EC and 20 Preamble Directive 2006/54/EC.

<sup>102</sup> Gerards, *Nieuwe Ronde, Nieuwe Kansen: naar een Semi-open Systeem van Gelijkebehandelingswetgeving?* *op. cit.*, 94, 155.

<sup>103</sup> See: C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651, para. 36; C-273/97, *Sirdar v The Army Board and Secretary of State for Defence*, [1999] ECR I-7403, para. 23; C-285/98, *Kreil v Bundesrepublik Germany*, [2000] ECR I-69, para. 20; C-341/08, *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, [2010] IRLR 254, para. 60; and, C-447/09, *Prigge and Others v Deutsche Lufthansa AG*, [2011] ECR I-8003, paras. 56 and 72. The first three cases concerned sex discrimination and the EU sex discrimination directives, while the latter two concerned age discrimination and Directive 2000/78/EC.

<sup>104</sup> *Petersen*, *op. cit.*, 103, para 60.

<sup>105</sup> C-356/09 *Pensionsversicherungsanstalt v Christine Kleist*, [2010] ECR I-11939, para 41; and, C-614/11 *Niederösterreichische Landes-Landwirtschaftskammer v Kuso*, [2014] 1 CMLR 32, paras 50 and 51.

available to all grounds of discrimination, it would have done so in the anti-discrimination Directives. Therefore, it is submitted that providing for justification of direct discrimination in national law would be a breach of EU law and case law.

But, there are a number of other reasons why introducing a general justification defence for direct discrimination is ‘misconceived and undesirable’<sup>106</sup> or ‘neither necessary nor desirable’.<sup>107</sup> First of all, the EU system of only allowing for exceptions that are prescribed by law provides for legal certainty and clarity.<sup>108</sup>

Secondly, justification of direct discrimination misconceives the concept of direct discrimination. As Bell writes, direct discrimination tackles less favourable treatment specifically because of a suspect and prohibited characteristic and this is treated by the law ‘as taking into account irrelevant considerations’.<sup>109</sup> This is thus a more invidious form of discrimination which causes an ‘affront to human dignity’<sup>110</sup> and ‘is more corrosive of society’.<sup>111</sup> If justification of direct discrimination was provided for, it would allow irrelevancies to be taken into account. By not doing so, the law signals that less equal treatment on a prohibited characteristic is not permitted and it recognises the serious effect direct discrimination can have.

Another related argument is that ‘the inability to justify direct discrimination also serves to advance substantive equality’, according to Bell. He links this to the fact that direct discrimination is often linked to stereotypes or generalisations and that ‘by excluding the justification of direct discrimination, the law becomes a potent weapon to deconstruct such stereotypes’.<sup>112</sup> This is supported by Gill and Monaghan who argue that ‘justifying direct discrimination will *reinforce* [their italics] rather than challenge existing discriminatory patterns. This of course cuts across the whole scheme of the anti discrimination legislation and frustrates its purpose’.<sup>113</sup>

Ellis and Watson sum up the above very well where they write that the possibility of justifying direct discrimination ‘permits a raft of undefined excuses for discrimination which are not articulated in EU law. This has the

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<sup>106</sup> Ellis and Watson, *EU Anti-Discrimination Law*, *op. cit.*, 32, 174.

<sup>107</sup> Gill and Monaghan, *Justification in Direct Sex Discrimination Law: Taboo Upheld*, *op. cit.*, 94, 120.

<sup>108</sup> See on this; Gerards, *Nieuwe Ronde, Nieuwe Kansen: naar een Semi-open Systeem van Gelijkbehandelingswetgeving?* *op. cit.*, 94, 146.

<sup>109</sup> Bell, *Direct Discrimination*, *op. cit.*, 90, 270.

<sup>110</sup> Gill and Monaghan, *Justification in Direct Sex Discrimination Law: Taboo Upheld*, *op. cit.*, 94, 121.

<sup>111</sup> Bowers and Moran, *Justification in Direct Sex Discrimination Law: Breaking the Taboo*, *op. cit.*, 94, 315.

<sup>112</sup> Bell, *Direct Discrimination*, *op. cit.* 90, 270.

<sup>113</sup> Gill and Monaghan, *Justification in Direct Sex Discrimination Law: Taboo Upheld*, *op. cit.*, 94, 121.

potential gravely to undermine the operation of the principle of equality...'<sup>114</sup> Therefore, a justification defence of direct discrimination should not be laid down in EU law and the defence should stay confined to cases of indirect discrimination.

## 5. Conclusion

In this article, the development of the concept of indirect discrimination via US, UK and EU law and case law was examined and this was followed by an analysis of the rationale of this development. Both of these have influenced the present provision against indirect discrimination in the EU anti-discrimination Directives. Providing protection against indirect discrimination in anti-discrimination law can be seen as a positive development because this aims at a more substantive concept of equality and acknowledges that formal equality might not be enough to achieve real equality in society.

After a short discussion of the term 'provision, criterion or practice', and the requirement of a comparator for a finding of direct and, it was submitted, also for indirect discrimination, the main elements of the definition of indirect discrimination - particular disadvantage and objective justification - were scrutinised. In relation to particular disadvantage, it was submitted that neither actual group disadvantage nor actual individual disadvantage is required under the EU Directives' definition of indirect discrimination, although this has not yet been clarified by the CJEU.

It was also submitted that the objective justification test included the consideration of the question whether less far-reaching and less discriminatory alternatives could be used to achieve the aim of the provision, criterion or practice and, if there was such an alternative but it was not used, then the provision, criterion or practice would be held not to be justified and thus indirectly discriminatory. It was argued that this comes very close to imposing a duty of reasonable accommodation like the duty towards disabled people under Article 5 Directive 2000/78/EC and that support for this can be found in the case law of the CJEU.

In the last part, the question whether a general justification defence should be made available for direct discrimination in the same way as this has been done for indirect discrimination, was examined. The answer to this question was a clear 'no' and a number of arguments for coming to this conclusion were given, including that this would go against the EU anti-discrimination Directives and CJEU case law.

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<sup>114</sup> Ellis and Watson, *EU Anti-Discrimination Law*, *op. cit.*, 32, 173.

From the above, it can be concluded that the concept of indirect discrimination in the new definition given in the 2000 Directives (2000/43/EC and 2000/78/EC) has played and is playing a very important and positive role in EU anti-discrimination law because it provides an additional layer of protection for individuals and groups across the EU who are particularly vulnerable to discrimination. The concept of indirect discrimination, with a narrow interpretation of any restrictions on the principle of equal treatment, a strict objective justification test which includes a duty of reasonable accommodation and the continued absence of a justification defence for direct discrimination will continue to advance substantive equality.

# Youth Unemployment in Africa: Recent Developments and New Challenges

John Opute \*

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## 1. Introduction

Youth unemployment remains a central issue for both developed and developing economies; the latter, however, is a particular issue in Africa where it stands at 21 per cent, considerable higher than the world average of 14 per cent, although below the first ranked Middle East and North Africa which has average youth unemployment of 25.6 per cent. Significantly, in demographic terms there are a high proportion of young people, between the ages of 15 – 24, taking the United Nations definition of youth, in the African population; a segment of the population which is growing at a concerning rate. In addition, it needs to be emphasised that the nature of youth employment in general, and in Sub-Saharan Africa in particular, is extremely heterogeneous in terms of gender, geographic distribution and the disparities of low economic growth in individual countries.<sup>1</sup>

The labour market in Sub-Saharan Africa presents further problems for youth employment as the formal labour market is small and entry into the sector is difficult. This issue was perfectly illustrated by a survey in South Africa which revealed that 39 per cent of young unemployed people almost gave up searching for work and 47.1 per cent discontinued searching because of lack of work opportunities in their area. The survey also illustrated the minor role played by supporting agencies; only 6.9 per cent had registered at employment agencies or trade unions.<sup>2</sup>

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<sup>1</sup> IMF (2007) International Monetary Fund, *Country Report* No. 07/20 of January, 2007.

<sup>2</sup> Kanyenze, G., Mhone, G. and Sparreboom, T. (2000) Strategies to Combat Youth Employment and Marginalisation.

Accordingly, youth unemployment in Africa is a consequence of a complex, interdependent set of factors, constrained economic growth, political instabilities, the lack of educational provisions, and inadequate social provisions in areas such as health. As a comprehensive study on youth employment concluded a vicious circle of low economic growth leads to a decline of resources leading to a further reduction of growth. This results in low aggregate demand on the labour market and is linked to low skills among young people and the relative size of the youth labour force, resulting in youth unemployment.<sup>3</sup>

The central role of education, and the contribution this makes to the economic prosperity of countries, has been widely studied and there is an impressive empirical literature, in part related to the broader theoretical concepts of human capital theory<sup>4</sup>. The literature focusing on the relationship between the efficacy of education and changes in human capital, that is the contribution changes in educational levels make to economic growth, are matters of debate. However, in the African context, the summary of a United Nations study clearly emphasises the educational prerogative.<sup>5</sup>

The main causes (of youth unemployment) of this situation include the poor conditions for economic growth and job creation, but also results from certain issues that specifically affect young people, such as lack of education and skills

## 2. Nigeria and Youth Employment

The issue of employment in Nigeria, as in many developing economies, is central and dependent on numerous interlocking factors. In addition, Nigeria's young population is on the increase and the economic benefits derived from the oil reserves provide opportunities for industrialisation. Consequently, the economic, political and social systems, inclusive of industrial relations, are increasingly confronted with the issues generated by these developments.

Nigeria with the largest population in Sub-Saharan Africa, its important resource of oil, and its diverse ethnic population provides an excellent example of the problems and issues of youth unemployment. The supply of labour needed for the industrialisation process, in particular young people, is severely constrained by the decline in educational provisions and standards due to state policies and inadequacies.

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<sup>3</sup> Blanchflower, D. G. and Freeman, edit. , B. F. (1999) *Youth Employment and Joblessness in Advanced Countries*, National Bureau of Economic Research.

<sup>4</sup> Krueger, A. B. and Lindahl, M. (2001) *Education for growth: why and for whom?*, *Journal of Economic Literature*, 39 (4), pp. 1101 –1136.

<sup>5</sup> United Nations Economic Commission for Africa, (December 2005) *Youth, Education, Skills and Employment*, Poverty and Social Policy Team, Economic and Social Policy Division.

Education and training are designed to provide the required and competent manpower to move the economy forward. Unfortunately, the educational system is dysfunctional, as graduates of many institutions are unemployed or not competent to contribute meaningfully to the economy<sup>6</sup>. On the other hand, the evolving industrial relations system can play a vital role in the issue of employment. In particular, the relationship between management and trade unions can determine appropriate strategies for youth employment. For example, undue focus on seniority as opposed to competence in the reward structure will not encourage new entrants, which in most cases will be younger employees. It is noted that 50 per cent of Africa's population is below the age of 18 and a high percentage of Africa's population is between ages 15 – 24.<sup>7</sup> In furtherance to this, over 60 per cent of Nigerian youths were unemployed or underemployed<sup>8</sup>. Unfortunately, there is no clear labour policy linking education with the labour market. From the perspective of the state, there are a number of initiatives, which are aimed at youth intervention programmes for the purposes of integrating young people into the labour market. The most common type of intervention for youth is skills training and this approach has the added advantage of improving the chances for young entrepreneurship.<sup>9</sup> Nigeria has had a history of innovative youth employment programmes.<sup>10</sup> The Rivers State government agricultural employment programme of the late 1980s (directed at the youths) is an example. Another example is the Federal Government National Open Apprenticeship Scheme (NOAS), aimed at providing vocational education and training to unemployed youth. The Nigeria Employers' Consultative Association (NECA) is able to lead the effort of the organised private sector in the promotion of youth entrepreneurship through internship and apprenticeship programmes.<sup>11</sup> However, these policy initiatives to deal with youth employment need to be analysed in the broader framework of the political, economic and educational context.

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<sup>6</sup> Oshinowo, O.A (2007) A survey of contemporary manpower requirements in the Nigerian economy, *report of ITF-NECA*.

<sup>7</sup> Mbachu, C. (2005) ICT and Youth Employment, *concept paper submitted to the GKP regional Africa meeting*, 30 January, 2005, Accra, Ghana.

<sup>8</sup> Babalola, J.B. (2007) Reinventing Nigerian Higher Education for Youth Employment in a Competitive Global Economy, *paper presented to the department of educational administration and planning Unical, Nigeria*.

<sup>9</sup> Godfrey, M. (2003) Youth employment policy in developing and transition countries – prevention as well as cure, *World Bank Social Protection Discussion Paper, No. 0320*.

<sup>10</sup> Nwuke, K. (2002) Youth and Employment in Africa, *concept paper presented at the Youth Employment Summit*, September 7-11, 2002, Alexandria, Egypt.

<sup>11</sup> NECA is the Nigeria Employers' Consultative Association. It is the umbrella organisation of employers in the organised private sector of Nigeria and was formed in 1957. It has membership strength in excess of 350 organisations.

Of greater consequence, the result will examine the fact that some variables, such as culture, the society and business challenge integration, centralisation and decentralisation of labour laws/regulations, reviewing the role and importance of the law, trust and transparency in the tripartite (stakeholders) employment relations are crucial. Accordingly, the effectiveness of any approach is better between two or more consenting parties. Beyond this, the strengths and weaknesses of any approach are entirely dependent on the environmental factors prevalent in every country as well as several demographics. In effect, we should end the search for one 'right' approach to youth unemployment; and in its place, aim at understanding what in the context matters in every country/region

### **3. The Nigerian Political and Economic Framework**

The political structure of Nigeria transformed from protectorate (as a British colony) in 1914, through regions in 1954, independence in 1960 and republic in 1963, to a twelve-state structure in 1967. Today, the country operates a three-tier federal structure, comprising a central government, 36 states and a federal capital territory, Abuja and 774 local government areas.

Nigeria offers an example of a country with increasing business opportunities as a result of the recent democratic settings.<sup>12 13</sup> With a census figure of about 140 million in 2006, it is Africa's leading oil producer and ranks amongst the ten oil-producing countries of the world. The Nigerian economy depends primarily on oil, which accounts for about 14% of GDP. As is typical of most developing African models, the rest of the economy has agriculture accounting for about 30 per cent of the GDP whilst the manufacturing sector is limited and developing slowly.

### **4. The Educational Framework**

Higher education is provided through a number of tertiary institutions including 24 federal universities. In addition, the federal government compliments state government efforts by providing secondary education through federal government colleges as well as local government efforts through the Universal Basic Education (UBE) programme. This programme is aimed at providing compulsory and free primary education throughout the country. In addition to these, there are also specialised manpower training

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<sup>12</sup> Nwaka, G.I. (2005) Treating people and communities as assets. *Global Urban Development*, 1 (1), pp 1-11.

<sup>13</sup> Udogu, E.I. (2005) *Nigeria in the twenty-first Century-Strategies for Political Stability and Peaceful Co-Existence*. Trenton: Africa World Press, Inc.

institutions, such as the Industrial Training Fund (ITF), Centre for Management Development (CMD) and the Administrative Staff Training College of Nigeria (ASCON).

In a broad sense, the goals of higher education in Nigeria is to contribute to national development through high level relevant manpower planning as well as creating an enabling culture for the acquisition of both physical and intellectual skills for self-reliance.<sup>14</sup> However, beyond this is the need for the state to redirect manpower towards the growth sector of the economy, such as petroleum, gas, agriculture, manufacturing, solid minerals and tourism.

The traditional Nigerian education was predominantly agricultural, trades and crafts, which emphasised character training and job orientation.<sup>15</sup> In this system of training, professional and vocational skills were acquired through apprenticeship. The introduction of western education placed emphasis on literary and academic subjects. This latter development led to the decline of vocational and technical education. This was further complicated by frequent changes in the educational system.

The disruptive rivalry between the professional (academic) and vocational /technical components have made it difficult for the education system to meet the competency requirement of the education sector and the economy as a whole. The view is held that competence refers to the behaviour that employees must acquire to input into their respective assignments to enhance economic growth, thus making it a combination of knowledge, skills, understanding, ability, capacity, application aptitude and performance.<sup>16</sup> Accordingly, education system of every region/country (as much as practicable) should be restructured such that the curriculum delivers the appropriate skills to graduates, and thereby creating a core of professionals relevant to the economic challenges of the country. However, there are also other vocational institutions that have been sidelined because of the preference for university education. The belief that a University education (in very literate societies) provides assurance to employment is outdated.

Not only is there a skills mismatch in Nigeria but the educational institutions have not provided the climate for conducive learning<sup>17</sup>. Most institutions are either poorly funded or run programmes with little or no relevance to the immediate requirements of the society. The state governments have also ventured into establishing higher institutions to fulfil electoral promises rather

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<sup>14</sup> Oshinowo (2007) p. 3.

<sup>15</sup> Fafunwa, A.B. (2005) Current and future skills and competencies requirements of educational sector, *concept paper submitted to the ITF-NECA SCMRNE*.

<sup>16</sup> Adu, I.E (2005) Current and Future Skills and Competencies Requirements in the Agriculture, *concept paper submitted to the ITF-NECA National Survey*.

<sup>17</sup> Oshinowo (2007) p. 3.

than meeting the priority of the state. This development has caused specific problems leading to cases of strike actions by staff and students, which has not encouraged qualitative education. Some organisations, in an attempt to bridge this gap, have established private institutions which may be more efficient but hardly affordable by the majority of the population or of providing a realistic solution. However, even more consequential is the imbalance between the graduates and the job opportunities that are available in the economy.

### 5. The Labour Market Policies

Political instability in Africa remains an issue of concern with respect to state policies and in particular labour policies. Most states have an established department for employment and productivity related matters but these are very reactive and in most cases, are just part of an “old order”. Some commentators believe that the state should intensify efforts to diversify the economy as a labour enhancement policy.<sup>18</sup> It is also the view of some that the profile of youth unemployment needs to be understood for better appreciation of the challenges and possible opportunities. This could cover such areas as gender, geographical locations, health status etc.

These all point to providing enabling environment by the state and taking country specific approaches rather than the usual contention that a regional directed measure can serve as a panacea. This is because (as it has become obvious) economic growth does not necessarily equal job creation. Examining recent developments in some African states are worthy of note with respect to labour market policies. For example, Kenya aims to create over 500,000 new jobs by expanding the number of technical training institutes, supporting entrepreneurs in rural areas, initiating labour intensive public works and through Trees for jobs programme. In Ghana, a National Youth Employment programme has been created with focus on productive employment - where they are needed; such as health extension workers, waste and sanitation workers etc. Whilst in Nigeria, the focus is on commercial farming, tourism, ICT, transport and utilities as well as the informal sector. Tackling youth unemployment therefore requires not just a country specific approach but a holistic perspective as well.<sup>19</sup>

Whilst these are some of the approaches that can be pursued (with some reasonable and positive results), the underlying challenge is continuity. Who will continue to champion these laudable programmes? This is the greatest

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<sup>18</sup> Mudashir, I. (2013) *ICPAN Gives Recipe to Youth Unemployment*. [Online].

Available from: <http://allafrica.com/stories/201307011660.html>. [Accessed 1 July, 2013].

<sup>19</sup> World Bank (2009) *Youth Unemployment a Major Challenge for African Countries*. [Online].

Available from: <http://go.worldbank.org/D9HUZOZKBO>. [Accessed 20 October, 2013].

challenge. Not for lack of ideas but lack of sustainability of the laudable plans. The labour policy in many states in Africa therefore requires partners and partnerships arrangements that extend beyond the “four walls” of government. Institutional partners such as Employers’ Association, Trade Unions, Educational institutions, Non-profit organisations and the likes should be established with a view to enhancing continuity.

## 6. Methodology

The methodology was based on open-ended and semi-structured interviews in a number of selected companies (as detailed in Table 1 of the paper) to which access had been granted. This approach was complimented by a questionnaire, which was administered on the employees of the same companies. In effect, the study is based on the ‘case study’ model. There were two separate sessions of interviews conducted on company premises, each lasting for a period of around two hours. The interviews were conducted with HR professionals in the participating companies, which formed the basis of the study. The interviews were supplemented with data from NECA.

For the study, only the units of companies in the western region of the country were interviewed/surveyed. Amongst other reasons, most HRM initiatives and practices emanate from this region, which serves as hub to most business organisations. Consequently, though the selected companies provide obvious limitations to the research, the strategic position of the region provided a reasonable setting for some generalisations that the research has made. Besides, given the lack and insufficiency of data and information in Nigeria this study has a pioneering dimension, thus providing a basis for further work in this area.<sup>20</sup>

The 11 companies that were selected for the survey cover very strategic segments of the Nigerian economy. These segments are drilling and extraction (oil and gas), manufacturing (metal products), food and beverages (body care and home products) and services (banking and finance). As a result of the limited time of the study, only the units of the companies in the western region of the country were surveyed. The western region of the country is the business centre of the country, as well as a better spread of age group and gender. Lagos (in the western region) used to be the federal capital city.

An important point concerning the companies surveyed is that they all participated in the Student Industrial Work Experience Scheme (SIWES) of the federal government. This scheme is a partnership involving the Industrial Training Fund (a government agency) the higher institutions and the organised

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<sup>20</sup> Oshinowo (2007) p. 3.

private sector for students' placement in relation to on the job training and experience. The placements period vary from a minimum of three months to a maximum of one year.

Additional details of the surveyed companies are set out in Table 1 and the section summarising the companies.

**Table No. 1 - Analysis of Company Profiles**

Name of Company	Major characteristics							
	Year Est.	Structure	Staff Strength	Turn-over	% of Ex- port	Overseas Affiliation	Product	Trade Group
Britannia Foods Plc	1965	Multi'nal	2,200	\$230m	10%	Britannia Tweppes	Food	FBTE
Rex Bottling Coy Plc	1951	Multi'nal	7,700	\$425m	0%	Rex Hellenic Bottling Coy S.A.	Soft Drinks	FBTE
Crescent Aluminium Nigeria Plc	1959	Multi'nal	650	\$65m	2%	Inlinks Monte Carlo	Metal	SEWUN
Nobel Producing Nigeria	1951	Multi'nal	2,250	N/A	100%	Sexxon Nobel U.S.	Oil and Gas	NUPE NG
Delta Aluminum Nigeria Plc	1960	Multi'nal	2,500	\$100m	12%	Toncraft Group U.K.	Metal Products	SEWUN
Precious Bottling Company Plc	1959	Multi'nal	4,700	\$225m	0%	Affelta S.A.	Soft Drinks	FBTE
Nigerian Agape Oil Ltd	1958	Multi'nal	2,100	N/A	100%	Agape S.A. Italy	Oil and Gas	NUPE NG
Tiscon Nigeria Ltd	1986	Private Ltd	265	\$65m	0%	Private	Oil Service	NUPE NG
Trinity Bank Plc	2006	Private Ltd	4,750	\$550m	0%	Private	Finance	NFBTE
Ady Distilleries Ltd	1979	Private Ltd	510	\$40m	15%	Private	Alcohol and Soft Drink	FBTE
Premier Breweries Plc	1946	Multi'nal	2,050	\$865m	15%	Preineken N.V.	Alcohol and Soft Drink	FBTE

Kwabever Nigeria Plc	1923	Multi'nal	2,025	\$270m	15%	Kwabever Overseas Holdings B.V.	Foods and Body Care Products	FBTE
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Source: - Compilation from:

Company Annual Reports/Accounts, Interviews with company officials and Company web sites. Notes:

- i) These companies have been disguised. Therefore, the names used are non-existing.
- ii) The survey covered 415 employees. Less than 1 percent is in the age bracket 14-19 years and 34 per cent are in the age bracket 20-29 years.
- iii) On the average (all companies taken together) employees within the age bracket of 15-24 years are about 20 per cent.

## 7. Case Studies – Summary of Companies

*Metal:* The metal sector in Nigeria (which is part of the industrial group), contributed about 39 per cent of the GDP of the country in 2007. The metal and building companies have similar operations and contributed about 2 per cent of the GDP. Delta Aluminium is involved in downstream operations such as establishing corrugating plants for further use and developments of aluminium coils (e.g. making of different profiles of roofing sheets). On the other hand, Crescent Aluminium is involved with food and beverage industry such as Kwabever for the supply of aluminium collapsible tubes and Premier Breweries for aluminium cans for the packaging of drinks.

*Oil and Gas:* The oil business has significant importance to the Nigerian economy contributing about 37 per cent of the Gross Domestic Product (GDP) of the country in 2007. Nobel Producing Nigeria and Agape Oil Company Nigeria Plc are amongst the major players in the industry. Whilst Nobel's operation is focused on the offshore wells, Agape's operations are focused on inter-land wells in the Niger Delta region.

*Food & Beverages:* The food and beverage industries have some common similarities. They are a major part of the industrial sector of the economy, which contributed about 39 per cent to the GDP of the country in 2007. Their products are household necessities, such as beverages and detergents and also making such products easily available to the Nigerian consumers.

*Finance:* This sector is the rallying point for all economic activities in the country, contributing about 28 per cent to the GDP in 2007. A healthy financial sector is therefore important for economic sustenance and development. It is an established fact that in any economy the survival of the banking sector and other industrial sectors is that of mutual support and dependence. For example, the countrywide operation of Trinity Bank is a catalyst for economic growth/support for all industries. This has been

achieved through such activities as corporate banking, investment banking, retail banking and commercial banking.

The analysis of the organisations provided is intended to demonstrate the strategic positions these occupy in the economic development of the country. Therefore, the number surveyed may be limited in terms of the totality of the business organisations in Nigeria, but considering date of establishment, staff strength, turnover and relevance of products (see Table 1) they are a reasonable representation of the average business organisation in Nigeria. Besides, they are all industry leaders in their various sectors according to NECA's Golden Jubilee Report & Accounts.<sup>21</sup>

### **8. Youth Employment: Key Actors/Institutions**

Organisations in Nigeria have complained of the skill gap in meeting manpower requirements. Besides, the educational system has not achieved its full potential due to underfunding and the mismatch between the characteristics of the economy and the education system. The key actors in employment in Nigeria are the state, employers (represented by NECA) and the educational institutions.

The state provides legislation and the environment, which promotes an educational system that is relevant to the characteristics of the economy. The employers' on their part can pursue self-centred employment policies, which provide immediate benefit to operations without regard to any corporate responsibility. On the part of the higher educational institutions, there are no adequate data and information to guide human capital requirement. Consequently, educational institutions find it difficult to have clear strategies to match the skill requirements of the economy.

There are many commentaries on the issue of youth unemployment in Nigeria and the importance of intervention by the state and other stakeholders.<sup>22 23 24</sup> These commentaries centre on such approaches as increased internships in partnership with employers, review of educational curriculum, supporting the informal economy through small scale financing in collaboration with financial

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<sup>21</sup> NECA Golden Jubilee Report: This report covers the activities of the association between the periods 1957-2007 and thus captures 50 years of service to business and contribution to economic development and the roles of supporting organisations.

<sup>22</sup> Okojie, C.E. (2003) Employment creation for youth in Africa: the gender dimension Paper presented for the *Expert Group Meeting on Jobs for Youth: National Strategies for Employment Promotion*, 15-16 January, Geneva, Switzerland.

<sup>23</sup> Mbachu, (2005) p. 3.

<sup>24</sup> Oshinowo (2007) p. 3.

institutions etc. However, the paper posits that a wider approach is required; it views the issue of youth employment from the perspective of not only state but also the inclusion of employers, trade unions and educational institutions. Tables 2 and 3, and Chart 1, highlight the various levels of advancement in education in West Africa as well as status of youth population and labour force participation.

**Table No. 2 - Youth Population and Labour Force Participants Rates, West Africa**

	% of Total Population	Medium Age – Yrs	Labour Force Participation Rate, Youth 15-24 Yrs		
			2000	All	Male (1985)
Benin	20.2	16.5	29.0	17.0	12.0
Cote d'Ivoire	21.1	18.0	29.0	16.0	13.0
Gambia	17.7	19.5	27.0	14.0	13.0
Ghana	19.7	18.0	29.0	17.0	12.0
Nigeria	19.2	17.4	26.0	16.0	10.0
Senegal	20.0	18.0	28.0	17.0	11.0
Sierra Leone	19.0	17.9	26.0	17.0	13.0
Togo	19.5	17.1	28.0	17.0	11.0

Source: UN, Youth at the United Nations, Comparison of Country Profiles – Africa.

**Table No. 3 - Youth Literacy Rates in West Africa**

	All Youth 1985	All Youth 2000	Female % Literacy Rate 2000	Female Rate as % of Males 2000
Benin	33.9	53.1	36.0	51
Cote d'Ivoire	42.9	65.0	59.7	85
Gambia	35.2	57.1	48.8	74
Ghana	74.8	91.0	88.3	94
Nigeria	64.7	86.8	83.8	93
Senegal	34.9	50.7	41.7	70

Togo	56.9	75.4	63.7	73
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Source: 1) ECA, 2002, Youth and Employment in the ECA Region 2) UNDP, 2002, Human Development Report 2002.

Projection of population growth into the 21<sup>st</sup> century shows that young people (in relation to the overall population) will continue to grow over the next twenty years.<sup>25</sup> Additionally, their large numbers and higher educational level calls for appropriate policy initiatives by all stakeholders. Tables 2 and 3 respectively, show the levels of youth population in relation to the overall population on the one hand, and on the other hand, the increase in literacy levels. The latter position is corroborated with the highly educated level of participants in the empirical study as reflected in Chart 1.

In terms of gender analysis, the empirical data confirms that women constitute a third of the average work force in the organisations surveyed. This reinforces the relevance of growth in female literacy level and the demand for job opportunities from this sector of the population.

### 9. Findings and Discussion

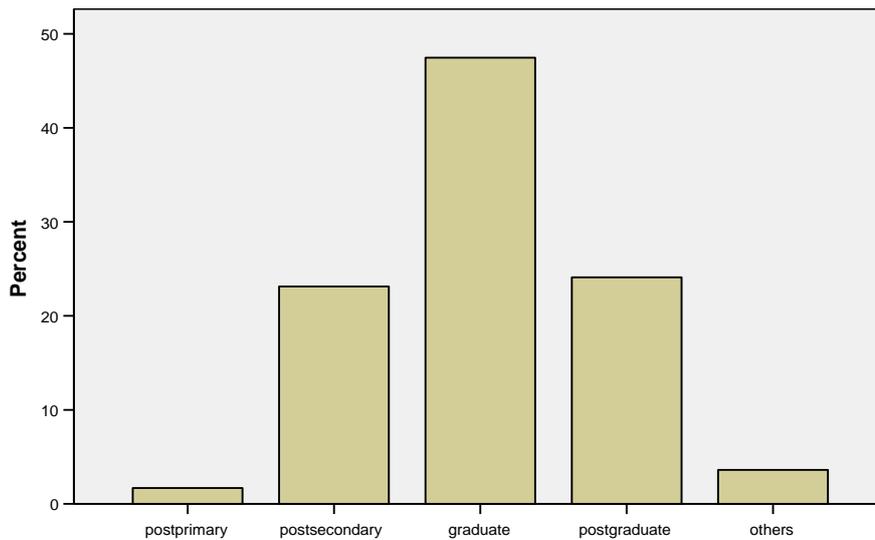
Most employers are critical of the quality of the products of Nigerian institutions as a result of a perceived fall in the standard of education. The incessant closure of educational institutions and the inconsistent educational policies and inadequate funding of the educational sector has impacted on the standards of education in several African nations. To compliment the training and skill of employees, working experience has become an important requirement. This approach inevitably excludes the young graduate leading to youth unemployment on the one hand; while on the other hand, there is a mismatch in the vacancy positions and the available candidates.

The above position has been supported with the analysis of the surveyed participants. In most cases, the educational qualifications of jobholders are higher than the job requirements. In general, the literacy level of the average junior employee (such as a machine helper) is secondary education, whilst most clerical positions are occupied by polytechnic graduates. From the surveyed participants, over 70 per cent are university graduates and only one third of participants are below 25 years old. Less than 1 per cent falls into the age group of 14 – 19 years. This has to be placed in the context of an increasing youth population in West Africa as a whole, and as Table 3 reveals an increase

<sup>25</sup> Okojie, C.E. (2003) p. 11.

in literacy rate among the youth. In contrast, Table 2 confirms only around 26 per cent labour force participation among the youth.

**Chart No. 1 - Educational Level of Surveyed Participants (Total number of surveyed participants: 415 employees)**



## 10. Classification

Furthermore, examining Table 2, the median age for youth in Nigeria is 17.4 years, a figure which confirms the low number of young people in the employment of the surveyed companies. In relation to the other factors, the high level of university graduates is a confirmation of education awareness, but could also portray a mismatch of competence. Table 2 confirms the improvement in literacy rate in Nigeria, an increase of over 20 per cent. Additionally, only around 5 per cent of all the surveyed participants have spent over 21 years in employment. This suggests that with the relevant skills, there will be job openings for the younger generation in these companies as the current labour force moves towards retirement.

One revelation during the interview session is the admission of most HR practitioners that some of the employees are over qualified for their positions. Therefore, whilst Chart 1 presents a highly qualified work force, some of the individuals concerned may have taken up these positions for lack of matching job openings in other sectors of the economy as confirmed by the survey

questionnaire. Besides, Nigeria (and Nigerian youths in particular) may not be faced with a major literacy problem but with lack of matching (relevant and appropriate) education and skills. Chart 1 also confirms that most unskilled positions in the work place of today are occupied with secondary or higher education leavers, which was not the situation around 15 years ago (as was revealed during the interview sessions with HR practitioners of the surveyed companies).

### 11. Challenges and Limitations

From the perspective of a developing nation, there is increased awareness of education in Nigeria. The demand for education (particularly in higher educational institutions) is increasing, and there is evidence that it has led to a decline in standards. Besides, the government is handicapped in addressing skill imbalance because of a lack of adequate information and no strategic partnership with the organised private sector. There is, therefore, an argument for Nigeria's education system to be restructured so that the curriculum delivers the appropriate skills to graduates, and creating a core of professionals relevant to the economic challenges of the country. There are also other vocational institutions that have been sidelined because of the preference for university education.

Trends in manpower requirements, emerging disciplines, upgrading and appropriate funding of relevant university and tertiary institution programmes are the new challenges. On the part of employers, a review of employment requirements and on-the-job training will enhance employment of new intakes. The incessant requirement of working experience sidelines 'new graduates' and artisans from being employed. A deliberate effort should be pursued to embrace job creation in partnership with the relevant stakeholders.

Many scholars have examined a number of intervention schemes such as rural employment promotion programme<sup>26</sup>, vocational skills development programme, information and communication technology initiatives<sup>27</sup>, promoting entrepreneurship<sup>28</sup>, improving labour market regulations and voluntary national service programme<sup>29</sup>. These programmes are valuable but success depends on the active role of all the stakeholders. The state should take the lead by engaging the relevant educational institutions, employers of labour, trade unions and related Non-governmental organisations (NGO).

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<sup>26</sup> Nwuke, K. (2002) p. 3.

<sup>27</sup> Okojie, C.E. (2003) p. 11.

<sup>28</sup> Mbachu, (2005) p. 3.

<sup>29</sup> Godfrey, M. (2003) p. 3.

The recent initiative of the NECA and the Industrial Training Fund to conduct a survey of contemporary manpower requirements in the Nigerian economy is a significant project. However, the government will be required to provide a framework for building on the relevant statistics and providing an enabling environment to discuss these challenges with the relevant stakeholders. For example, each higher institution might provide evidence of the establishment and running of all accredited courses of study.

On the part of business organisations, there should be commitment to establish In-house training facilities or schemes, and the active participation of placement programmes with higher institutions. They should commit to every legal requirement to support education such as the education trust fund. The Education Trust Fund (ETF) is a fund established under the Education Tax Act No.7 of 1993 and amended by Act No. 40 of 1998 with the objective of using the fund for project management to improve the quality of education in Nigeria. Perhaps the objectives of the fund require assessment in line with current challenges.

The trade unions, whose policies might increasingly be concerned with real job creation, and not only the current objective of job enlargement/enrichment for financial benefits, could make an impact. The primary role of trade unions is collective bargaining for its members. Most of their efforts are therefore aimed at immediate financial rewards. However, if job creation is targeted at basic crafts and apprenticeship, its members (in real terms) will increase and job opportunities at the 'shop floor levels' will become available for the youth, particularly those who may be limited in pursuing their education beyond tertiary levels. This certainly is a challenge for a new level of partnership between the trade unions and employers.

## 12. Conclusions

Creating viable jobs for young people is a crucial and therefore of essence to Africa's poverty eradication, sustainable development, and peace; and from the perspective of countries in transition, access to employment for youth is integral to peace-building processes.<sup>30</sup> The Nigerian economy is responding to increasing investments from all industrial sectors. The oil and gas industry continues to play significant roles in the Nigerian economy in spite of the current challenges in the Niger Delta region. There are further opportunities for direct investments and the oil companies remain committed to additional

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<sup>30</sup> Zuehike, E. (2009) *Youth Unemployment and Underemployment in Africa Brings Uncertainty and Opportunity*. [Online]. Available from: <http://www.prb.org/Articles/2009/youthunemployment.aspx>. [Accessed 1 July, 2013].

investment in the oil and gas industry in Nigeria through continued joint venture operations with the Nigerian government. The manufacturing industry and finance business on the other hand have taken full advantage of the democratic setting (which has enhanced confidence in business activities) to expand their business activities and profitability.

The future of these business organisations, and indeed the country, depends on the availability of appropriate manpower with the relevant skill and commitment to take the country to the next level of economic advancement. A central issue is providing employment for young people on the formal labour market; the energy of the youths of Nigeria has to be directed to this future challenge which calls for the joint commitment of the entire stakeholders in the industrial relations setting.

Furthermore, the poor standard and quality of education (in the majority of the higher institutions) as a result of inadequate funding, absence of qualified teachers and teaching facilities has affected the quality of student output. The mismatch of skills, as a result of a lack or insufficiency of data as well as the resulting absence of educational policy (including the role of tertiary/vocational institutions) that targets the needs of industry and the community, now and in the future, requires immediate focus for the management and development of human capital in Nigeria.

Therefore, in response to the characteristics of the Nigerian economy, the various interlocking factors need to be addressed. Firstly, the state has to move away from simply policy formation to establishing a reliable and consistent database for useful integration by all relevant government institutions (including educational establishments). Secondly, the organised private sector has to move away from simply contributing to the Education Trust Fund (ETF), to improved partnership with the higher institutions. This needs to be linked to instituting on-the-job training programmes for every segment of business, which thirdly forms the basis of skill development and job creation.

The results also raise the fact that educational establishments should liaise with government agencies as well as industry to determine skills that are lacking on the one hand, as well as skills that can be supported for economic growth, on the other hand. By so doing, graduates leaving higher/vocational institutions would have studied subjects that are relevant to the society. Employers should also promote employment of students through work experience schemes and industrial attachments to their organisations rather than recruiting on the basis of experience and further education. There should be a programme of building from within rather than from outside.

The Nigeria experience is almost synonymous with most countries in Africa. Therefore, the greater lesson for Africa is that every country should explore what approach provides the greatest opportunity based on demographics, the

state of the formal/informal economy, the consenting partners – who should form the bedrock for the sustainability of any approach. Youths remain the most abundant asset that Africa can claim. This challenge must be translated to opportunities which should be sustained by the consenting partners.

# Vocational Training in the Context of Law of June 14th 2013 on Employment Security: The “Personal Learning Account”

Nicole Maggi-Germain \*

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## 1. Introductory Remarks

The Senate passed following a forty-hour debate in the Senate and another sixty-hour debate in the National Assembly, the bill on the enhancement of employment security on May 14 2013. This bill was presented at the National Assembly on March 6, 2013<sup>1</sup> after an accelerated procedure was initiated<sup>2</sup>. This is part of a normative process in which, in conformity with articles L.1 to L.3 of employment legislation, that involves the social partners in law making. This process is preceded by negotiations nationally undertaken at the sectoral level by employers’ associations and workers’ unions. This “conventional precondition” originates from the 2007 Act on the modernization of social dialogue<sup>3</sup>. The reform proposes to connect the law to the concept of social

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Translation from French by Emilien Blandine.

<sup>1</sup> Law No. 2013-504 of 14 June 2013 on Employment Security, Official Journal of 16 June.

<sup>2</sup> A project or a bill is examined by the two houses of the French Parliament, that must agree on a single version. Until an identical text is approved by both houses, the text goes back and forth between the National Assembly and the Senate. The French Constitution (art. 45) provides for the possibility that, after two readings of the text by each house or a single reading if the Government has previously initiated the accelerated procedure, by a joint Commission composed of seven members of the Assembly and seven senators. The text is developed and submitted for approval by the Government at both meetings. No amendment shall be admissible without the consent of the Government. The joint Commission has drafted a text (No. 980 and No. 531 of 23 April 2013).

<sup>3</sup> Law No. 2007-130 of 31 January 2007 on the Modernisation of Social Dialogue, Official Journal 1 February 2007, p. 1944.

dialogue, more precisely to the “Procedures of coordination, consultation and information.” In addition to being merely considered as a legal concept, social dialogue is depicted as a tool<sup>4</sup> supporting social reforms put forward by unions, which play a relevant role in terms of consensus<sup>5</sup>: “Our reform is a gesture of trust in relation to social dialogue as it rests upon the certainty that social partners are capable of bringing the necessary developments to our social model. We therefore needed to contemplate new game rules”<sup>6</sup>.

The shift in the presidential majority and the appointment of a socialist candidate at the head of the government a year ago did not affect the significance of social dialogue. A guidance document which emanated from the social conference on July 9<sup>th</sup> and 10<sup>th</sup> of 2012 was distributed to the social partners on September 7, 2012, triggered an inter-professional negotiations at the national level that lasted over four months.

On January 11, 2013, these negotiations culminated into the conclusion of the agreement “for a new economic and social model” designed to underpin competitiveness of enterprises on the one hand and security of employment and career paths for workers on the other hand. On the employer’s side, the Medef<sup>7</sup>, the CGPME<sup>8</sup> and the UPA<sup>9</sup> signed it while they were only three out of five trade unions. It’s interesting to note that the agreement did not include a preamble which would have shed light upon its objectives, revealing the parties’ common goals. An analysis of the clauses shows that the agreement proposes to secure employees’ career paths through the establishment of new rights while granting the firm more flexibility in the management of employment. In that way, the National inter-professional agreement (ANI) seems to favour a flexicurity approach more than following the French model of securing professional career paths<sup>10</sup>.

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<sup>4</sup> G. Larcher, Minister of Labour, speech to the National Assembly, Official summary record 2nd sitting of Tuesday, 5 December, 2006.

<sup>5</sup> See C. Gobin. *Dialogue social*. In P. Durand (ed.), *Les Nouveaux Mots du pouvoir*, Aden, 2007, 300 p. 136-142 ; N. Maggi-Germain, « Sur le dialogue social », In *Droit social*, July-August, p. 798-807 ; A. Supiot, « La loi Larcher ou les avatars de la démocratie représentative », In *Droit social*, 2010, p. 525-532; C. Radé, « La loi négociée : simple marketing politique ou véritable produit de la démocratie sociale » In *Droit ouvrier*, 2010, 319-323.

<sup>6</sup> G. Larcher, speech to the National Assembly, cit.

<sup>7</sup> *Mouvement des entreprises de France*, Movement of French enterprises.

<sup>8</sup> *Confédération générale du patronat des petites et moyennes entreprises*. General Confederation of employers of small and medium enterprises.

<sup>9</sup> *Union Professionnelle Artisanale*.

<sup>10</sup> Beyond the semantic distinction, the concepts of flexicurity and the idea of securing career paths are two different systems of values based on different legal principles. While flexicurity is limited to improving occupational transitions, career security seeks to combine legal and contractual terms, by ensuring that individuals can access training regardless of certain risks (job loss or loss of work). From this point of view, career security involves the establishment

New rights for employees (the widespread provision for supplementary health coverage, accrued rights to unemployment benefits, the establishment of a personal learning account) are implemented resulting in higher levels of employment flexibility in order to “provide enterprises with the means to adjust to structural problems and to safeguard jobs”<sup>11</sup> (employees’ internal mobility<sup>12</sup>, agreed employment protection with possible temporary reduction of working hours and wages<sup>13</sup>, the provision of casual work, etc). Further, in order to “rationalize the procedures for legal disputes” (Title V of the ANI), the time-limit to make claims that concern the enforcement or termination of an employment contract is reduced from five to two years (Art. 26). At the same time, a fixed compensation award covering damage caused by the dispute on redundancy may be granted during the settlement procedure before the conciliation tribunal (Conseil de Prud’hommes). Such compensation would permanently end a dispute that opposes an employer and an employee (Art. 25).

Given that from a legal perspective, the government is an external agent in this “multidimensional”<sup>14</sup> form of negotiations, it has amended them in order to “lay the foundations of a ‘new economic and social model’ that no longer opposes the competitiveness of enterprises and the security of career paths”<sup>15</sup>. Based upon the motives outlined in the government bill, enhanced employment security, is, “the affirmation of a new equilibrium whereby one person or the other gains more security without losing its adjustment or mobility capacity.” This is the main challenge: enhanced anticipation and the capacity to adjust earlier, quicker through negotiation, in order to protect employment and consider new rights for employees, both individual and collective<sup>16</sup>.

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of a network of contractual obligations but also devices that extend beyond the contractual framework, allowing an extension of the exercise of certain rights previously acquired. See N. Maggi-Germain, *Formation professionnelle continue et sécurisation des parcours professionnels*, in *Semaine sociale Lamy Supplément*, 7 April 2008, No. 1348 (Special issue on securing career paths), p. 21-25.

<sup>11</sup> Session III of the ANI.

<sup>12</sup> Le refus du salarié entraînant son licenciement pour motif personnel et non pour motif économique (art. 15, dernière ligne). Employee’s refusal leading to the dismissal for personal reasons and not for economic reasons (Article 15, last paragraph).

<sup>13</sup> Lower-wage earners up to 1.2 SMIC (*salaire minimum interprofessionnel de croissance*, minimum wage). Art. 18, footnote on page 11.

<sup>14</sup> Jacques Freyssinet interview with *aef.info*, No. 17633, 18 December 2012.

<sup>15</sup> Rapporteur of the Committee on Social Affairs, socialists groups meeting of 17 April 2013, Official Journal of 18 April, p. 3375.

<sup>16</sup> Introduction to Bill No. 774 on securing employment, 6 March 2013.

The act is divided into four chapters. The last chapter involves various arrangements while the remaining three are premised upon the following: “Creat(ing) new rights for employees”, “Striv(ing) against precarity in employment and in accessing employment” and “foster(ing) the negotiated anticipation of economic changes, in an attempt to develop skills, protect jobs and manage economic redundancies.” Having been accused by a communist senator of “selling out employment legislation”, the government has encountered more of a significant amount of opposition from the left than from the right party. In total, out of 5300 amendments proposed only 342 have been declared admissible<sup>17</sup>. Inadmissibility was mainly expressed against the amendments to article 1 on the extension of the transferability of health and accident coverage for employees whose contracts have been terminated<sup>18</sup>. The creation of a universal, individual and integrally transferable personal learning account (Art. 5) remains one of the most relevant measures. Mainly due to the fact that it is one of the most symbolical initiatives agreed in principle by members of parliament. It is expressed in the early draft of a new category of subjective rights: rights attached to the person (I), that are included in a right to vocational and continuing training that remains to be built (II). On December 14, 2013 the Interprofessional National Agreement (ANI) implemented a procedure on employment training. The agreement was repeated in the Act on March 5, 2014<sup>19</sup>.

## 2. Rights: A New Proposal

The personal learning account brings together different legal perspectives since it is based on two different logics: the asset-based approach (endowment) and the drawing rights approach, leading up to some paradoxes<sup>20</sup>.

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<sup>17</sup> Gilles Carrez, chairman of the Finance Committee of the AN, Second meeting of Thursday, April 4, 2013, Official Journal of 5 April p. 3778.

<sup>18</sup> “Portability” was already provided by the ANI of 11 January 2008 on labour market modernization for employees of companies in sectors represented by MEDEF, CGPME and UPA (industry, trade, services and craftsmanship), excluding the sector of the social economy, agriculture or the professions. The duration of health and welfare benefits provided in the former company is extended by the bill up to 12 months instead of 9.

<sup>19</sup> Law No. 2014-288 of 5 March 2014 on vocational training, employment and social democracy, Official Journal of 6 March 2014, p. 4848.

<sup>20</sup> For further developments, see Jérôme GAUTIÉ, Nicole MAGGI-GERMAIN et Coralie PÉREZ (2015), « Fondements et enjeux des "Comptes de Formation" : les regards croisés de l'économie et du droit », In *Droit social*, février, p. 169-180.

### 2.1. *The Personal Learning Account: An Overview*

1) The personal learning account: an extension of the individual rights to training (*Droit Individuel à la Formation*, DIF)

By adding it to article L.6111-1 (paragraph 4) of the Labour Code, Article 5 of the law, gives symbolic relevance to the personal learning account (CPF). More precisely it is added to the general principles dedicated to the to lifelong vocational training. The choice of this particular codification helps to establish a hierarchy among the different articles.

In regard to the personal learning account, the first part of Article 5 of the law states the following:

“In order to facilitate one’s own access to lifelong professional training, each person is granted a personal learning account since the entering into the labour market, regardless of their status. The personal learning account is calculated in terms of hours and is used by the individual when they access a training course as an individual, regardless of whether or not they are an employee or a job seeker. In the case of a change or loss of employment, the account is transferable and cannot be debited under any circumstances without an explicit agreement obtained from the account holder”.

However, the advocated universal character of the account<sup>21</sup> appears to be moderated both for account holders and recipients. Even if in the “account holder” category, the text aims at “any person”, there remains the condition that he or she has entered the labour market, in other words, recorded within the active population<sup>22</sup>, regardless of its status. Inactive pensioned are excluded from the system<sup>23</sup>. On the contrary, school leavers or young interns are included in the system. The personal learning account (CPF) is the concern of the continuous professional training, codified in section 6 of the Employment Act and not in initial training, which in turn, is codified in the Education Act.

The advocated universal character of the account is also moderated by recipient categories: hours can be mobilized under the personal learning account (CPF) by “the person when he or she accesses a training course as an individual, as an *employee* or a *job seeker*”<sup>24</sup>. The March 5, 2014 Act stipulates that a personal learning account is open to “all persons that are 16 and older, in

<sup>21</sup> It is one of its characteristics as pointed out under 5, 2 of the ANI of 11 January 2013 (the account has a “universal”, “personal” and “transferable” character).

<sup>22</sup> J. M.Germain, Report No. 847 of 27 March 2013 on behalf of the commission of social affairs on the bill regarding securing employment vol. I, 590 p., p. 86.

<sup>23</sup> The account is created just after school, except for those who do not want to enter the workforce that are still present in small proportion in the population, as pointed out by the National Assembly 2nd meeting of 4 April 2013, Official Journal 5, p. 3771.

<sup>24</sup> Italics added.

*employment*<sup>25</sup> or in search of employment, or who are currently receiving guidance through a professional orientation and integration project<sup>26</sup>. Therefore, based upon the current state of this right, this list excludes the self-employed and civil servants. The objective is to establish a system linked to employment and more particularly to employees. From this vantage, the philosophy conveyed in the personal learning account, departs from a universal right to individual professional training, which in turn, would benefit the whole population. However, references have been made in the law in regard to person “in employment”, while the December 14, 2013 ANI was referring to employees (wage earners *per se*), may indicate some development perspectives. Furthermore, it is envisaged that “training hours recorded in the account remain acquired in the case of a change in the professional status or employment loss suffered by its account holder” (Art L.6323-3 of the Labour Code).

This restrictive approach argues for the maintenance of the Individual Training Leave (CIF). It is a system that gives real shape to the employees’ or former employees<sup>27</sup> right to training while allowing them to, namely, “open more extensively to the culture, social life and to the exercise of benevolent and associative responsibilities<sup>28</sup>”. One can only regret that the personal learning account (CPF) is not subjected to more significant inspiration from the Individual Training Leave (CIF).

Unlike the National Interprofessional Agreement (ANI), the bill that was introduced on March 6, 2013 at the National Assembly makes no mention of the financing question involved in the personal learning account (CPF). On the contrary, the ANI envisages the transfer of rights acquired under the Individual Right to Training (DIF) in the Personal Learning Account (CPF) while also

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<sup>25</sup> The personal account can be created for people starting at the age of fifteen if they enter an apprenticeship.

<sup>26</sup> Including workers with disabilities received in centers providing placement services or specific workshops.

<sup>27</sup> The “training leave” is introduced by Act of 3 December 1966 on guidance and vocational training. It provides for the right to take a leave, which is paid under certain conditions (since law of 16 July 1971); it allows a worker to take an internship of his/her choice, during the working time. The CIF is a “right”: the employer may only delay the exercise of the right to leave (under certain conditions and for a maximum period of nine months, Art R. 6322-7 of the Labour Code). Financial support for the CIF (1 year or 1200 hours) is provided by a joint body external to the company: the OPACIF (Article L. 6322-12). The duration of the individual training leave shall not be deducted from the annual paid leave. It is equivalent to a period of work for the determination of the rights of the persons to paid annual leave with regard to the rights that workers have according to their seniority in the company (Article L. 6322-13).

<sup>28</sup> Art. L. 6322-1, 3 of the Labour Code.

conditioning its implementation through “an agreement on the funding arrangements between social partners, regional authorities and the State, who will in turn undergo consultation on the topic at issue, as soon as possible” (art 5, paragraph 4). Introduced by the government at the National Assembly on April 3, 2013, amendment no 5562 is the corrective, which stresses that the account is funded by 1. Rights acquired under the Individual Right to Training (DIF), 2. “By supplementary financial provision (*abondements*), provided namely by the state or the regional authorities.” Therefore, contributors who have been directly identified are both the enterprise, in the form of the 120 DIF hours afforded to each employee, and public authorities. However, this is not a limited list given other funding sources can be conceived. They may originate from joint bodies, from the recipient himself, and even from the employer. The March 5, 2014 Act has stated the necessary clarifications: the employer first funds, the personal learning account (CPF) in the form of hours credited at the end of each year (art. L.6323-10): 20 hours per year for 6 years and 10 hours per year in the following three years; in other words, 150 hours for a full time employee (art L6323-11). It can then be supplemented. “In the case where the length of the training course is higher than the number of hours recorded on the account, training can be funded with additional funded hours, upon the account holder’s request” (art L6323-4-II). All of these training hours can be funded by various ways such as the employer, the recipient, a representative training fund organisation (OPCA<sup>29</sup>), the State, regional authorities, the national Job center (Pôle Emploi), the Agefiph - Fund for Persons with Disabilities - and the National Pension fund for employees<sup>30</sup>. Financial provision legally defined as “supplementary” may add to the Personal Learning Account (CPF) in two cases provided in the Law:

-According to a collective agreement<sup>31</sup>, which concerns the definition of eligible training courses and the employees given priority<sup>32</sup> (art L. 6323-14).

-In enterprises with at least fifty employees, where it has been six years since an employee has not benefited from measures<sup>33</sup> aimed at securing his career

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<sup>29</sup> *Organisme paritaire collecteur agréé*, accredited joint collecting fund for training.

<sup>30</sup> If the CPF is filled with the hours accrued by an employee as part of his personal account to prevent hardship, as created by the law No. 2014-40 of 20 January 2014 “to ensure the future and justice of the pension system (Art. L. 4162-1 et seq. Labour Code).

<sup>31</sup> Signed at the level of company, group, sectoral or trade unions and employers’ organizations signed by the agreement constituting a joint accredited collective fund for training.

<sup>32</sup> Especially the least skilled workers, workers exposed to occupational risk factors, employees holding jobs threatened by economic or technological developments and part-time employees.

<sup>33</sup> Interview conducted every 6 years, to make a state of the art analysis of the career path of employees.

path<sup>34</sup>: the employer is required to credit the employee's account by 100 additional hours (130 hours if the individual is a part time employee) (art L.6323-13).

The last case mentioned here aims at penalizing employers' inertia.

Hypothetically, one can suggest that once enterprises contribute directly to the funding of the Personal Learning Account (CPF), they may aim at "capturing" training, as it happened before with the Individual Right to Training (DIF)<sup>35</sup>. A risk exists within this because the purpose of the personal learning account (CPF) is not clearly defined by the legislation and remains vague ("In order to facilitate his or her employee's access to lifelong professional training, each person is granted with a [personal learning account (CPF)]").

Could the personal learning account (CPF) be a mere "extension" of the Individual Right to training (DIF)?

This appears to be the philosophy advocated by the ANI. Precisely, the legal regime of the personal learning account (CPF) is modelled on that of the DIF. The employee can only use their personal account upon the employer's agreement when it is used during working time. However, the December 4, 2013 ANI and the March 5, 2014 Act has stated that the employer's agreement was no longer necessary given since training courses are conducted outside working hours (Art L6323-17, paragraph 2).

The primary buffer established by the legislation to an eventual "capturing" of the personal learning account (CPF) by the enterprise is no doubt, a qualification requirement as stated in article 5. This is the condition that allows supplementary funding to be mobilized<sup>36</sup>. The fact that the system may be

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<sup>34</sup> Professional interviews conducted every 2 years age and at least two of the following three actions: training, accreditation of prior learning (*validation des acquis de l'expérience*–VAE) or pay or career advancement.

<sup>35</sup> Created by the national intersectoral agreement of 5 December 2003, it was taken over by the Act of 4 May 2004 which set the legal framework of the device while leaving the social partners to organize, by collective agreement, the implementation of the DIF in sectors and enterprises. The employee with a certain seniority acquires 20 hours of training per year, accumulated over 6 years. He has therefore a time credit of 120 hours, whether on a permanent or temporary contracts (rights are then calculated pro rata). The exercise of the individual right to training is the initiative of the employee, in agreement with his employer (art. L. 6323-9). In principle, training takes place during working time. The employee then receives a training allowance (50% of the net wage of the employee), which is not a "salary" and therefore is not subject to social security contributions (article L. 6321-12).

<sup>36</sup> The CPF is supplied by financial provisions provided namely by the state or the regional authorities to promote access to one of the qualifications mentioned in Article L. 6314-1, that is "it must be registered in the national directory of professional certifications, is recognized in the classification of a national sectoral collective agreement, and it opens up to the possibility of a vocational qualification"

externally managed<sup>37</sup>, as evoked in the report compiled by parliamentary Jean-Marc Germain<sup>38</sup>, may also reduce potential risks.

### *2.1.1. The Individual Right Category: Beyond Employment Status*

In 1999, the governmental ministry posed a question for professional training regarding recognition of a right to continuous professional training for employees. In a working paper<sup>39</sup>, the ministry, then led by Nicole Péry, emphasized the need to elaborate an *individual* right to training (i.e. freedom to make use of one's acquired rights, while also building a training project that reconciles one's personal project and corporate interest, in agreement with the employer), transferable (rights to continuous professional training acquired within an enterprise would not be forfeited in case of employee mobility) and collectively guaranteed (given the management system for this right rests upon a mutual funding system<sup>40</sup>). While it was introduced in 2003 by an interprofessional agreement at the national level and restated in the act a year later, the Individual Right to training (DIF) partly reflects these guiding principles. 'Transferability' or 'portability'<sup>41</sup> of acquired rights has been at the core of relevant debates for almost ten years now. When it was created, the Individual Right to training (DIF) only provided for a relative transferability in the advent of the termination of an employment contract: the employee was required to use their training rights during their notice period. The January 11, 2008 ANI on the "modernization of the labour market" and the November 24, 2009 Act<sup>42</sup> introduced extended portability: acquired rights, or remaining ones, are transferable in another enterprise (or when brought under the responsibility of the unemployment benefit system), subject to the employer's

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<sup>37</sup> By a joint body as the Joint Fund for career security. In the end, the Caisse des dépôts et consignations, a public institution, will manage the CPF, from an accounting point of view only.

<sup>38</sup> J.M. Germain, Report No. 847, cit., p. 96.

<sup>39</sup> N. Pery. *La formation professionnelle. Diagnostics, défis et enjeux*. The Secretary of State contribution to women's rights and vocational training, 17 March 1999, in *La documentation française*, p. 239. The same idea is expressed by J. M. Bélorgey, *Minima sociaux, revenus d'activités, précarité*. In *La documentation française*, Commissariat Général du Plan, May 2000, p. 147.

<sup>40</sup> Principle laid down, with regard to the fund to ensure training for employees of one or more sectors, by Article L. 6332-7 of the Labour code ("They are managed jointly. They pool the money they receive from businesses").

<sup>41</sup> The concept of "portability" is a legal one, but its definition does not match the context of the DIF or CPF. Portability is a "debt that the debtor has to pay the creditor" (G. Cornu *Vocabulaire juridique*, PUF, Quadrige, 2004. The notion of transferability, a legal category to be built would have suited better to these measures.

<sup>42</sup> Law No. 2009-1437 Law No. 2009-1437 on guidance and long life vocational training Official Journal of 25 November 2009.

agreement. However, this portability was limited in time: the employee lost their rights if they did not make the request to their employer within the two years following their recruitment. The Act proposes a personal learning account that is “completely transferable”. “Finally, [the Act] should provide for the transferability of rights under the Individual Right to Training (DIF) for the case of transition between the public and private sectors”<sup>43</sup>.

The first proposal to extend rights beyond the employment status is the most innovative feature of the personal learning account and likely what distinguishes it from flexicurity in the meaning of Community law. Based upon a typology of various forms of labour market organization, the European Commission proposed four “flexicurity programmes” in its 2007 communication. The first programme, entitled “[resolving] the contractual segmentation problem”<sup>44</sup>, aims to “redistribute flexibility and security in the most equal form possible among the active population”. Among other objectives, it also aims to redefine rules applicable to economic redundancies “[...] in order to reduce bureaucracy and the length of procedures [...]”. Flexicurity rests upon the objective of rendering the labour market as more flexible. In contrast, the enhancement of security for career paths needs to achieve two further objectives. On the one hand, it needs to create legal gateways among different employment statuses by establishing legal transitions. On the other hand, it needs to link a set of rights and immunities, which are eventually acquired under the previous status or are attached to the individual (*infra*) while it can be exercised under another status. It is precisely continuity of activity through the granting of new rights that is sought, rather than uniformity in legal statuses of employment, for instance through the creation of a single employment contract<sup>45</sup>. Establishing more security for career paths implies the articulation of the status and contract: if a worker’s rights were acquired under an employee status, they need to be flexible regardless of the employment status. Such is the intent of article L6322-25 of the Employment Act, which in principle, states the existence of a right to individual training leave (CIF) for “any person who, has held a fixed-term employment contract during his professional life.” The CIF-CDD<sup>46</sup> and the DIF are premised on the

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<sup>43</sup> Jean-Marc Germain, Report No. 847 of 27 March 2013, cit., p. 93.

<sup>44</sup> European Commission. *Vers des principes communs de flexicurité : des emplois plus nombreux et de meilleure qualité en combinant flexibilité et sécurité*. Communication cited, 2007, p. 15.

<sup>45</sup> The idea dates back to 2004 thanks to two economists Pierre Cahuc and Francis Kramarz. *De la précarité à la mobilité: vers une Sécurité sociale professionnelle*. 2004 Report to the Minister of Economy and the Minister for Employment, 6 December, 202 p., p. 145 and ff., and was taken by the candidate at the presidential election Nicolas Sarkozy during the 2007 campaign.

<sup>46</sup> The right to individual training leave (CIF) acquired under employee status in fixed-term contract goes on at the end of the contractual relationship (Article L. 6322-29), i.e. it continues

same logic. However, these rights can only be acquired under an employment contract and are open according to seniority. The originality of the personal learning account (CPF) is to establish continuity of rights acquired outside the employee status (“all persons, independently of their status, from their first entry onto the labour market”, Employment Act, art 5, I. paragraph 2) and independently of any condition related to individual seniority. In other words, the opening of rights assumes a progressive detachment from the employment status. While some rights remain linked to employee status, others aim to cover the aggregate of workers, and moreover the worker as a person. Given that these rights have distinct purposes, so should be the terms in which they are exercised.

## *2.2. The Personal Learning Account (CPF): Contradictions*

### *2.2.1. A Repository of Existing Training Systems*

The person being trained is granted either with the status of a professional training intern or that of an employee in a work-related training, without strict performance of actual work. In this case the acquisition of rights attached to an employment contract is called into question: will the training received be assimilated to a work period to define rights of those concerned in regard to annual paid leave and to rights that an employee holds from his seniority within the enterprise as is the case for the CIF (art L6322-13)? The Personal Learning Account (CPF) is, in the current state of the law, secured by corporate funding through which it is credited. Supplementary funding from the state, regional authorities or a joint body among others, only intervene in terms of additional financial contribution, precisely as a supplement. The concept of *abondement* (supplementary funding) per se limits the application scope of the Personal Learning Account and is conducive to a segmentation of funding arrangements. In reference to a terminology used in parliamentary debates, the personal Learning Account (CPF) is thus a repository<sup>47</sup> from which the enterprise can draw through rights acquired by its employee, with the possibility to seek, if need be, additional financial provision from public authorities or joint bodies. Even if, in conformity with legislation, training hours contained in the Personal learning Account (CPF) cannot be merged<sup>48</sup>,

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for the period in which the former employee on a temporary contract can be registered as a job seeker, or be in a self-employed status.

<sup>47</sup>For example, the rapporteur of the bill Claude Jeannerot, of the socialist group, Senate, 19 April 2013, Official Journal 20, p. 3625.

<sup>48</sup> An amendment providing for the absorption of DIF by the CPF has been filed by the UMP group in the National Assembly. It was rejected, the Minister of Labour Michel FIR referring

they can still be pooled together<sup>49</sup>. However, this form of mutual compensation remains asymmetrical: only the sums paid under the Individual Right to Training (DIF) can benefit from the additional financial provision (*abondement*) described above. The legal framework did not provide for the compensation to operate in the opposite direction. In other words, a literal interpretation of article 5 of the 2013 Act conditions the use of the Personal Learning Account (CPF) to payments on grounds of acquired rights, as established under the Individual Right to Training (DIF). In the case where an employee mobilizes his personal learning account under this acquired rights based upon the DIF, he or she should be subjected to the legal regime for employees using their DIF: only training received during work time can be assimilated to work time per se. The supplementary funding regime (*abondement*) from public authorities will not be capable of causing the demise of the legal system given that initial access to training occurs through the Individual Right to Training (DIF). In the same vein, let us consider the case a serious fault which initially deprived the terminated employee from any use of the DIF, either within the enterprise, during his or her period of notice; or with a new employer, or else, when he is placed under the responsibility of the Unemployment benefit regime (Art L6323-17 and 18). Will such a fault prevent the employee from using his or her Personal Learning Account?

For the rapporteur, Jean-marc Germain, “as far as the Personal Learning Account is concerned, this condition should no longer exist, if the account is to be additionally funded by regional authorities and the state, bearing in mind that social partners will still be able to maintain their contribution through the DIF which in turn will fund the personal learning account”<sup>50</sup>. The 14 December 2013 ANI (art 14, paragraph 4) provided that the employee would lose his or her acquired rights under the termination of an employment contract. This provision was not restated in the 2014 Act.

Based on the summary which accompanied the government bill submitted and also determined funding sources for the personal learning account (CPF), “the account becomes the repository of rights held by the employee under the Individual Right to Training (DIF) and can be mobilised in accordance with existing systems”<sup>51</sup>. Therefore, the personal learning account (CPF) was designed as a mechanism allowing the articulation of different funding sources with the exception of the training programme that remains under the aegis of the employer and is managed by the enterprise. It is interesting to note that the

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to collective bargaining (Amendment No. 30 of the UMP, Second meeting of Thursday, 4 April 2013, Official Journal, 5 April, p. 3776)

<sup>49</sup> I.e. they can complement each other.

<sup>50</sup> National Assembly third meeting of 4 April 2013, official Journal of 5 April p. 3804.

<sup>51</sup> National Assembly Amendment No. 5562 submitted by the Government.

national interprofessional agreement (ANI) had provided that the enterprise would be able to add a financial supplement to the personal learning account (CPF) beyond the number of hours acquired under the Individual Right to Training (DIF) while this would allow the employee to access a training course likely to lead to a qualification or certificate (art 5, paragraph 3). The provision, which was not restated in the bill, was designed to be an addition to the individual training leave (CIF)<sup>52</sup>.

Employee status and the legal regime that is applicable to training-related actions will be conditioned by resources and systems to be mobilised accordingly. Yet, this will result in the re-introduction of logics of segmentation in opposition to which social partners and the government would like to operate. Paradoxically, this segmentation results from a syncretism, precisely from which the personal learning account originates. The law provides that “in addition to the account, the other training systems for which the account holder is eligible can be mobilised.” (Art 5, I, paragraph 2). Given that the respective objectives behind DIF, CIF and public financial funding are distinct, the combination of these systems seems quite unrealistic. Evidently, it could have been simpler and more coherent to create a personal learning account (CPF) outside existing systems. The objective behind this personal learning account (CPF) would have pertained to the development of employee professional capacity<sup>53</sup>, prior to serving as an instrument that ensures articulation among existing financial resources.

After the Act was passed in 2013, exercise terms of the acquired rights under the personal learning account system remained quite vague. They were more precisely stipulated in the Act in 2014. Hours of training undertaken under the Personal learning account system (CPF) and within working hours are considered as effective working hours for which employee remuneration provided by the employer remains unchanged (art 6323-18). If he or she is trained outside working hours, the employee is given the status of a professional training intern. During the training period, the employee benefits from social security benefits for work-related health and safety insurance. (L6323-19).

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<sup>52</sup> Whose object is to enable the employee to attend training.

<sup>53</sup> On this concept, the philosophy and legal framework must be distinguished from the concept of employability, see Nicole Maggi-Germain, “La capacité du salarié à occuper un emploi”, In *Droit social*, December 2009, p. 1234 to 1245.

*2.2.2. Increased Security in Workers' Career Paths through the Development of their Professional Capacities or Employee Empowerment through more Individual Accountability for his or her "Employability"?*

Already in 1986, German sociologist, Ulrich Beck noted, in his work, *Risk Society*, the evolution from a "unified employment system that occupies whole days and lives, with the total absence of professional activity as its only counter-alternative- a system typical of the industrial society-towards a system of flexible under-employment that is plural, decentralised and saturated with risks, *more likely one that is no longer familiar with unemployment issues (if here, we are referring to the absence of professional activity)*"<sup>54</sup>. Within such a system, unemployment is in some ways "integrated". As a substitute, there exists a generalisation of employment insecurity which is unknown to the 'old' system of full employment that characterised the industrial society"<sup>55</sup>. In contributing to the construction of professional transitions, could it be that professional training is being conceptualised in a form germane to the provisional job and skill management (*Gestion prévisionnelle des emplois et des compétences* – GPEC), one of the other themes evoked in the National interprofessional agreement (ANI) and the Employment Act, and in line with this evolution described by Beck?

In his report, parliamentary member Jean-Marc Germain relates the objectives behind the personal learning account system (CPF) to the construction of professional transitions: "In relation to employee access to lifelong professional training, the 5 October 2009 ANI notes that 'in an economy that is increasingly open to the world (...) the accelerated renewal of technical production and distribution of goods and services continuously requires employee initiative and competencies. Employees' aspirations for an enhanced management of their professional development require the renewal of the objectives and means of continuous professional training. A personal account that can be mobilised during intentional or unintentional professional transitions, attends to this objective. As a result, distinctions between employee training and that of job seekers are reduced"<sup>56</sup>. At the same time, several amendments<sup>57</sup> were submitted to the national assembly by the democratic and republican left wing of parliament, including the communist party. These amendments have resulted in the addition of one sentence in the first paragraph of article L.6111-1 of the Employment Act, which intended to define the objectives of professional training. In addition to being a national

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<sup>54</sup> In italics in the text.

<sup>55</sup> Ulrich Beck. *La société du risque*. Paris, Aubier, 2001, 521 p., p. 304.

<sup>56</sup> Supra, report, p. 88.

<sup>57</sup> Amendments No. 456, 457, 463, 465 of the 2nd meeting of 4April 2013 of the NA, Official Journal 5, p. 3764 and 3765.

obligation, professional training is considered to be “a decisive element for the enhancement of employment security and for employee professional advancement”.

For the first time, the Law for the development of participation and employee ownership emphasized the concept of enhanced employment security. This Law also includes provisions of economic and social order and creates<sup>58</sup>, namely, mobility leave, an emblematic feature in the construction of professional transitions<sup>59</sup>. In the 7 January 2009 ANI on the “development of training, professionalization and the enhancement of security for professional paths”<sup>60</sup>, the concept is included as a transversal theme that was inadequately defined. Professional transitions, which in the case of professional mobility aim at linking legal statuses by ensuring continuity in the application of rights and immunities, differ from the professional path. In the concept of the professional path, the worker is involved in continuity on his professional career<sup>61</sup>, which is first built within the enterprise, precisely within the framework of one or several employment contracts<sup>62</sup>. The professional path framework underpins the implementation of systems designed to facilitate professional transitions (internal or external to the enterprise, in the current job or towards new employment or from one employment status to the other) towards a process of professional development. The process consists of a skills

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<sup>58</sup> Law No. 2006-1770 of 30 December Official Journal, 31 December 2006.

<sup>59</sup> Mobility leave is offered to employees in companies with at least a thousand employees with an agreement GPEC. It is intended to promote professional transitions accompanying measures, training and periods of work within or outside the company who proposed the leave (Article L. 1233-78). Acceptance by the employee of the proposed mobility leave wins out of the employment contract by mutual agreement of the parties after the leave (Article L. 1233-80).

<sup>60</sup> Taken by Act No. 2009-1437 of 24 November 2009 on guidance and lifelong vocational training, *supra*.

<sup>61</sup> This notion, at the foundation of the French idea of the role of the state was already present in some collective company-level agreements: the SNPE Matériaux énergétiques has established in its agreement of 21 November 2007 (signed by all the trade unions, with the exception of SUD) a “career” savings account that can be used in particular for training at least 70 hours (LS, short social report No. 15007 of Tuesday, 4 December 2007). See the agreement of 4 October 2004 on the principles for the development and career progression within Veolia Environment (Signed by the CFDT, CFE-CGC, CFTEC, CGT, FO, UNSA). The agreement of 24 September 2004 on the Training and GPEC in the pharmaceutical industry Industries (CGT was not a signatory).

<sup>62</sup> See, for example, Article L. 6321-13 of the Labour Code (introduced through Law No. 2005-157 of 23 February 2005 Article 67 IV Official Journal of 24 February 2005.) The employer, pursuant to an extended collective agreement or extended or to the employment contract, agrees to renew the contract of an employee employed on a seasonal basis for the next season, may enter into an employment contract for a fixed term to allow the employee to participate in a training programme provided by the company.

development path in which information about, orientation' training and recognition (*infra*) are included. In other words, if the person acquires a set of rights, these are exercised within a collective legal framework. Employers, joint bodies, the State and regional authorities work in unison towards the enhancement of employment security for the employee.

Such an approach contradicts the logic of employability. Although the term does not bear any legal value, it forms part of the managerial norms, which confine the enterprise within its economic role<sup>63</sup>. In focusing on the individual, the logic allows for a selection between employees who are and who are not "employable". Employees are assessed as active members who align themselves with the enterprise's strategy. From the vantage point of a legal analysis, the logic of employability leads to the employee's responsibility, or more precisely to multiple situations within which their responsibility is likely to be required. The employee's initiative (or lack thereof) thus becomes an essential criterion. From this point of view, the personal learning account (CPF) remains ambiguous, as demonstrated by parliamentary activities. "With the personal learning account system, we will shift from the collective obligation to finance employees' training to an individual obligation to finance every individual's training"<sup>64</sup>. "The individual account implies a distinct organization of the circuits, increasingly centred on the employee, whose training initiatives need to be trusted. It is a right that is more distinctive than the Individual Right to training (DIF). It differs completely from the way in which Gérard Filoche caricatured it, with his well-known lyricism, portrayed the system as the new employee-training booklet. While the Individual Right to Training (DIF) could afford such criticism given that it's negotiated with the employer, the individual account requires the employee's autonomy and responsibility. To be sure, this is where we depart from each other. You think that the employee does not know what is good for them. In other words, you only believe in collective rights, while here, we are creating an individual right that is guaranteed collectively"<sup>65</sup>. The collective dimension of the personal learning account system (CPF) appears to be very limited: "this account will be included in the framework of training catalogues which will be fixed with social partners at national level. It is hoped that their content will prove useful to the country and, *a fortiori*, to the persons concerned by allowing them to find

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<sup>63</sup> A retrospective and theoretical approach to the concept of human resources is available at B. Quélin. *L'analyse fondée sur les ressources et les compétences*. In *Le management. Fondements et renouvellements*, 360 p., p. 29-41, p. 30 and 31.

<sup>64</sup> Jean-Marc Germain, Report No. 847 of 27 March 2013, cit., p. 112.

<sup>65</sup> Speech to the National Assembly by Jean-Patrick Gille, Socialist, republican and citizen group, second sitting of 4 April 2013, Official Journal, 5 April p. 3764.

employment and to progress professionally”<sup>66</sup>. The very notion of “account” assumes an ambivalent character. On the one hand it places training within a consumerist approach, just as the notion of “accrued rights” to unemployment insurance in the January 11, 2013 ANI<sup>67</sup>. On the other hand, it assumes that the account, from which the individual would draw, would be funded through “deposits”. In addition, the notion assumes that the account would also be funded by contributions from the employee who would give part of his or her time in exchange of credited training hours, as is the case with the time savings account (*Compte épargne-temps- CET*)<sup>68</sup>. Within this logic, the Morange report that was published in 2010 suggested the creation of a “social account” for each employee on the basis of the current time savings account<sup>69</sup>. Besides, the concept of an “account” also presupposes that each worker is capable of thinking and designing his or her training plan, while a major part of access inequality to training is correlated with the number of study years covered in initial training. Overseas experiences such as the one proposed through the ILA\* in the 1990s in the UK, the *individual account for learning*, has extended the logic of the account by far. In paying an amount of £25, which was topped by a statutory contribution of £150, where individuals were able to open an account in a bank that gave access to discounts on training-related actions. The account expired after one year<sup>70</sup>.

From this vantage point, the Personal learning account system (CPF) is consistent with the concept of individualization, which characterizes industrial relations today and is at the core of the most global developments in employment rights in general, and particularly in continuous professional

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<sup>66</sup> Speech to the National Assembly Jean-Marc Germain, Rapporteur of the Committee on Social Affairs, Socialist Group, Republican and Citizen, 2nd meeting of 4 April 2013, OJ 5, p. 3761.

<sup>67</sup> Art. 3, creating *droits rechargeable* to unemployment insurance. The term is not present in the law.

<sup>68</sup> Established by the law of 25 July 1994 on the profit-sharing (Article L. 3151-1 et seq.), The time savings account was created to allow employees to convert additional holidays and use time to create jobs, it has gradually become a device for time management and for the employee an opportunity to save money. See Nicole Maggi-Germain, “À propos de l’individualisation de la formation professionnelle continue”, In *Droit social*, July-August, 1999, p. 692-699.

<sup>69</sup> Information of the Social Affairs commission at the conclusion of the work on French flexicurity presented in 2010 by MP Pierre Morange, Report No. 2462, 28 April 2010, p. 238, p. 57.

<sup>70</sup> The program was suspended due to widespread fraud. See Circé-Amnyos (consulting firm) and J.Barthélémy and associates. *Opportunité et faisabilité d’un compte épargne formation*. Working Paper, 2008, 131 p., p. 31. Coralie Perez, “Regard sur quelque sex périencesé trangères de ‘comptes individuels de formation’”, In *Droit social*, n° 12, Dec.2014, pp. 981-985.

training. The role of the initiative<sup>71</sup>, as a manifestation of autonomy, thus becomes the basis from which might emerge the most mythicized representations of the employee as the actor in his skills development<sup>72</sup>; a pure mind, free from any contingency.

The functions of a Right to Training that has yet to be designed are not to foster employability of employees but to develop or maintain their professional capacity. This includes the development of their qualifications and competencies, while taking into account the acquisition of theoretical and empirical knowledge as well as opportunities to apply them. While these opportunities depend upon the individual per se, they primarily depend upon the context and means made available within the enterprise to maintain and develop this professional capacity. The enhancement of employment security is one of these means.

### 3. A Right to Training that Remains to be Defined

Neither the Individual Right to Training (DIF) nor the Personal Learning account (CPF) pertains to “rights to training” *per se*. The ambiguity lies with the fact that there exists confusion between the Rights to training and legal mechanisms, precisely between principle and rule. Yet, the distinction is fundamental. As is reminded in *The Digest*<sup>73</sup>, “one should not seek to draw law from the rules. Instead, rules should be drawn from law.” A Right to Training should be modelled onto (existing) legal systems: it cannot be identified with them. An individual right to training lies within distributive justice<sup>74</sup>: it proposes to give persons their rightful due, while taking into account, their level of initial education, for instance. This also implies that individuals are to

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<sup>71</sup> Determining criterion to define the legal regime applicable to the time spent in training (considered or not as working time); see. Court of Cassation, Social Chamber, 16 January 2008, No. 07-10095 published in the Bulletin: “whereas, having noted that the training activities related to the project *Alliance* had not been requested by employees, it follows that whatever their nature, these training time could not be charged to the learning account, the court of appeal that has pointed out that the debits made were manifestly unlawful ruled that that the plea is unfounded”.

<sup>72</sup> One of the objectives stated in the preamble to the ANI of 5 December 2003 concerning the access of employees to training throughout working life.

<sup>73</sup> Issued on 30 December 533 under the Emperor Justinian, it is composed of extracts from books of Roman jurists. Together with the Justinian code (collection of imperial compilations), the *Institutes* (collection of quotations from jurists of the Roma Republic or the Roman Empire) and *Novelles* (collection of new constitutions of Justinian), it makes up the *Corpus Juris Civilis*, that is to say the largest compilation of ancient Roman law (529-534).

<sup>74</sup> Aristote. *Ethique à Nicomaque*. GF-Flammarion, 1992, p. 346, p. 144.

be guided on a training path. On various points, the Act provides a number of responses.

### *3.1. A Right to Training: The Concept*

#### *3.1.1. The “Right to” and the Legal Framework*

No text exists which declares a Right to professional training. The preamble of the 1946 Constitution whose constitutional value was granted recognition from the Constitutional Council (*Conseil constitutionnel*) in 1971 does not provide for equal access to professional training<sup>75</sup>. While the rate of access to training amounted to 41% in 2007, the figures represent short-term training. Precisely, the length of internships is approximately 30 hours per intern<sup>76</sup>. In regard to the Individual Right to Training (DIF)<sup>77</sup>, only 6% of the employees attended a training course within the framework in the same year and 6.5% in 2010<sup>78</sup>. The average length of training is of 22 hours. The DIF is primarily used in large enterprises for short and non-diploma courses.

The History of the right to continuous professional training shows the extent to which the effectiveness of a right to training is conditioned by its implementation methods. As a result, opening the possibility to transpose training onto the employee’s free time generates significant inequalities not only among employees in varying sectors, but mostly between male and female employees. The intrusion of a “grey” period (neither working hours, nor rest periods) in the employee’s free time implies that the public is deprived access to training within this mechanism. Therefore, an effective right to training can only be understood as a right that is exercised in principle during working hours. Also, the training program needs to provide for further arrangements whereby remuneration can be paid directly by the employer, or indirectly by joint institutions such as the OPCA<sup>79</sup>, the State or regional authorities. The provision would allow these various funding sources to supplement each other. Finally, a right to training needs to extend to the aggregate of workers in the sense of community law. Those concerned range from employees to the self-

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<sup>75</sup> “The Nation guarantees equal access for children and adults to education, vocational training and culture. The organization of free and secular public education at all levels is a duty of the State. Preamble to the Constitution of 27 October 1946, paragraph 13.

<sup>76</sup> Bill of the Budget Law 2009, under *formation professionnelle*, 139 p., P. 38 (regarding training activities of 2007).

<sup>77</sup> The ceiling of 120 hours of training to which employees could have access was reached in 2009.

<sup>78</sup> R. Descamps, “Le DIF : la maturité modeste”, In *Bref Céreq*, no. 299-2, mai, 4, 2012, p., p. 2.

<sup>79</sup> Accredited joint collecting fund for training.

employed, including civil servants, job seekers, or the professional training intern<sup>80</sup>. In fact, the Employment Act provides for an individual right to continuous professional training of the self-employed, members of liberal as well as non-remunerated professions, and their collaborating and joint partners<sup>81</sup>. With universally declared as a guiding principle in the January 11, 2013 ANI, it is assumed that the allocation of training hours does not depend upon the individual's employment status. However, rights formerly acquired under the Individual Right to training (DIF) and acquired today under the Personal learning account (CPF) are calculated on a prorata temporis basis for part-time employees (subject to more favourable provisions made in enterprise-, group- or sectoral-level agreements- Art L. 6323-11, paragraph 2). While there is no intention to pretend that the right to training needs to fall within the logic of perfect equality, the validity of these criteria of differentiation still needs to be questioned. The need to receive training does not vary according to employment status. The benefit of a personal right that transcends employment statuses here seems to be of significant pertinence.

Instead of introducing a new training system codified under the general principles of lifelong professional training, the French legislation would have been well advised to add the fundamental principles that structure the different systems, which could then have been listed in detail in the rules on access to training. The right to lifelong professional training could have been defined as follows: "the right for each employee to be released from work in order to attend training aimed at maintaining his or her professional capacity and to allow them to progress by at least one qualification level, during their professional life.

Remuneration or the payment of a replacement income, training-related initiatives taken during working hours and guidance afforded to employees during their training path all contributes to the effectiveness of this right".

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<sup>80</sup> ECJ 19 March 1964, M.K.H. Unger, R. Hoekstra against Bestuur der Bedrijfsvereniging voor Detailhandel Ambachten in Utrecht, Case 75-63, ECR, p. 347; ECJ July 3, 1986, Lawrie Blum, aff. 66/85, D. 1986 IR 452 (about a teacher trainee); ECJ 31 May 1989 Rec. p. 1621: "The essential feature of an employment relationship is the fact that a person performs services for a while, in favour of another person and under the direction thereof, benefits in return for which he receives remuneration. Provided that it refers to effective and genuine activities, neither the origin of the resources to pay, or the nature of the legal relationship between the employee and the employer cannot have consequences for the recognition of a person as a worker"; ECJ, 3rd c., 21 Feb 2013 aff. C-46/12, SNB c / Styrelsen for Videregående Uddannelser og Uddannelsesstøtte.

<sup>81</sup> Art. L. 6312-2 states that "Self-employed workers, members of the liberal professions and non-employed workers, including those who do not have any employees, as well as their collaborating or associated partners to in Article L. 121-4 of the Commercial Code, benefit personally of the right to continuing training".

The confusion that exists between the Right to training and systems underpinning access to training creates legal instability. The individual Right to Training (DIF), the Individual training leave (CIF) and the personal learning account (CPF) are eventually muddled insofar as the question about their combination is repeatedly mentioned<sup>82</sup>. It is unrealistic to attempt to subsume these systems under each other given that their purposes diverge. On the contrary, they need to be envisioned as distinct categories while being subjected to unique legal effects. Objectives set for the Individual Training Leave (CIF), the individual employee's prerogative, are extended. The CIF is designed to allow an employee to pursue his or her initiative and as an individual, to undertake training-related initiatives that will allow him or her to access a superior level of qualification, to change his or her occupation or professional field or to be more open to culture, social life and responsibilities within voluntary organisations (art L. 6322-1). As far as the Individual Right to training is concerned, no specific purpose has been fixed. The Employment Act only indicates that social partners can define "priorities", through a collective agreement at sectoral or enterprise level. In the absence of an agreement, the act refers to a typology of training-related actions conducive to the exercise of the individual right to training (actions related to promotion, actions towards acquiring, updating or improving in terms of knowledge, actions towards qualifications- art L. 6323-8). However, due to the fact that the use of acquired hours requires the employer's approval, training-related initiatives that originate from this framework are generally linked to corporate needs. This concept has been coined " 'special' training program" (*formations difables*). In addition, the March 5, 2014 Act removed the Individual Right to Training (DIF), which has been absorbed by the personal learning account system (CPF).

Nevertheless, the Individual Training Leave (CIF) and the Individual Right to Training (DIF) are complementary. As a result, they cannot be rolled into one. Having a personal learning account system (CPF) would be beneficial if it filled the gaps left by the Individual Training Leave (CIF) and the Individual Right to Training (DIF): a larger public, training program that lead to qualifications (through the additional funding system (*abondement*) which supports the DIF under the CPF, for example). Therefore, the relevant logic should not be that of provision in term of hours (*dotation*) which, *a priori*, couldn't be easily

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<sup>82</sup> By way of example: Gérard Larcher – member of the Senate. *La formation professionnelle : clé pour l'emploi et la compétitivité*. Document submitted to the President of the Republic Nicolas Sarkozy, 65 p., p. 21, 2012; François Davy – former president of Adecc, *Sécuriser les parcours professionnels par la création d'un compte social universel*, report submitted to the Ministry of Labour, 2012, 40 p., p. 22-23.

defined. Instead, logic of the social drawing right (*droit de tirage social*) seems more appropriate. Its terminological rationale is explained as follows:

*Drawing rights because their enactment depends upon a double-edged condition: the design of an adequate provision and the account holder's decision to make use of this provision. Social Drawing Rights because they are social both in terms of their way of establishing (different funding added to the provision) and their objectives (social utility)”<sup>83</sup>.*

1) *An asset-based system or a social drawing right?*

The hour-based provision system and social drawing rights are premised upon distinct logics.

The first mechanism is restricted to provide individuals with a pre-defined number of hours. It lies within an individualistic perception of professional training: human beings possess a degree of rationality that allows them to make pertinent use of training systems. It also confines continuous professional training within a consumerist approach by limiting it to affording the character of a claim which the worker (or any individual) would be able to make to the employer, a joint institution or to the whole community. Neither the Individual Right to Training (DIF) nor the personal learning account (CPF) is liable for such claims<sup>84</sup>. A right to continuous professional training has more to do with the construction of the professional state of persons than with a right to claim. The social drawing right substantialises the right to training, which it coalesces to the person *per se*. Professional training belongs to the category of social rights, which is of non-commercial character and has to do with national solidarity<sup>85</sup>. This is because it is essentially attached to the person, contributes in shaping them through the construction of their professional identity while increasing the level of instruction and improvement of members of a society. The right to training has no material equivalent. It is one of the rights that cannot be turned into a financial claim. It attends to objectives with a scope that goes beyond recipients' interests and concerns those of society as whole. It is not a form of authority that is imposed on an individual but rather the marker of the interdependent connection between members of a coordinated society. Beyond the “right to”, one should consider aspirations, the human

<sup>83</sup> A. Supiot “Du bon usage des lois en matière d'emploi”, In *Droit social*, 1997, p. 229-242, p. 242 ; and A. Supiot (ed.) *Au-delà de l'emploi. Transformations du travail et de venir du droit du travail en Europe*. Report for the European Commission Paris, Flammarion, 1999, 321 p.; see also the special issue of *Droit social*, May 1999, p. 431-473.

<sup>84</sup> Ibid.

<sup>85</sup> See R. Demogue. *Les notions fondamentales du droit privé*. In *LGDJ, La mémoire du Droit*, 2001, 681 p., p. 443 à 480 (Converting rights into money), 1911.

being's life-related purposes<sup>86</sup>. As a result, the act of exercising social drawing rights cannot become an obligation for its account holder, nor should it be conditioned by the emergence of potential risks<sup>87</sup>. A right attached to the person needs to own a certain set of legal attributes, primarily, in terms of its universal, fundamental and non-patrimonial character<sup>88</sup>. There remains a need to construct an articulation between rights attached to the person- regardless of employment status- and more restrictive rights per employment contracts.

What may be the merits of the idea of a professional social security? Since 2002, the theme has been developed by the CGT who envisions it, namely as an alternative to redundancies<sup>89</sup> and to flexicurity<sup>90</sup>. According to the CGT<sup>91</sup> Confederation secretary, Maryse Dumas, "In case of job cuts, whether collective or individual, the employment contract needs to be maintained (the salary as well) until the individual employee is redeployed or until a solution is identified. Despite this endeavour, the objective should not be to exert pressure upon enterprises, which are already in difficulty, but to call for inter-firm solidarity. Such solidarity could be operationalized through the occupational or sectorial pool, and through the conversion of funds designed to finance re-deployment programs in the form of redeployment leave and remuneration"<sup>92</sup>. In this case, access to training needs to be facilitated and "implies a public sector with a new managerial approach in which workers' unions and professional associations would be involved. Such a system would allow for extensive mutual cost coverage in line with objectives pertaining to training, mobility and employment integration"<sup>93</sup>. In regard to the social contribution of enterprises, the project proposed by the CGT also makes provision for adjustment needs that take into account the management of recruitment practices.

Other authors argue for a very different conceptualisation of professional social security in which some of the enterprise's obligations such as re-

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<sup>86</sup> See M. Villey. *Le droit subjectif en question*, in *Archives de philosophie du droit*. Vol. IX, 1964, p. 97 à 127, p. 102.

<sup>87</sup> On this last point see A. Supiot, ed. *Au-delà de l'emploi*, cit. p. 90

<sup>88</sup> The ANI of 11 January 2013 provides that portability does not imply a conversion of hours into money (Art. 5, par. 3) Act 2013 provides that the personal learning account is calculated in hours (Art. L. 6111-1 as amended by the Labour Code as).

<sup>89</sup> See for instance J.-C. Le Digou. *Demain le changement : Manifeste pour un nouveau syndicalisme*. Armand Colin, Paris, 2005, 267 p., p. 93. See in particular p. 90-96 and 108-112.

<sup>90</sup> J.-C. Le Digou. *Vers une sécurité sociale professionnelle*. Alternatives Économiques Poche No. 052, 2011.

<sup>91</sup> Confédération générale du travail – a french trade union.

<sup>92</sup> M. Dumas. « Sécurité sociale professionnelle et nouveau statut du salarié : le projet de la CGT », In *Les cahiers Bernard Brunbes*, 11, 2004, p. 33-35.

<sup>93</sup> J.-C. Le Digou, 2011, *cit.*

deployment can be brought to fall under the responsibility of the community. “In the realms of employment, professional social security ought to guarantee decent income and quality guidance to all job seekers by allowing redeployment towards future employment. (...) A public service in charge of redeployment would replace the enterprise’s obligation in this respect”<sup>94</sup>. In the presidential wishes stated on 4 January 2007, Nicolas Sarkozy called for a professional social security that would have to fulfil four missions, namely, “the payment of unemployment benefits, personalized guidance for job seekers, professional mobility support and lifelong training. (...) In regard to the contract of professional transition, a real contractual relationship with rights and obligations will be established between individuals (recently) out of employment and the professional social security system. In line with the social dialogue reform, social partners will be responsible for managing this new collective arrangement in collaboration with the state.” In discussions on the bill on employment security enhancement, the rapporteur, Jean-Marc Germain, refers to the management of the personal learning account (CPF) and argues for “the creation of a real training insurance regime along the lines of the unemployment insurance mechanism created in 1958. In fact, this regime could be managed by social partners”<sup>95</sup>. The labour minister, Michel Sapin presents the bill as a “base (...) towards a universal personal account that will be a central pillar of ‘professional social security’”<sup>96</sup>.

The professional social security concept aligns itself with the History of continuous professional training. Already in 1966, continuous professional training was envisaged as a “national obligation” in the legislation<sup>97</sup>. Today, this provision is included in the general principles of lifelong professional training (Labour code, Art L. 6111-1). The state is not specifically targeted in the text: “national obligation” encompasses social partners. Joint partnership is fundamental to the professional training system. Based on the 1969 report compiled by the Court of Auditors (*Cour des comptes*), “This (arrangement) implies that there is consultation for policy development, and also cooperation

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<sup>94</sup> Pierre Cahuc and Francis Kramarz. *De la précarité à la mobilité : vers une Sécurité sociale professionnelle*. Report to the Ministry of Employment, Labour and Social Cohesion, La documentation française, 202 p., 2004, p. 11 et 12.

<sup>95</sup> J.-M. Germain, rapporteur, NA, third sitting of 4 April 2013, Official Journal of 5 April, p. 3810. The information report of the Committee on Social Affairs at the conclusion of the work on French flexicurity presented in 2010 by MP Pierre Morange referred to the idea of a professional insurance replacing the unemployment insurance to manage the social account of each employee (Report No. 2462, April 28, 2010, 238 p.).

<sup>96</sup> AN, parliamentary debates, 1st sitting of Tuesday, 2 April 2013.

<sup>97</sup> Law of 3 December 1966 on guidance and vocational training.

in its execution”<sup>98</sup>. Consultation takes place, “namely with the employer and employee representative associations as well as *the self-employed*”<sup>99</sup>. However, if consultation is not underpinned by a principle of solidarity, the concept of professional social security may lead to enterprise responsibility being transferred to the community and individuals. The insured individual contributes as much as they receive: “The essence of solidarity in the meaning acquired in Social Right is to establish a common pot within a community of human beings. Each and every one ought to contribute to the pot according to their means and may seek from the pot according to their needs. This mutual arrangement replaces the individual utility calculus (which it forbids) by a collective utility calculus”<sup>100</sup>. However, prior to being a form of insurance, social security is an institution that unites its members around a common project, a social cohesion factor. The concept was also present in Mauss’ essay on gift: “The worker gave his life and labour to the community on the one hand, to his employers on the other. If they are required to contribute to the insurance mechanism, those who benefited from this service still owe him his remuneration. In collaboration with the worker’s employers and based upon the rights, the state, representative of the community, owes him some form of security in life, against unemployment, illness, old age and death”<sup>101</sup>.

### 3.1.2. Access to Training: In Search of Equity

#### 1) Differed qualification-based training: an objective, not a right

In 1990, the right to professional qualification was included in the Employment Act<sup>102</sup>. In 2009, the objective of facilitating employees’ advancement by at least one qualification level during their professional life

<sup>98</sup> Court of Auditors. *La mise en œuvre de la politique de formation professionnelle et de promotion sociale*. In Report to the President of the Republic of 1969, second part, Les Administrations de l’État. Observations communes à plusieurs ministres, Official Journal 1971, administrative documents, p. 177 à 270, p. 181.

<sup>99</sup> Italics added. *Ibid.*

<sup>100</sup> A. Supiot. *L’esprit de Philadelphie*. Paris, éd. du Seuil, 2010, 192 p., p. 160.

<sup>101</sup> M. Mauss (1923-1924). *L’essai sur le don*. In *Sociologie et anthropologie*, PUF, 1966, 475 p., p. 260-261.

<sup>102</sup> Law No. 90-579 of 4 July 1990 on training credit, quality control of the CVT and amending Book IX of the Labour Code. It appears today in Article L. 6314-1, in the general provisions of Book III on CVT.

was included as a principle in the same article by social partners<sup>103</sup> and policy makers<sup>104</sup> as follows:

“Any worker or person engaged in active life has a right to information, orientation and professional qualification. On individual initiative and regardless of their status, they should be able to attend a training course which would allow them to progress by at least one level in the course of his or her professional life by acquiring a qualification that is in line with economic needs that are predictable in the short and medium term. The qualification should be:

1. Either registered in the national repertoire of professional certificates under article L. 335-6 of the Code of Education.
2. Recognised in classifications established by a national sector-based collective agreement;
3. One that gives right to a professional diploma provided by the branch level (CQP<sup>105</sup>).

The qualification issue is not merely related to the person and their approach to training. It is at the core of the concept of justice and is fundamental to the continuous professional training system introduced in 1971. Should the allocation of hours under the person learning account system be egalitarian or redistributive?

The very notion of the Individual Right to Training (DIF) suggests the introduction of corrective mechanisms that would achieve concrete equality given a concern for equity. In Aristotelian terms<sup>106</sup>, the rule will thus be able to “bend according to the shapes of the stone” and make it possible to personalise employee’s rights<sup>107</sup>. If applied to continuous professional training, this personalization implies that employees’ initial education is taken into account based on the Right to vocational training that remains to be built<sup>108</sup>.

<sup>103</sup> ANI of 7 January 2009 on the development of training, professionalization and career security.

<sup>104</sup> Law No. 2009-1437 of 24 November 2009 on guidance and lifelong vocational training, *supra*.

<sup>105</sup> Professional qualification certificate.

<sup>106</sup> Aristote. *Ethique à Nicomaque*. GF-Flammarion, 1992, 346 p., book V (Justice), chapter XI, p. 163.

<sup>107</sup> See N. Maggi-Germain, « La formation professionnelle continue entre individualisation et personnalisation des droits des salariés », In *Droit social*, May 2004, p. 482 to 493. As a comparison, see Court of Cassation, Social Chamber, 18 January 2005, No. 02-46737: he fails to comply with his obligation with regard to employees’ reclassification, the employer who does [...] communicate to each employee who is about to be dismissed without any specific, and personalized proposals of reclassification.

<sup>108</sup> The idea has been developed by the European Parliament in its Report on the Commission memorandum on lifelong education and training. It draws attention to the proposal that all persons should be entitled to a certain number of years of public education, which implies that those who left school early are entitled later in life to complementary education aimed at

The National Interprofessional agreement (ANI) and the bill initially proposed, make no mention of this aspect. It is only in the amendment introduced by the government on funding sources for the personal learning account (CPF) that the topic on conditions of hourly allocations is raised. In this respect, the 2013 Act goes beyond the ANI as it connects the concept of mutual and supplementary funding to qualifications. This is stated below:

“The account is credited (...) 2. By supplementary funding, provided namely by the State or regional authorities, in order to facilitate access to one of the qualifications mentioned in article L.6314-1, particularly for individuals who left schooling in earlier stages or who, further to their initial post-compulsory education, did not obtain any accredited professional qualifications.” According to the rapporteur Jean-Marc Germain, “the personal learning account aims to materialize this objective linked to professional training under the first paragraph of the same article (The CPF also aims to) allow each person to progress by at least one qualification level during his or her professional life, regardless of his status”<sup>109</sup>. Given that the acquired rights to 120 hours under the Individual Right to Training (DIF) are not sufficient for obtaining a qualification<sup>110</sup>, supplementary funding and/or the possibility to mobilize other training systems such as the Individual Training leave (CIF) or the operational preparation to job (*Préparation opérationnelle à l'emploi-POE*)<sup>111</sup> will be required. Several amendments proposed by the Democratic and Republican<sup>112</sup> left wing at the national assembly, and by the Republican and citizen communist group<sup>113</sup> in the Senate took their concern for equity further.

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acquiring the necessary vocational qualifications that will enable them to play an active role in society and give them access to the labour market; European Parliament Committee on Culture, Youth, Education, the Media and Sport (2001), Report on the Commission memorandum on Lifelong Learning A5-0322/2001, 25 p. (paragraph 42, p. 12). In the same vein, see also draft law on the possibility to have a passport to guarantee equal access to education and training throughout life, presented to the AN on 20 March 2002 by MP Gerard Lindeperg and in the ANI of 5 December 2003 which put forward the idea of a right to “deferred skills training”.

<sup>109</sup> Cited Report, p. 86.

<sup>110</sup> For example, initial training at the level V (BEP or exit before the final year of secondary education) as a family carer requires 840 hours.

<sup>111</sup> Established by the ANI of 7 January 2009 which sets up a system to increase employment readiness of jobseekers, compensated providing in some cases for an allowance, to increase access to (permanent or temporary of at least 12 months) employment for “training activity that cannot exceed 400 hours in order to acquire the foundation of professional skills necessary for the proposed position” (Article 21 et seq.).

<sup>112</sup> Amendment No. 4886, AN second sitting of 4 April 2013, Official Journal of 5 April, p. 3766.

<sup>113</sup> Amendment No. 53, Senat, sitting 19 April 2013, Official Journal of 20 April, p. 3624.

In conformity with provisions included in the 2009 ANI<sup>114</sup>, the amendments argued for priority access to diploma and qualification-based courses for employees without or with low qualifications<sup>115</sup>. Based on an amendment introduced by left-wing parliamentary members, this right needed to be extended and set within an unlimited timeframe and be calculated in terms of accrued training as being worth at least 10% of time at work<sup>116</sup>.

However, while amendments codify a right to deferred training according to the principles under the right to continuous professional training, the Social Affairs Commission includes the objective for deferred and qualification-based training in the Employment Act provisions that deal with “means” (supplementary funding to the CPF)<sup>117</sup>. In doing so, the commission limits the symbolic value as well as the constraining power (the objective for deferred and qualification-based training is limited to the supplementary funding mechanism) of the legislative provision<sup>118</sup>. The November 24, 2009 Act brought adjustments to the ANI signed during the same year. During the parliamentary debates that preceded the passing of the November 24, 2009<sup>119</sup> Act, two similar amendments were proposed under Nicolas Sarkozy’s presidency by the left-wing, including the socialist group<sup>120</sup>. The Special Commission of the senate did not have a favourable opinion in respect of these propositions: “First, it is not appropriate to target a specific public within general objectives for lifelong professional training. In addition, this unloads a particular form of responsibility onto professional training without specifying the obligations of the national education system. It would be illusory or even, dangerous to demand that national education affords the role of the family”<sup>121</sup>.

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<sup>114</sup> Paragraph 1.4.3 of the ANI of 7 January 2009 under the title *La formation initiale différée*.

<sup>115</sup> Amendment No. 4886, AN second sitting of 4 April 2013, Official Journal of 5 April, p. 3766.

<sup>116</sup> Amendment No. 4887, AN second sitting of 4 April 2013, Official Journal of 5 April, p. 3766.

<sup>117</sup> Speech by Jean-Marc Germain, second sitting of 4 April 2013, Official Journal of 5 April, p. 3767.

<sup>118</sup> Even though Article 8 of the law on guidance and planning to reconstruct education in the French republic establishes a right to deferred initial qualifying training (Bill No. 441, 20 March 2013).

<sup>119</sup> Law No. 2009-1437 of 24 November 2009 on guidance and lifelong vocational training.

<sup>120</sup> Amendment No. 131 (rejected) to Art. No. 1 presented by members of the Socialist Group, Senate, 21 September 2009, Official Journal of 22 September, p. 7784. Amendment No. 25 (rejected) to Article 1 presented by members of the Communist, Republican, Citizen group and by the Senators of the Left Party, Senate sitting of 21 September 2009, Official Journal of 22 September, p. 7785.

<sup>121</sup> Speech at the Senate by rapporteur Jean-Claude Carle, Senator of the UMP group (majority of the President N. Sarkozy), sitting of 21 September 2009, official Journal of 22 September p. 7785.

Even if “the intent (*l’esprit*) of the personal learning account”<sup>122</sup> is to provide employees with an access to training that is inversely proportional to acquired qualifications, the law does not attend to a right to differed and qualification-based professional training. This is so although studies, which have been conducted, do demonstrate that access to training is not adequately open to those who need it the most, namely, less trained or less qualified individuals<sup>123</sup>. We can notice that if the December 14, 2013 ANI included, in the category of training courses eligible for the CPF, “qualification-based courses which attend to the economic needs that are predictable in the short and medium term *and*<sup>124</sup> which facilitate the enhancement of employment security for employees” (Art. 13, paragraph 3), the 5 March 2014 Act first states the only training “which facilitates the acquisition of foundations of knowledge and competencies as defined by decree”. (Art. L 6323-6, I).

## 2) *A New Professional Development Advisory Service*

The employment security enhancement project places the person in a professional development process materialized in a training path, which encompasses information, orientation, training and accreditation. The right to information and the right to orientation were noted in the November 24, 2009 Act (Art L. 6314-1). In this respect, the act has made provision for a “public service for lifelong orientation” designed to “guarantee access to information that is free, comprehensive and objective for all persons. Information here pertains to training, qualifications, job opportunities and levels of remuneration in addition to access to advisory and guidance services in quality orientation that are organized in networks” (art L6111-3). In reference to the provisions made in the ANI, the law creates a new article (L. 6314-3) in the Labour Code. This article recognizes the right to benefit from advisory services in professional development that are provided by the public service of orientation and whose primary objective is to help the employee improve their level of qualification. The existing articulation between the interventions of joint

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<sup>122</sup> J.-M. Germain, AN second sitting of 4 April 2013, Official Journal of 5 April, p. 3774, Speech in response to an amendment No. 5421 filed by the UDI group, Union of Democrats and Independents.

<sup>123</sup> Finally, see also the report of the Court of Auditors that finds out that the proportion of young people without vocational qualification has been shrinking since the introduction of “training contracts” in 2003, “this trend is exacerbated in occasion of the crisis. Like other employment policy tools, training contracts are hardly targeted to those who need them the most”, Court of Auditors. *Le marché du travail : face à un chômage élevé, mieux cibler les politiques*. Thematic public report, 2013, 170 p., p. 106-107.

<sup>124</sup> Italics added.

institutions and the public service of orientation noted in the ANI has disappeared from the law that is related to subsequent negotiations on continuous professional training<sup>125</sup>. One of the fears expressed in parliamentary debates pertains to the possibility to witness the emergence of a career guidance market. Consequently, the guidance monopoly has been placed under the aegis of the public sector and the provision made in the bill for the possibility of having CPF to finance this guidance (possibility introduced by the ANI) has been removed. However, ambiguity lies within the stance taken by the labour minister, Michel Sapin in this case: “According to those concerned by this topic, it is evident that employees should not have to spend from their frequently low incomes to access this service. Nevertheless, this service will need to be funded, and as far as I am concerned, I would not be surprised if each individual was to mobilize their personal account”<sup>126</sup>.

It seems clearly pertinent to implement this public service at local level. Similarly, regional authorities hold a fundamental place and the forthcoming bill on decentralization (Act III) should redefine the public service of professional orientation and employment. The choice of the territorial level aligns itself fully with the perspective of right territorialisation that attends to a European Union demand<sup>127</sup>.

The level of information, which the employee is likely to receive, is extended. It concerns the professional environment, the development of occupations on respective territories as well as various training systems. It pertains to guidance, which is designed to allow the employee to enhance their competencies and where possible, facilitate their professional development project. The aim is to “foster the training-related initiative of an active individual. Throughout his professional path, this individual is alternately a private sector employee, a public actor or a job seeker. As they entered active life, they also benefited from training programs designed for apprentices and youth entering the labour market”<sup>128</sup>. Based upon parliamentary debates, it is clear that the creation of an advisory service for professional development was envisioned in relation to the personal learning account (CPF). “Precisely, these provisions become systems. They introduce, on the one hand, a territorialised mechanism designed to incite

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<sup>125</sup> Second sitting of 4 April 2013, Official Journal 5 April, 3781.

<sup>126</sup> Ibid., p. 3778.

<sup>127</sup> See N. Maggi-Germain, « La territorialisation du droit. L'exemple des politiques de l'emploi et de la formation professionnelle continue », In *Droit et société*, No. 69-70/2008, p. 441-477, article drawn on an online report: N. Maggi-Germain and P. Caillaud. *Les évolutions du cadre juridique de la formation professionnelle continue : un changement de paradigmes?*. Report by the Ministry of employment, housing and social cohesion/ DARES, 2006, p. 448.<http://halshs.archives-ouvertes.fr/halshs-00403783/fr/>.

<sup>128</sup> Report by J.-M. Germain, supra, p. 88 (under “Aims”).

and guide the individual towards qualifications- the professional development advisory service and on the other, a tool that fosters access to qualification: the personal account<sup>129</sup>. The implementation of this professional development advisory service needs to be aligned with recent reforms such as the creation of an ‘orientation-training passport’ or the transformation of the professional interview<sup>130</sup>.

#### 4. Conclusion

The law, which was recently passed, lies within a certain degree of continuity. It was introduced by a socialist government, which took office after UMP candidate Nicolas Sarkozy ensured a ten-year presidential mandate. From the vantage point of a legal analysis, there is no discontinuity<sup>131</sup>. Proposed reforms are well in line with contemporary conditions and equally indicate the consensus that can emanate from social dialogue.

For the personal learning account system, inspiration is drawn from other projects. Its resemblance with the training savings account<sup>132</sup> is significant. Evidently its greatest quality lies with its symbolic strength. Like the Individual Right to Training (DIF) at the time, the personal learning account is likely to help trivialize the concept of lifelong professional training. If it achieves notoriety, the category of the rights related to the person can be exerted. All training systems do not automatically become rights attached to the person. The personal learning account system (CPF) cannot be a mere repository of systems and funding mechanisms. On the contrary, training systems need to be

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<sup>129</sup> Although these measures were not in force yet (the law makes reference to a decree of the Council of State, which has not been enforced yet), some sectoral agreements have in the meantime implemented it.

<sup>130</sup> See Nicole Maggi-Germain, « L’entretien professionnel : de l’outil managérial au dispositif juridique instrument des politiques publiques de l’emploi », *Les Cahiers sociaux* n° 267, oct. 2014, p. 597-602.

<sup>131</sup> “The senators of the UMP group would therefore wish to go further, with a radical overhaul of the Labour Code, introducing more flexibility, providing annualized hours, removing the 35-hour pattern, with a view to creating a shock of competitiveness, what the Government proclaim sit wants to do, it keeps talking about it! – Unfortunately without never getting at the end of [...]”

[1] All these reforms will therefore in the right direction, and that is why, despite the lack of audacity I mentioned, the UMP group rather sees favorably the bill transcribing ANI January 2013”, Speech by Jean-Noël Cardoux, Senate of 17 April 2013, Official Journal of 18 of April p. 3386.

<sup>132</sup> M. Bernard Seillier, Group of the European and Social and Democratic Roundup. *Le fonctionnement des dispositifs de formation*. Report on behalf of the joint mission of information on Vocational Training of the Senate – No. 365 vol. I (2006-2007) – 4 July 2007, vol. I, 344 p., p. 201 and ff.

distinguished according to their respective ends. When they are differentiated, they can then be hierarchically organized and some of them will be identified as rights related to the person because they will have the relevant attributes. It is through this condition that the right related to the person will be able to acquire real consistency as a legal category.

The 2013 Law was only the first stage that preceded consultation between the State, regional authorities and employer and worker associations at national and interprofessional level on the implementation of the personal learning account system (art 5, Act IV) and on the opening of national and interprofessional negotiations on professional training as at January 1, 2014 (art 5, Act V).

*“We create the framework, we create a strategy, and we provide direction. Other legal documents will follow. The first year of this legislature has not ended. In respect of professional training and professional social security, however, we have immense ambitions for the country and for French employees”<sup>133</sup>.*

Will this lead to the codification of a right to lifelong learning, for instance?

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<sup>133</sup> Speech by M. Christian Paul, Groupe socialiste, républicain et citoyen, AN second sitting of 4 April 2013, Official Journal of 5 April, p. 3765.

# The Employment Relations System in the Hong Kong Brand of Capitalism since 1997: Cases of Two Multinational Banks

Teresa Shuk-Ching Poon \*

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## 1. Introduction

Until 1997, the organisation of employment relations (ER) in Hong Kong has been characterised as highly decentralised with no institutionalisation of collective bargaining practices at the industrial/central level, particularly for the private sector with only few exceptions. Workers are free to join trade unions but recognition of trade unions is up to individual employers who, except only very few, choose not to do so. Employment contract is left to be negotiated between employers and individual employees. Such an ER system in Hong Kong is seen as the conception of voluntarism as diffused from Britain to her long-time Colony (Chiu and Levin, 1999<sup>1</sup>) After 1997, Hong Kong has experienced both significant political and economic changes. Politically since 1 July 1997, Hong Kong's sovereignty has returned by Britain to the People's Republic of China (PRC) and it has become one of the latter's Special Administrative Regions (SARs). While guaranteed under the Hong Kong Basic Law that the PRC's socialist doctrine would not be applied to govern capitalist Hong Kong for a period of 50 years after the sovereignty handover, significant economic and political transformation in the PRC has nonetheless brought about important changes in the institutional context within which Hong Kong operates. Economically, Hong Kong is seriously affected by the 1997 Asian Financial Crisis (AFC), bursting of the real estate and dot-com bubble,

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<sup>1</sup> Chiu, S.W.K. and Levin, D. A. (1999) "The Organization of Industrial Relations in Hong Kong: Economic, Political and Sociological Perspectives" *Organization Studies*, 20 (2) pp. 293-321.

outbreak of Severe Acute Respiratory Syndrome (SARS), further liberalisation of Chinese economy, and, more recently, the 2008 Global Financial Crisis (GFC). Chiu and Levin (1999<sup>2</sup>), in their study of the organisation of industrial relations in Hong Kong, portray a possible scenario of the development of a more centralised industrial relations system after 1997 which formally regulated labour-management relations from the top down. Now that nearly 20 years has gone past, this scenario does not seem to materialise and the ER system in Hong Kong stays pretty much the same. The research question worth examining is: why have there been little changes to the ER system in question although Hong Kong has gone through significant political and economic changes since 1997?

The Varieties of Capitalism (VoC) approach (Hall and Soskice, 2001<sup>3</sup>; Carney, Gedajlovic, and Yang, 2009<sup>4</sup>) is used as a theoretical framework to examine the Hong Kong case of employment relations. While Hong Kong is not a country in its own right, it has demonstrated many institutional features as found in Liberal Market Economies (LMEs) included in the VoC framework. One major criticism on the VoC framework is that it is a static theory unable to explain the institutional changes occurred in many market economies over time. However, the counter argument is that institutional stability despite the impact of significant exogenous changes is not because of inertia but of policymakers' and employers' considered decision to retain existing pattern of institutions as a result of powerful system feedback (Thelen, 2010<sup>5</sup>). Here the important role of policymakers and, for that matter, of the state in impacting on institutional changes is highlighted. Hong Kong is a good case to bring the VoC framework to test as although it has experienced significant political and economic changes over the past 20 years or so, its decentralised employment relations system remains more or less intact.

Firm-level case studies are conducted to examine if there have been any changes over the past 20 years to employment practices in companies operated in Hong Kong, so as to provide more insights in answering the research question. Case study analysis is useful to examine development of the

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<sup>2</sup> Chiu and Levin (1999) *op. cit.*

<sup>3</sup> Hall, P. and Soskice, D (2001) "An Introduction to Varieties of Capitalism" in Hall P. and Soskice (eds) *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*. New York: Oxford University Press.

<sup>4</sup> Carney, M., Gedajlovic, E. and Yang, X (2009) "Varieties of Asian Capitalism: Towards an Institutional Theory of Asian Enterprise" *Asia Pacific Journal of Management*, 26 (3), pp. 361-380.

<sup>5</sup> Thelen, K. (2010) "Beyond Comparative Statics: Historical Institutional Approaches to Stability and Change in the Political Economy of Labor" in Morgan, G, Campbell, J.L. Crouch, C., Pedersen, O.K. and Whitley, R. (eds). *The Oxford Handbook of Comparative Institutional Analysis*. London: Oxford University Press.

employment relations system in Hong Kong over time as it can capture rich contextual details and enable researchers to gauge how the changing contexts impact on policymakers and employers and the way they respond. Two multinational banks' retail businesses are examined as the retail banking sector is an important economic sector in Hong Kong, in terms of its contribution to the GDP and level of employment. Multinational banks are chosen as cases for analysis as they are more susceptible to global, regional, and local changes and therefore better able to reflect the changing contexts at various levels. Interviews were conducted in the two banks, between July 2005 and March 2006 and again between September 2012 and June 2013, with employees engaged in human resource management positions and line management functions at the senior, middle, and front-line levels. Interviews were also conducted with representatives of the Hong Kong Banking Employees Association, the only banking employee association at the industry level. Data collected from the interviews are supplemented by documentary information gathered from relevant government, industry and related institutions.

The paper is divided into six sections including this introduction. The VoC approach and its discussion of employment relations in various types of economies will first be outlined, followed by an examination of the Hong Kong brand of capitalism and its employment relations system before and after 1997. The Hong Kong retail banking sector will then be examined, covering its structure and employment, changing institutional context, corporate strategies and employment relations. Thereafter, changing employment practices of two multinational retail banks over a period of nearly 20 years will be presented and analysed, followed by the conclusions and theoretical implications of the paper.

## 2. Varieties of Capitalism and Employment Relations

According to the VoC approach, the main actor in different varieties of capitalist economies is the firms which maintain their competitive advantage by adopting strategies that are aligned with the opportunities and resources embedded in the institutional environments specific to these various economies (Hall and Soskice<sup>6</sup>, 2001; Carney, Gedajlovic, and Yang, 2009<sup>7</sup>). Institutions in these economies help firms solve coordination problems arising from uncertainties, moral hazard and opportunism as a result of the incomplete and implicit contracts governing the economic relationship between various actors. Coordination problems in five different spheres are examined, covering employment relations, vocational training and education,

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<sup>6</sup> Hall, P. and Soskice, D (2001), *op.cit.*

<sup>7</sup> Carney, M., Gedajlovic, E. and Yang, X (2009), *op.cit.*

corporate governance, inter-firm relations and workforce's internal coordination. Different institutions, which are inter-connected, deal with these five spheres separately and produce institutional complementarities reinforcing one other. Hall and Soskice (2001<sup>8</sup>) came up with two ideal types of capitalist models: liberal market economies (LMEs) and coordinated market economies (CMEs), each of which solve their respective coordination problems with a different set of institutions. Firms operated in LMEs tend to coordinate their economic activities through market and hierarchies. By contrast, firms operated in CMEs depend more on political and societal institutions to help coordinate their economic activities. Institutional complementarities provide a solid foundation sustaining the competitive advantage of firms and the capitalist economies to which they belong. Even in face of strong market pressures, the specific set of self-reinforcing institutions in these capitalist economies is rather resilient. Institutional changes, if they do occur, are likely to be incremental (Frege and Kelly, 2013<sup>9</sup>)

Employment relations is among the five spheres examined in the VoC framework from which coordination problems related to employees' wage bargaining and work conditions, organised labour and employers' associations are to be solved by firms. In LMEs, firms coordinate their activities primarily through hierarchies or market arrangements to achieve competitive advantage. Relations between employers and employees are therefore governed by market relationship. Management has the autonomy to hire and fire according to market situation, with no obligation for firms to help organise and recognise trade unions. Without prominent trade unions and employer associations in place, economy-wide coordination of wages is the rule rather than exception. A highly fluid labour market enable firms to adopt flexible labour strategies to pursue new opportunities as they arise from the economy and, at the same time, discourage labour to learn firm-specific skills not easily transferred across firms. By contrast, in CMEs, firms coordinate their activities through political and societal institutions. CMEs' firms usually adopt production strategies that require highly skillful labour force to exercise a significant degree of autonomy to make the strategies effective. Coordination problem emerges as to how best to manage these highly skillful employees who are open for poaching by other firms. To solve this problem, non-market institutions such as employers' associations and industry-level trade unions set wages through industry-level bargaining to come up with collective agreements covering all employees

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<sup>8</sup> Hall, P. and Soskice, D (2001), *Ibid.*

<sup>9</sup> Frege, C. and Kelly, J. (2013) "Theoretical Approaches to Comparative Employment Relations" In Frege, C. and Kelly, J. (eds.) *Comparative Employment Relations in the Global Economy*. Oxon: Routledge. pp. 28-42.

possessing equivalent level of skills. Wage inflation is therefore contained and poaching is made rather meaningless. Work councils, with elected employee representatives, are entrusted with the authority to govern job security and work conditions. By ensuring that there will not be arbitrary lay-offs and undesirable changes in work conditions, such institutional arrangement help encourage employees to work harder and to invest in company-specific skills to enhance further development.

The VoC approach is not without its criticisms. First and foremost is the paradoxically deterministic nature of the approach, reducing firms to mere actors that behave entirely under the control of the ‘isomorphic power of institutions (Carney, Gedajlovic, and yang, 2009<sup>10</sup>). Closely related to the first criticism is the lack of variety in a theory of varieties of capitalism. As different economies are predicted to fit into only two viable forms of capitalism—LMEs and CMEs, critics therefore comment on the theory as advocating ‘dual convergence’ which is empirically not the case (Crouch, 2005<sup>11</sup>). Many recent studies engaged with the literature identify more than two types of capitalism characterising various national economies (Amable, 2003<sup>12</sup>; Martin and Thelen, 2007<sup>13</sup>), and highlight diversity within one single national economy at one particular point in time or across different periods of time (Lane and Wood, 2009<sup>14</sup>; Schneiberg, 2007<sup>15</sup>). A third criticism is that the VoC approach does not differentiate between different types of firms operated in various national economies, totally ignoring the importance of MNCs in influencing employment practices (Deeg and Jackson, 2007<sup>16</sup>). Last but not the least important is the criticism of the approach as being a static model, particularly weak in explaining the institutional changes taken place in different economies over time. Changes, if that does occur, are taken as minor adjustments to restore the economy to a state of equilibrium through renewed pattern of coordination among various institutions. The role of the state and the result of

<sup>10</sup> Carney, M., Gedajlovic, E. and Yang, X (2009), *op.cit.*

<sup>11</sup> Crouch, (2005) *Capitalist Diversity and Change: Recombinant Governance and Institutional Entrepreneurs*, Oxford: Oxford University Press

<sup>12</sup> Amable, B. (2003) *The Diversity of Modern Capitalism*. Oxford and New York: Oxford University Press.

<sup>13</sup> Martin, C. J. and Thelen, K. (2007) “The State and Coordinated Capitalism: Contributions of the Public Sector to Social Solidarity in Postindustrial Societies” *World Politics*, 60 (1): 1-36.

<sup>14</sup> Lane, C. and Wood, G. (2009) ‘Diversity in Capitalism and Capitalist Diversity’, *Economy and Society*, 38 (4): 531-551.

<sup>15</sup> Schneiberg, M. (2007) “What’s on the Path? Path Dependence, Organizational Diversity, and the Problem of Institutional Change in the US Economy, 1900-1950” *Socio-Economic Review*, 5 (1): 47-80.

<sup>16</sup> Deeg, R. & Jackson G. (2007) “Towards a More Dynamic Theory of Capitalist Diversity” *Socio-Economic Review*, 5 (1), pp. 149-79.

political struggles among various social groupings in shaping and changing institutional configurations are grossly under-examined in the early version of the VoC framework (Thelen, 2010<sup>17</sup>)

### 3. Hong Kong's Brand of Capitalism and the Employment Relations System

As a British colony, Hong Kong has been a world renowned liberal market economy until 1997 when its sovereignty was handed back to the PRC, becoming one of its Special Administrative Regions. Prior to 1997, many institutional arrangements in Hong Kong fit well into the description of a LME. Prior to the sovereignty handover, Hong Kong's industrial relations system is widely acknowledged as being influenced by the British tradition of voluntarism, which is well reflected locally in the 'positive non-interventionist' policy adopted by the government. Adhering to such a policy, Hong Kong government plays a significant role in providing the economy with only necessary support in services such as infrastructure, education, and social welfare (hence 'positive') while leaving businesses free to operate (hence non-intervention) (Wilkinson, 1994<sup>18</sup>). Determination of wages has never been coordinated by the government and the use of collective bargaining mechanism is rare in regulating employment issues, particularly for the private sector. Bargaining, if there is any at the enterprise level, is almost always employer-dominated (Chiu and Levin, 1999<sup>19</sup>). Before the outbreak of the AFC in 1997, although Hong Kong's manufacturing sector was steadily shrinking as many factories were closed down and moved to the Pearl River Delta region with plentiful supply of cheaper labour, the city was nonetheless faced with a tight labour market. During that time, surplus labour was quickly absorbed by the fast expanding service industries. Moreover, some 60,000 Hong Kong people, mostly professionals and managers, migrated annually elsewhere between the late 1980s and mid 1990s due to political uncertainty, decreasing the number of people in the workforce. In such a tight labour situation, while employers are free to hire and fire workers to tailor to emergent business needs, employees are reluctant to invest in company-specific skills as they can easily find jobs with higher pay and much better working conditions than what their current jobs could offer (Chiu, So and Tam, 2008<sup>20</sup>).

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<sup>17</sup> Thelen, K. (2010), *op.cit.*

<sup>18</sup> Wilkinson, B. (1994) *Labour and Industry in the Asia-Pacific: Lessons from the Newly-Industrialized Countries*, Berlin: de Gruyter, Ch. 5, pp. 150-186.

<sup>19</sup> Chiu and Levin (1999) *op.cit.*

<sup>20</sup> Chiu, S.W.K., So, A. Y. and Tam, M. Y. M. (2008) "Flexible Employment in Hong Kong: Trends and Patterns in Comparative Perspective" *Asian Survey*, 48 (4) pp.673-702.

Even after the sovereignty handover since 1997, Hong Kong as a SAR of the PRC has continued to operate as a liberal market economy. Organised labour movement in Hong Kong has remained weak, as reflected in an increasingly fragmented nature of the trade unions and a persistently low density of trade union membership throughout the 1990s. Hong Kong government has continued to uphold the laissez-faire doctrine and maintain its non-interventionist stance towards industrial relations after the sovereignty handover. Although some trade unionists elected to the Legislative Council managed to put up the Employees' Right to Representation, Consultation and Collective Bargaining Ordinance and had it passed and gazetted literally on the last day of the colonial rule (i.e. 30 June 1997), this Ordinance was suspended by a bill, reviewed and reconsidered by the Labour Advisory Board, a tripartite body appointed to advise the government on labour-related matters. In October 1997, this Collective Bargaining Ordinance was repealed, by the enactment of the Employment and Labour Relations (Miscellaneous Amendments) Ordinance to remove, amongst other important provisions, the right of trade unions to engage in collective bargaining (Chiu and Levin, 2010<sup>21</sup>). Similarly, the Unfair Dismissal Ordinance passed in Hong Kong's final colonial days was suspended after July 1996 and ultimately repealed (Chiu and Levin, 1999<sup>22</sup>). Without the legal right for trade unions to represent employees in collective bargaining and the protection of active trade unionists against unfair dismissal, pay determination has continued to be decentralised, in particular for the private sector. Negotiation of pay and other terms of employment have therefore continued to take place at the enterprise level individually between employers and employees.

The onset of the AFC in 1997, bursting of the real-estate and dot-com bubbles and outbreak of SARS between 1997 and 2003 ushered in a period of significant economic downturn in Hong Kong. Unemployment rate hit an all-time-high in 2003, reaching a historical record of 7.9 percent (CSD, 2015<sup>23</sup>). This period also witnessed the loss of a huge number of jobs from Hong Kong to the Pearl River Delta, mostly in servicing industries covering banks, airlines, and telecommunication companies employing large number of relatively unskilled labour to man call centres and perform back office duties. To sustain competitiveness within a context of economic downturn, there has been a

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<sup>21</sup> Chiu, S.W.K. and Levin, D.A. (2010) "HRM in Hong Kong since 1997" *Asia Pacific Business Review*, 9 (4), pp.32-54.

<sup>22</sup> Chiu and Levin (1999) *op.cit.*

<sup>23</sup> Census and Statistics Department (CSD) (2015) *Labour Force Chart 006: Unemployment Rates (Seasonally Adjusted and Underemployment Rates* <http://www.censtatd.gov.hk/hkstat/sub/sp200.jsp?tableID=006&ID=3&productType=9> (accessed August 24, 2015)

rising trend for companies to outsource non-core functions to areas with cheap labour such as China and India to maintain the operations at low costs. A general state of an oversupply of labour is recorded. With a decreasing demand of labour, coupled with the return of some overseas migrants searching for jobs, it is not surprising that many organisations in various industries implemented labour adjustment strategies such as increasing part-time employment, requiring employees to work irregular hours, using more shift and overtime work, and cutting wages to maintain a higher level of numerical, temporal, and financial flexibility (Chiu, So and Tam, 2008<sup>24</sup>). When all these labour adjustment strategies failed to control costs, redundancy and mass layoffs resulted in both the manufacturing and the service sector including hotels (Chiu and Levin, 2010<sup>25</sup>). While there were instances in the late 1990s and early 2000s where employees and trade unions took action to fight against employers' measures implemented to threaten workers' job security, the few cases of industrial unrest was isolated, restricted to specific sectors where labour was more organised and failed to make significant impact on the existing employment relations system (Chiu, So and Tam, 2008<sup>26</sup>). So even after the sovereignty handover, Hong Kong's employment relations system has still been very much operated under the shadow of British tradition of voluntarism. The few federations of trade unions that exist in Hong Kong have continued to function more as pressure groups to bargain with the government, instead of employers, for policies that could bring more protection and benefits to the workers. Some active trade unionists have successfully found their way into the Legislative Council through election, seeking to influence government labour policies from within the governance structure.

Towards the end of 2003, Hong Kong's economy has gradually picked up as a result of a general economic recovery in the region, reinforced by positive outcomes brought about by the PRC's liberalisation policies implemented to enhance its economic integration with the Hong Kong SAR. Among the most important policies implemented was the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA), an agreement effective on 1 January 2004 facilitating trade and investment between the two economies with new liberalisation measures introduced. To facilitate trade liberalisation in various types of services, an important provision in CEPA is the mutual recognition of professional qualification between the two areas in question. Up to 2013, 10 supplements to CEPA were signed to enhance the original

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<sup>24</sup> Chiu, S.W.K., So, A. Y. and Tam, M. Y. M. (2008) *op. cit.*

<sup>25</sup> Chiu, S.W.K. and Levin, D.A. (2010), *op.cit.*

<sup>26</sup> Chiu, S.W.K., So, A. Y. and Tam, M. Y. M. (2008) *op. cit.*

agreement, covering various sectors including manufacturing, banking, insurance, retail and tourism (TID, 2013<sup>27</sup>). The Individual Visit Scheme (IVS) introduced under CEPA's tourism liberalisation measure has, until recently, been seen as bringing tremendous benefit to Hong Kong. Mainland residents from 49 cities, previously only able to travel to Hong Kong under business visa or by joining group tours, can now visit Hong Kong in their individual capacity if applications are endorsed by the local Public Security Bureau offices. (Tourism Commission, 2015<sup>28</sup>).

Hong Kong's economy continued to grow from late 2003 until 2007 when the GFC broke out as a result of a series of unexpected financial incidents including the demise of Bear Stearns, bankruptcy of Lehman Brothers, and nationalisation of American International Group (AIG). Though the economy of Hong Kong was hit hard by the GFC, the adverse economic impact of the crisis was rather short-lived. Unemployment rate in Hong Kong climbed from 3.3 percent in 2008 to 5.3 percent in 2009, but quickly went down to 4.3 percent in 2010 and 3.4 percent in 2011. Since then, unemployment rate has stood at the level of low- to mid-three percent (CSD, 2014<sup>29</sup>). In the recent few years, the labour market in Hong Kong remained tight. In 2010, the Minimum Wage Ordinance was passed after years of active trade unionists' lobbying to the government. Low-paid workers who are paid mostly by hour in mainly four sectors including retail, restaurants, estate management, as well as security and cleaning services are now protected and paid the Statutory Minimum Wage (SMW) implemented in May 2011 (Minimum Wage Commission, 2012<sup>30</sup>). Despite the enforcement of the SMW, most employers can still be able to continue to determine pay unilaterally at the enterprise level, and to hire and fire employees freely to adjust to normal business cycles and unexpected economic crises.

<sup>27</sup> Trade and Industry Department (TID) (2013) *Mainland and Hong Kong Closer Economic Partnership Agreement (CEPA), CEPA Legal Text* [http://www.tid.gov.hk/english/cepa/legaltext/cepa\\_legaltext.html](http://www.tid.gov.hk/english/cepa/legaltext/cepa_legaltext.html) (accessed September 16, 2013).

<sup>28</sup> Tourism Commission (2015) *Individual Visit Scheme*, [http://www.tourism.gov.hk/english/visitors/visitors\\_ind.html](http://www.tourism.gov.hk/english/visitors/visitors_ind.html), Commerce and Economic Development Bureau (accessed October 13, 2015).

<sup>29</sup> Census and Statistics Department (CSD) (2014) *Hong Kong Annual Digest of Statistics*, Hong Kong.

<sup>30</sup> Minimum Wage Commission (2012) *2012 Report of the Minimum Wage Commission*. Hong Kong.

## 4. Hong Kong's Banking Sector

### 4.1. Structure and Employment

In Hong Kong, only licensed banks are allowed to offer full banking services and take deposits of all different sizes and maturity period. As a renowned liberal market economy, foreign banks are free to set up subsidiaries to operate in Hong Kong. In 2014, approximately 70 of the world's 100 largest banks have an operation in Hong Kong (HKTDC, 2014<sup>31</sup>). The Hong Kong Monetary Authority (HKMA) acts as a de facto central bank and is vested with the authority to ensure prudential operation and stability of the banking sector. As an important segment in the financial services industry, the banking sector has made significant contribution to the Hong Kong economy. Between 2000 and 2004, the sector accounted for around eight percent of the GDP in Hong Kong each year and recorded an average annual growth rate of nearly 10 percent in the five years before 2006 (CSD, 2006<sup>32</sup>). Despite the outbreak of GFC in 2008, the banking sector maintained a significant 10 percent contribution to Hong Kong's GDP in 2010 at basic prices, amounting to HK\$162.6 billion of value-added (CSD, 2012<sup>33</sup>).

The number of banks operating in Hong Kong has grown quickly since the early 1990, reaching an all-time-high of 185 in 1995. As a result of the mergers and acquisition activities carried out by local banks and the closing down of foreign bank subsidiaries after the outbreak of the AFC in 1997, the number of banks shrunk in Hong Kong. After 2002, banks incorporated outside Hong Kong has slowly increased again. More recently even after the outbreak of the GFC in 2008, the number of banks in Hong Kong has grown steadily, maintaining a rather stable figure. By the end of June 2015, there were altogether 157 banks operating in Hong Kong, 21 of which were incorporated in Hong Kong and 136 outside the territory (HKMA, 2015<sup>34</sup>) (See Table 1).

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<sup>31</sup> Kong Trade Development Council (HKTDC) (2014) *Banking Industry in Hong Kong*, Hong Kong Trade Development Council, Hong Kong <http://hong-kong-economy-research.hktdc.com/business-news/article/Hong-Kong-Industry-Profiles/Banking-Industry-in-Hong-Kong/hkip/en/1/1X000000/1X003ULX.htm> (accessed August 7, 2015).

<sup>32</sup> Census and Statistics Department (CSD) (2006) *Composite Employment Estimates, National Income Section (2)1*, Census and Statistics Department, Hong Kong.

<sup>33</sup> Census and Statistics Department (CSD) (2012) *Hong Kong Monthly Digest of Statistics—Feature Article: The Financial Service Sector in Hong Kong*. Hong Kong: Hong Kong Census and Statistics Department, pp. 1-34.

<sup>34</sup> Hong Kong Monetary Authority (HKMA) (2015) *Monthly Statistical Bulletin*, July 2015—Issue No. 251, Hong Kong Monetary Association, Hong Kong <http://www.hkma.gov.hk/eng/market-data-and-statistics/monthly-statistical-bulletin/table.shtml#section3> (accessed July 21, 2015).

**Table No. 1 - Number of licensed banks in Hong Kong SAR**

Month/Year	Number of Licensed Banks in Hong Kong		
	Incorporated in Hong Kong	Incorporated outside Hong Kong	Total
1993	32	140	172
1995	31	154	185
1997	31	149	180
1999	31	125	156
2001	29	118	147
2003	23	111	134
2005	24	109	133
2007	23	119	142
2009	23	122	145
2011	23	129	152
2013	21	135	156
2014	21	138	159
June 2015	21	136	157

Source: HKMA, 2015, *Monthly Statistical Bulletin (July 2015 – Issue No. 251)*, Number of Authorised Institutions and Local Representative Offices, Hong Kong: Hong Kong Monetary Association, <http://www.hkma.gov.hk/eng/market-data-and-statistics/monthly-statistical-bulletin/table.shtml#section3> (Accessed on 21 July 2015)

With the opening up of the financial sector in China, many locally incorporated banks in Hong Kong are eager to expand their operation into China. By the end of 2013, there were 13 banks incorporated in Hong Kong having business operations in China, eight of which with their subsidiaries incorporated in China. These 13 banks altogether opened and maintained over 400 branches and sub-branches in China, directly or through their subsidiary banks (HKTDC, 2014<sup>35</sup>).

The number of people employed in the banking sector dropped from 78,710 in 1994 to 71,451 in 2002, as a result of the local merger activities and the continued decline of Hong Kong's economy since 1997 (HKAB, 2006<sup>36</sup>; VTC, various years<sup>37</sup>). There were 72,121 people employed in the banking sector in

<sup>35</sup> Kong Trade Development Council (HKTDC) (2014) *Banking Industry in Hong Kong*, Hong Kong Trade Development Council, Hong Kong <http://hong-kong-economy-research.hktdc.com/business-news/article/Hong-Kong-Industry-Profiles/Banking-Industry-in-Hong-Kong/hkip/en/1/1X000000/1X003ULX.htm> (accessed August 7, 2015).

<sup>36</sup> Hong Kong Association of Banks (HKAB) (2006) "The Chief Executive's Speech at Hong Kong Association of Banks Luncheon", *Press Release*, 26 April, Hong Kong Association of Banks, Hong Kong.

<sup>37</sup> Vocational Training Council (VTC) (various years) *Banking and Finance Industry Training Board, Hong Kong Manpower Survey: Banking and Finance Industry*, Vocational Training Council, Hong Kong.

2004, the number of which increased steadily to 95,136 in 2007 as a result of the gradual recovery of Hong Kong's economy after it hit the rock bottom subsequent to the outbreak of SARS. While there was a slight decrease of the banking sector employees in 2008 to 93,479 because of the onset of the GFC, the total number of banking staff has since then grown steadily and reached 99,081 by the end of 2013 (CSD, 2014<sup>38</sup>). Over the last decade or so, there has been a notable trend for Hong Kong people to cross the border to work in Hong Kong-based banks operating in China and for Mainland Chinese nationals employed in banks operated in Hong Kong. In the financing, insurance, real estate and business service sector, for instance, the number of Hong Kong employees working in China has increased steadily from 18,000 (9.5 percent of employees in the sectors concerned) in 2001 to a peak of 26,500 (11.4 percent) in 2005, and thereafter scaled back to 14,000 in (8.0 percent) in 2010 (CSD, 2001<sup>39</sup>; 2005<sup>40</sup>; 2011<sup>41</sup>). In a survey conducted by the Financial Services Development Council in 2015, 18 percent of the surveyed retail banking companies in Hong Kong reported that there was an over 20 percent increase in the total number of Mainland Chinese nationals employed in these firms over the past 10 years (FSDC, 2015<sup>42</sup>).

#### 4.2. *Changing Institutional Context since 1997*

While the banking sector is highly concentrated in Hong Kong SAR, competition in the retail banking sector has always been fierce. As there is no geographical barrier of entry, the banking sector is crowded with players of different sizes and nationalities. The outbreak of the AFC in 1997 and the ensuing economic downturn as a result of property market crash and public health crises weakened credit demands as well as foreign currency, syndicated and mortgage loan businesses. (Thomas, 2004: 63<sup>43</sup>). Further deregulation of

<sup>38</sup> Census and Statistics Department (2014), *op.cit.*

<sup>39</sup> Census and Statistics Department (CSD) (2001) Social Data Collected Via the General Household Survey, Special Topics Report No. 30, *Hong Kong Residents Working in the Mainland of China*, Census and Statistics Department, Hong Kong, pp.42.

<sup>40</sup> Census and Statistics Department (CSD) (2005) Social Data Collected via the General Household Survey, Special Topics Report No. 42, *Hong Kong Residents Working in the Mainland of China*, Census and Statistics Department, Hong Kong, pp.16.

<sup>41</sup> Census and Statistics Department (CSD) (2011) Social Data Collected Via the General Household Survey, Special Topics Report No. 57, *Hong Kong Residents Working in the Mainland of China*. Hong Kong: Census and Statistics Department, pp.19.

<sup>42</sup> Financial Services Development Council (FSDC) (2015) *Developing Hong Kong's Human Capital in Financial Services*, FSDC Paper No. 13, January, FSDC.

<sup>43</sup> Thomas, H. (2004) "The Banking System" in Ho, S., Scott, R. H., & Wong, K. A. (eds) *The Hong Kong Financial System: A New Age*, New York: Oxford University Press.

the Interest Rate Rules (IRRs) in 1998 to remove interest rate caps by phases on time, saving, and current accounts put even more pressure on banks to save costs to compensate for the revenue loss because of lower interest margin (HKIB, 1999<sup>44</sup>). Deflation and the rising real interest rates in Hong Kong since 1997 has jeopardized borrowers' ability to repay their debts, affecting banks' asset quality (Jiang et al. 2003: 3–4<sup>45</sup>). Banks were faced with a growing pressure to enhance revenue but, at the same time, maintain asset quality. The percentage of incomes coming from interest-based sources has significantly dropped, forcing banks to expand the share of non interest-based incomes coming mainly from fees earned by selling to retail customers a diverse range of financial products including mutual funds, bonds, and structural products (Carse, 2003<sup>46</sup>). More banks perceived themselves as financial services providers, venturing into wealth management and private banking services to boost their retail businesses (Carse, 2001<sup>47</sup>).

Adversely affected by the AFC, there has been an increasing trend for banks to acquire or merge with other banks to increase both the economy of scale and scope to control costs and increase income. Multinational banks operated in Hong Kong, in particular, were affected by the merger and acquisition activities carried out by their parent companies in home countries. These consolidation activities gave rise to a gradual decrease in the number of people employed by Hong Kong-based banks in the early 2000s. Besides consolidation, a significant number of banks in Hong Kong took action to close branches, centralise bank operations, and outsource processing tasks to areas with lower labour costs. Bank staff engaged in back office work and relatively low-skilled tasks were most at risk. Surplus staff was usually reduced by redeployment before being retrenched and made redundant. While an oversupply of clerical and supporting staff in the retail bank sector was recorded, there was at the same time a high demand for qualified people who were required to possess the requisite knowledge and licences to fill the newly created positions of customer service managers (CSMs), customer service officers (CSOs) and financial consultants.

It is not surprising for banks to stage redundancy programme to cut current employees but at the same time recruit new staff to fill newly created positions. The changing employment structure in the retail banking sector is obvious.

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<sup>44</sup> Hong Kong Institute of Bankers (HKIB) (1999) *Hong Kong Banking System and Practice*, 4th edition, Hong Kong: HKIB.

<sup>45</sup> Jiang, G., Tang, N., Law, E., & Sze, A. (2003) "The Profitability of the Banking Sector in Hong Kong" *Hong Kong Monetary Authority Quarterly Bulletin*, September, Hong Kong: Hong Kong Monetary Authority, pp. 5–14.

<sup>46</sup> Carse, D., "The State of the Banking Industry in Hong Kong" (2003) 21 *BIS Review* 1–4

<sup>47</sup> Carse, D., "The Changing Landscape of Banking in Hong Kong" (2001) 71 *BIS Review* 1–4.

With the implementation of CEPA in 2004, allowing Hong Kong-based banks to enter into the China market two years earlier than their foreign counterparts, almost all major banks ventured across the border to open new branches in strategic locations such as Shenzhen, Guangzhou and Shanghai or simply upgrade their existing representative offices into branches. Smaller banks merged with one another to attain the scale required to enter the China market. Expanding into a new market, many banks redeployed existing supervisory or managerial staff to take up new positions in their Chinese operations, creating vacancies in Hong Kong branches. Between 1994 and 2004, the proportion of managerial and supervisory staff employed in the banking sector has therefore increased from 39.4 percent to 51.9 percent (VTC, various years<sup>48</sup>).

Having survived the 1997 AFC and a rather lengthy period of economic downturn, Hong Kong retail banks' performance has since 2004 gradually improved. In 2007, financial problems began to surface initially in the US as a result of the subprime mortgage crisis and significant depreciation of toxic mortgage-based securities and structural assets, challenging seriously the survival of even famous investment banks and financial companies worldwide. Because of Lehman Brothers' bankruptcy, structured investment products (known as minibonds) offered by Lehman Brothers and sold to customers through 13 Hong Kong banks' retail distribution channels became almost worthless (Wang, 2008<sup>49</sup>). The outbreak of the GFC and the global financial failures were translated into public protests staged by retail banks' customers in Hong Kong. At a time of great uncertainty and huge loss of public confidence, even rumours spreading around could lead to a major bank run. Bank of East Asia, a local medium-sized retail bank, was falsely accused of heavily exposed to the troubled US financial institutions, Lehman Brothers and AIG, resulting in a run on the bank in September 2008 (England, 2008<sup>50</sup>). Multinational banks operating in Hong Kong was seriously affected because of their global nature as they had businesses in the US and other foreign countries that were in great financial turmoil. As a result of global business restructuring, large multinational banks, including HSBC and the Citigroup, shed their international workforce covering hundreds of people in Hong Kong. Compared with their multinational counterparts, local and Chinese banks operating in Hong Kong were not as seriously affected by such a global turmoil.

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<sup>48</sup> Vocational Training Council (VTC) (various years), *op.cit.*

<sup>49</sup> Wang, L. (2008) "Lehman Brothers' Minibonds Teach Hong Kong Investors a Big Lesson" *China Stakes*, 29 September <http://www.chinastakes.com/2008/9/lehman-brothers-minibonds-teach-hong-kong-investors-a-big-lesson.html> (accessed September 16, 2013)

<sup>50</sup> England, V. (2008) "Hong Kong Bank Recovers from Run" *BBC News*, Hong Kong, 25 September, <http://news.bbc.co.uk/2/hi/7634895.stm> (accessed September 16, 2013).

While Hong Kong's economy has quickly bounced back since 2009, some multinational banks were still active in implementing redundancy programmes already phased in under their Headquarters' directive. As a result of the outbreak of the GFC, HKMA has strengthened its "continuous supervision" policy aiming for early problem detection in supervising banks operated in Hong Kong. New supervisory policies and practices issued to banks by HKMA after 2008 covers a diverse range of important areas including corporate governance, employees' competence and ethical behaviour, risk management and control, stress testing, internal audit, use of consumer credit data, as well as anti-money laundering and counter-terrorist financing (HKMA, 2013<sup>51</sup>). With an increasing emphasis on corporate governance, there has now been serious labour shortage in areas requiring employees to work in the mid- and back-office, providing support for regulatory compliance and risk management (FSDC, 2015<sup>52</sup>).

#### *4.3. Corporate Strategies and Employment Relations*

Operated within a constantly shifting institutional landscape, retail banks' operators in Hong Kong had to adjust continuously their corporate strategies in order to survive and stay competitive in the sector. Throughout the last two decades or so, many banks have sought to contain operational costs by consolidating existing back-office operations locally or relocating such operations to low labour-cost countries. Bigger multinational banks have sold off unprofitable businesses, outsourced non-core functions, and increasingly focused on high growth businesses and markets. With a notable decline of interest-based income, banks have long been expanding their wealth creation services and sell various kinds of financial products to customers, segmented into at least the mass and high net-worth categories. More banks have recently started or expanded their private banking businesses to target exceptionally wealthy customers possessing at least US\$ one million to invest. Mergers and acquisitions are commonplace among banks to achieve greater economy of scale and scope, and to reach the requisite size needed to expand into the China market. Overall speaking, retail banks in Hong Kong adopted, over the last two decades or so, rather similar strategies to minimise costs, enhance revenue, improve operational efficiency, and explore new and high growth

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<sup>51</sup> Hong Kong Monetary Authority (HKMA) (2013) *Supervisory Policy Manual*, 21 August, Hong Kong Monetary Authority, Hong Kong <http://www.hkma.gov.hk/e/g/key-functions/banking-stability/supervisory-policy-manual.shtml>, (accessed September 16, 2013).

<sup>52</sup> Financial Services Development Council (FSDC) (2015) *Developing Hong Kong's Human Capital in Financial Services*, FSDC Paper No. 13, January, FSDC.

markets and business areas, bringing significant impacts to the employment relations practices implemented.

Hong Kong's retail banking sector has continued its practice of highly decentralised employment relations within a context of significant political changes and economic crises after 1997. Employers can hire and fire freely, negotiate pay and other employment terms with employees at the enterprise level, and offer incentive and bonus packages to retain talent. Retail banks in Hong Kong have increasingly adopted the performance-based pay system which was initially brought in by large multinational banks and subsequently adopted by Chinese and local banks. The old practice of paying mandatory annual bonuses to all staff, irrespective of branch and individual performance, has long been scrapped and substituted by various types of incentive plans. Incentives for employers to provide more training than the required basic job-related knowledge are very low, for fear of trained employees being poached by competitors or wasting resources unnecessarily on contingent staff. In some period of time when a general tight labour market is recorded in the retail banking sector, employees who are not satisfied with their jobs can easily find better jobs elsewhere. Those who choose to stay accept employers' demands to work overtime, more intensively for longer and irregular hours. In other period of time when there is an oversupply of labour in the sector, employees can do nothing but accept flexible employment practices imposed by their employers such as working part-time or in shifts, and taking up temporary contracts (Chiu, So, and Tam, 2008<sup>53</sup>).

Up until the early 2000s, very little open labour-management conflict has been found in retail banks operated in Hong Kong. However, overt labour conflict broke out in late 2001 due to mass layoffs as a result of a big merger to combine businesses of 10 out of 12 banks originally belonged to a Chinese banking group, threatening the job security of many employees and triggering the formation of the Hong Kong Banking Employees Association (HKBEA) in 2002. The association attracted initially many employees to join as members whose job security was under threat because of the Chinese Bank Group's mega-merger. At present, the Association has more than 7000 paid-up members the profile of whom has been diversified to cover more employees from local and multinational banks. HKBEA has since its formation represented its members in several major negotiations with bank management for retrenched staff's entitled bonuses, job transfer arrangement before layoff due to outsourcing, and staff dismissal because of perceived poor performance. Despite its effort, the Association is not able to boost the solidarity of its members, many of whom joined the association only because of the risk of

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<sup>53</sup> Chiu, S.W.K., So, A. Y. and Tam, M. Y. M. (2008) *op. cit.*

losing their jobs. When the perceived problem is solved, support given to the association by these members is much weakened. Without a strong base of membership, HKBEA has never been formally recognised by the industry as representing all staff as employed by the banks operated in Hong Kong.

## **5. Changing Employment Practices in Two Multinational Bank Cases since 1997**

### *5.1. History, Development and Corporate Changes of the Cases Since 1997*

Both of the multinational banks (Bank X and Bank Y) examined here have operated in Hong Kong for well over a century. 'Employment practices' is defined as a term covering areas including staffing and labour adjustment; performance and compensation management, employee training and development; as well as labour-management communication and industrial relations. Bank X is a wholly-owned subsidiary of a holding company of a large British multinational financial services group. It is the flagship member of the Group in the Asia-Pacific region and the largest bank incorporated in Hong Kong. Bank Y, a large multinational bank of US origin, is also among the largest foreign financial institutions in Hong Kong. Retail banking is an important line of business for both Bank X and Bank Y, currently operating 19 branches and premier centres for high net-worth customers (and many express banking centres with ATM machines installed) and 41 retail outlets in Hong Kong respectively. As the two MNC banks are highly globalised, they are greatly affected by the aftermath of the AFC and the GFC.

After the outbreak of the AFC, senior management of both Bank X and Bank Y were under pressure to increase cost control but, at the same time, enhance revenue. Fee-based income is seen as a good means to increase revenue as businesses returning interest-based incomes have very much dwindled in a shrinking economy. Since the early 2000s, both banks have upgraded their wealth management services, recruiting a great number of CRMs/CROs, financial planners and consultants, selling financial products to retail customers in different net-worth segments. Both Bank X and Bank Y had a long history to serve the financial needs of private banking customers who are now required to have an asset under management (AUM) of more than US\$3 to 4 million, higher than the industry average. Taking advantage of the gradual opening up of the PRC's banking sector to foreign banks since 2001 and the implementation of CEPA in 2004, Bank X and Bank Y expanded their operation in the PRC. They set up their wholly foreign-owned subsidiaries in the PRC to operate branches and outlets in a number of cities across China. To save costs, there has been a notable trend since the 2000s for both Bank X and

Bank Y to outsource low-skilled back office processing tasks to China or other areas offering cheap labour. This outsourcing trend has well continued after the GFC. With the development of e-banking services by the application of advanced information technology, there has been a trend for both Bank X and Bank Y to close some branches and reorganise others to become customer centres serving solely high net-worth customers.

After the outbreak of the GFC, the financial services group to which Bank X belong suffered from serious reputation damage and had to undertake internal reforms. In 2012, Bank X's Headquarters announced the decision to restructure, sell off some businesses and further cutting costs, resulting in a reduction of staff numbers by 10 percent. The number of positions to be cut amounted to 30,000 worldwide. Bank Y's parent financial group fared even worse as it had to be rescued by a massive stimulus package offered by the US government in November 2008. To recover financially, the group had to slash assets, businesses and jobs, and to cut 25 percent of its workforce since 2008. The group further announced in 2012 that it planned to cut more than 11,000 jobs worldwide, amounting to yet another four percent of its global workforce so as to reduce costs and enhance profitability. For both financial groups, strategic priorities after the GFC are to save costs, improve efficiencies and focus on the businesses where the future growth will be. Both financial groups to which Bank X and Bank Y belong see China as among the high-growth markets in the Asia Pacific region.

### *5.2. Staffing and Labour Adjustment*

With an expanding wealth management services since the early 2000s, both Bank X and Bank Y needed to recruit more CRMs, CROs and financial planning consultants. In 2002, Bank X recruited 100 more qualified people to add to the existing team of 400 financial planning managers. In Bank X, a CRM was supported by a CRO to take care of a portfolio of 300 to 400 customers. In Bank Y, a CRM and his/her associate worked closely with a team of specialists comprising Investment Consultants, Financial Consultants and Treasury Portfolio Consultants to advise customers on investment in funds, insurance products and foreign currencies respectively. There is a set quota in terms of sales volume or target revenue/profit for CRMs /CROs, financial planners and branch managers to meet. Work pressure has been intensified as computerized systems generate periodical monitoring reports, reminding staff to catch up quickly if they fall too much behind achieving the set quota. With intensified work comes long working hours. It is common for various categories of staff in bank branches to work overtime, ranging from two to three hours a day. It is also common for CRMs and financial planners to work

outside office hours as they need to arrange appointments to meet with their potential customers at a convenient time and place, very often after office hours in locations chosen by the clients.

By the end of 2002, Bank X employed 1,900 staff in Guangzhou and 500 employees in Shanghai for the outsourced processing work. By 2011, the number of staff employed by Bank X reached 5000 employees in various Chinese cities. Bank Y also operates a call centre in Guangzhou. The outsourcing of back office work and the closing of branches in both Bank X and Bank Y has made some categories of employees redundant. For instance, many tellers who used to carry out counter transactions were found superfluous with the closing of bank branches. For both banks, redeployment is the preferred means to reduce surplus staff. In Bank X, for instance, surplus tellers found suitable were transferred to fill the posts of CSOs and staff affected by the relocation of processing centres to Shanghai and Guangzhou were placed to other jobs first before retrenchment was made. However, there was still about 100 staff involved in processing tasks being retrenched in 2003. The bank chose not to actively offer a voluntary redundancy programme to cut surplus staff.

Subsequent to the liberation of the banking sector and the implementation of CEPA since 2004, Bank X and Bank Y have expanded their businesses into the PRC and employed more people to work across the border. While having to cut positions in Hong Kong operations after the outbreak of the GFC, Bank X and Bank Y has continued to see China as among the high-growth markets in the Asia Pacific region. There is therefore an expansion to both the number of branch networks and of employees working in China.

The aftermath of the GFC has seen another phase of staff cut in both Bank Groups' Hong Kong operation in support of their parent companies' decision to undertake corporate restructuring to contain costs. Bank X committed to cutting 3000 positions in Hong Kong starting 2011, to spread over a period of three years. Both front and back office employees who worked in Hong Kong's retail operations were to be cut by phases. The information technology function is seriously affected. Shortly before the outbreak of the GFC, Bank X underwent a broad banding exercise to consolidate more than 20 grades into eight bands. The eight-grade structure has been further refined to become an eight times eight structure, which means that the span of control under each of the eight grades is limited to eight employees. After the GFC, Bank Y has embarked on a transformation initiative to reengineer work practices. The marketing teams in Bank Y's retail business set up for different products are centralised and the Operation and Technology function in the bank is consolidated. Jobs cut in Bank Y came from six of its branches and from the Operation and Technology Function. Redeployment of affected staff to other

jobs within the banks was first carried out by both Bank X and Bank Y before redundancy was considered.

With mounting complaints received from retail customers who accused bank employees of inappropriately selling to them high-risk financial products, retail banks are required by HKMA to establish a system of procedures when selling investment products to retail customers to meet stricter compliance requirements. Bank staff previously involved in investment product control at the back office is, according to new HKMA regulations, not allowed to move into front office positions selling financial product to prevent bank staff from engaging in unethical sales behavior.

### *5.3. Performance and Compensation Management*

Bank X carries out mid-year and year-end appraisals, with continuous feedback throughout the year emphasised. A balanced scorecard is used to evaluate employees' performance on four different dimensions, including the financial aspects, customers, internal business processes, as well as learning and growth. Weightings assigned to the four dimensions mentioned are different for jobs of different nature. Customer Relationship Managers are used to be assessed according to three performance indicators: the sales targets attained, growth of customers' wealth portfolio with the bank, and customer satisfaction. As a result of more stringent regulatory control after the outbreak of the GFC, performance metrics of employees responsible for product sales has changed to focus not only on sales volume, but also to cover important aspects such as the quality of sales and customer services. For Bank Y, employees are required to set both financial (quantitative) and non-financial (qualitative) goals with their superiors. These goals are subject to mid-year discussions to see if adjustments should be made before annual performance reviews are carried out. New dimensions of employee performance are to be evaluated after the GFC, including the quality of people management and control. Bank Y assessed the performance of CRMs based on three performance criteria, namely, the sales target achieved by categories, level of service provided and compliance with regulations. These three performance criteria are used by sales-based staff in their self-assessment first, to be followed by their supervisors' assessment.

After the outbreak of the GFC, Bank X's incentive plans based mostly on product sales volume have been recently removed. Incentive payments have now been replaced by discretionary bonuses to be calculated according to different metrics adopted for the individual, business, and group levels. The size of the discretionary bonus pool is determined each year according to the Group's performance and its profitability and affordability. Individual level of

discretionary bonus is determined based on the outcome of individual employees' work appraisal results, on both their quantity and quality of services, and the overall performance of the lines of business to which the staff belong. For Bank Y, incentive compensation schemes have continued to operate, covering the deferred incentive compensation. For the deferred incentive compensation scheme, it is now the practice for Bank Y, as well as other Hong Kong-based banks, to offer a scheme which mirrors that of their competitors, according to the new HKMA regulations implemented after the GFC. The major objective of this regulation is to prevent Hong Kong banks from cashing employees out of the deferred compensation schemes administered by their existing employers, thus rewarding the employees concerned to leave their existing employers regardless. Bank X positions itself as Employer of the Choice and the pay market leader for high-performing employees. Bank Y, by contrast, chooses to offer employees remuneration packages at an average industry level.

#### *5.4. Employee Training and Development*

With an increasing demand of employees to fill positions of CRMs and financial planners, Bank X provided educational subsidies amounting to a total of HKD 15 million to support qualified staff to acquire the Certified Financial Planner (CFP) qualification in 2002, aiming to equip the existing 350 CRMs with a CFP qualification by the end of 2003. As it was difficult to recruit staff equipped with the skills to provide customers with investment advice from the external labour market, Bank Y recruited more than 40 fresh university graduates in 2004 to take up sales-based positions and put them through the one-year 'Banker Trainee Programme' to acquire the skills needed for their positions.

Bank X places learning, talent management and organisation development together under the same section. Globally driven by the Group, talent management is linked to the succession planning of key positions at the country, region and global levels. Besides technical skills, competencies identified as important for bank employees included a wide range of soft skills and leadership skills to enable staff to work effectively with both the internal and external organisational stakeholders. After the outbreak of the GFC, there has been a greater emphasis on employee ethics, and understanding work roles and relevant behaviour. As Bank X has gone onto a brand banding structure of having eight levels and eight span of control in each level, horizontal career movement is greatly emphasised as an important means of career development. To provide employees with better opportunities to move horizontally across

various positions is also seen as a way to maintain staff employability in a highly volatile and unpredictable business environment.

Bank Y offers their employees ample opportunities to develop within the company to compensate for the relatively less attractive salary packages as compared with their competitors. Bank Y runs a reputable Management Associate programme to train new recruits and this programme is regarded as an initial stage of the talent management process. To retain talents, employees who are identified as having high-potential are handpicked to attend the leadership and management development programmes run by the Group. However, there is no local training team for Bank Y which had to leverage the regional training team and resources located in Hong Kong.

### *5.5. Labour-Management Communication and Industrial Relations*

Job cuts in Bank X as a result of the Group's strategic objectives to reduce costs and increase efficiency after the outbreak of the GFC has raised HKBEA's concern. However, Bank X's management does not recognise HKBEA as representing their staff because of the Association's weak membership base. Bank X employs over 20,000 staff in Hong Kong the number of which is much bigger than the size of paid-up members of the Association. With retail banks generally offering a better-than-average compensation package compared with firms in other industries, there is little incentive for bank employees to join as members of the Association unless and until significant labour-management issues arise.

Maintaining good communication with employees is seen by both Bank X and Bank Y as of salient importance in fostering harmonious employment relations in banks. To understand employees' concern and grievances, Bank X conducts employee attitude surveys periodically to gauge staff opinion on various aspects of the bank's operation. Bank X also uses a variety of communication channels to promote good communication between management and staff at different levels. Communication channels included the CEO blogs, town halls which are meetings conducted by the CEO directly with hundreds of employees at all levels, and skip level meetings for staff to meet with managers one level above that of their supervisors. Bank Y conducts an annual Voice of Employee (VOE) survey to solicit employees' feedback towards management and gauge their overall degree of job satisfaction. A pulse survey is conducted every six months to 'feel the pulse' before the annual VOE is carried out. Bank Y sees these surveys as part of the talent retention process because employees can take this opportunity to voice out their career and other aspirations. By maintaining good communication between management and staff and having

staff grievances resolved earlier at the lowest level, potential conflict emerged between the two parties concerned can be prevented.

### *5.6. Changing Employment Practices: A Summary*

Employment practices of the two MNC banks' retail businesses operated in Hong Kong has undergone rather similar changes since 1997. Back office tasks are centralised or outsourced; branches' work reorganised or closed down; and positions of new customer relationship management and financial planning created. There has been a trend of intensification of work, and longer and irregular working hours for most bank employees. While more staff is employed to work in China to carry out processing jobs or fill the newly created positions in Chinese operations, surplus staff is found in Hong Kong as a result of job outsourcing, centralisation, branch closure and the negative impact of the AFC and GFC. Global business restructuring plans carried out by the two MNC banks' parent groups after the GFC put great pressure on both banks to centralise further their operations and implement redundancy programme by phases. Preferred labour adjustment strategies are redeployment and retraining of staff, certainly not redundancy. Formal performance appraisal systems are used and performance-related pay packages implemented. Performance evaluation criteria have been widened to cover not only quantitative (such as sales volume) but also qualitative (such as quality of transactions) metrics, in particular after the GFC. With tighter requirement on compliance and risk management after the outbreak of the GFC, incentive schemes are designed and operated to discourage staff's unethical sales behavior. Staff development and talent management are carried out to motivate and retain staff with great potential. Operated within a highly volatile business environment, bank management can at best offer staff employability, not job security. Various types of communication channels are used and employee surveys carried out to gauge staff feedback on bank management and operation. While HKBEA pushes for the recognition of its status to represent banking staff, the association is not taken seriously by both Bank X and Bank Y as having a formal status in representing their employees collectively.

## **6. Conclusions and Theoretical Implications**

Examining the employment relations system in Hong Kong since 1997, one can certainly confirm that the highly decentralised system without collective bargaining mechanism institutionalised at the industrial/national level has stayed intact despite significant political and economic changes taken place in Hong Kong over the period. While the PRC has resumed the exercise of

sovereignty over Hong Kong since 1997, it is however guaranteed under the Basic Law that Hong Kong can maintain its capitalist system for a period of 50 years to ensure peaceful national reunification. After 1997, Hong Kong government still adheres to the non-interventionist policy implemented during the colonial time. No doubt some trade unionists elected to the Legislative Council were successful in pushing for the enactment, just before Hong Kong's sovereignty handover, of the Employees' Right to Representation, Consultation and Collective Bargaining Ordinance and the Unfair Dismissal Ordinance. These Ordinances, however, were quickly suspended afterwards and never materialised. Since the year 1997, the tight labour market conditions in Hong Kong, due to the fast expanding servicing sector and an increasing number of professionals and managers migrated elsewhere before the sovereignty handover, had quickly been reversed with the onset of the AFC, bursting of the real estate and dot-com bubbles and the outbreak of SARS. A shrinking economy, coupled with the huge loss of jobs outsourced to low-cost areas, has brought about a burst of mass layoffs in the early 2000s, triggering affected employees to take collective actions against their employers to fight for their job security. With the gradual recovery of Hong Kong's economy since 2003 and further liberalisation of various economic sectors in the PRC, more Hong Kong-based companies commence or expand their operations in China, bringing increasing opportunities for Hong Kong employees to work across the border. While Hong Kong was seriously affected by the outbreak of the GFC in 2007, the negative economic impact was however only short-lived. Despite successful enactment of the Minimum Wage Ordinance in 2010 after years of struggle by active trade unionists, the scope of protection for low-paid workers is only very limited, covering mainly four sectors that employ workers mostly paid by hour.

Detailed examination of employment practices in two multinational bank cases operated in Hong Kong since 1997 has provided further insights into why there has not been much significant change to the decentralised ER system in Hong Kong over the past 20 years. Having experienced two major economic crises within only a short 10-year time span, senior management of these multinational banks certainly understand that they are operating in highly complex, turbulent and unpredictable local as well as regional and international contexts. In times of great economic turmoil, the multinational banks examined are under huge market pressure to set strategic priorities to control costs, improve efficiencies, enhance revenue, and focus on growing businesses and areas to maintain their competitive advantage. After the implementation of CEPA, the multinational banks examined take quick action to seize the opportunity emerged as a result of further liberalisation of China's banking market to expand their operation across the border. Employment practices

carried out by the banks to support these various corporate strategies are found to be highly flexible which can be quickly adjusted according to market changes and operational needs. A decentralised ER system, as has been practiced since 1997, is most suited to the demand of employers to unilaterally design and implement highly flexible employment practices to support whatever corporate decisions made to cope with volatile market conditions.

From the above analysis, it can be concluded that the VoC framework is useful in explaining why Hong Kong's employment relations system is so enduring over the past 20 years. However, the Hong Kong case does reveal the problems as highlighted in the major criticisms on the VoC framework which are discussed earlier in the paper. No doubt since 1997 Hong Kong has experienced significant political transformation and economic turmoil, these exogenous changes, however, have reinforced policymakers to reach a conclusion that the free market doctrine and non-interventionist policy are still the cornerstone of Hong Kong's success and the basis upon which its comparative advantage is built. So even after 1997, Hong Kong has continued to demonstrate many of the institutional features as found in a LME, though with features specific to this Special Administrative Region of the PRC which is being classified as an advanced city state capitalism (Witt and Redding, 2013<sup>54</sup>). That the view of all economies fitting into only two viable forms of capitalism—LMEs and CMEs—certainly need to be reappraised. As this criticism on the VoC framework is not very much related to what is examined in this paper, the institutional features specific to Hong Kong have not been investigated here.

Actors such as policymakers and employers do not respond passively to institutional demands. They are constantly evaluating the effect of exogenous changes on the economies and corporations, making considered decisions that may result in either sustaining or changing existing institutions. There is however not always agreement on what decisions should be made, especially among different political and social groupings, many of which have opposing interests. Exogenous changes such as Hong Kong's sovereignty handover and the impact of various economic crises open the floodgate for active trade unionists and workers to challenge the decentralised employment relations system, by pressing for legislations to legalise collective bargaining and refute unfair dismissal and by taking collective actions against employers' unilateral decision to implement corporate strategies resulting in mass lay-offs in periods of economic downturn. These attempts to fundamentally change the

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<sup>54</sup> Witt, M. A. and Redding G. (2013) "Asian Business Systems: Institutional Comparison, Clusters and Implications for Varieties of Capitalism and Business Systems Theory" *Socio-Economic Review*, 11 pp. 265-300. 1

employment relations system all fail as the few instances of collective actions taken by workers against their employers are isolated, restricted to specific sectors and therefore have only weak societal impact. More importantly, the government is quick to take action to suspend and repeal the Ordinances which will, if successfully put in force, challenge the integrity of the decentralised employment relations system in place. The impact of political struggles between policymakers and trade unionists (and the workers to which the unions represent) on shaping existing employment relations institution should not be overlooked.

Operated in a highly complex and uncertain environment, employers certainly find a free hand to solve coordination problems arising from uncertainties, moral hazard, and opportunism due to incomplete contractual economic relationship to their own benefit. Multinational corporations operated in Hong Kong, such as the bank cases examined, particularly welcome such an autonomy as their operations are subject to highly unpredictable changes not only in the local, but also regional and international contexts. Decisions made by multinational corporations' subsidiaries in Hong Kong are often subject to their headquarters' influences, especially in times of economic crises when these multinational companies tend to have their operations centralised and headquarters' power strengthened. A decentralised employment relations system which enable employers to hire and fire workers freely according to market situation, negotiate pay and other terms and conditions of work individually with employees, shy away from recognising trade unions and use flexible labour strategies whenever needed to sustain their competitive advantage is more than welcome. These employment practices are often diffused from multinational corporations to local companies, becoming eventually more or less standardised practices. The problem of treating firms as amorphous in the VoC framework, without acknowledging the important role assumed by multinational corporations in shaping institutional changes, should not be easily dismissed.

***Workers and Labour in a Globalised Capitalism,***  
**edited by Maurizio Atzeni.**  
**A Review.**

Chris Leggett \*

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The overall theme of *Workers and Labour in a Globalised Capitalism* is set by the editor's introduction: 'Neo-liberal globalisation and interdisciplinary perspectives on labour and collective action'. His justification for the book is that the attention of researchers from overlapping disciplines is shifting away from 'non-conflictual visions of work associated with Human Resource Management...back to workers and labour'. Its aim is 'to provide a comprehensive set of theories, themes and issues...that can help reflect on the centrality of labour within the contemporary process of globalisation'. The underlying perspective of this book is that adopted by Gall for his contribution (Chapter 9: 'New forms of labour conflict; a transnational view'), i.e. 'a Marxist or radical one whereby it is assumed that there is a continual and unceasing conflict of interest between capital and labour over the terms of exploitation of labour by capital and the oppression that is involved in maintaining this exploitation'. Many contributors however challenge orthodox interpretations of Marx in order to explain, for example, new forms of worker resistance to the capitalist labour process.

To achieve its aims *Workers and Labour in a Globalised Capitalism* is composed of ten chapters contributed by academics specialised in work and employment studies from universities in the UK, the USA, and the Netherlands organised into three parts: theoretical, classical and contemporary issues respectively. Part 1 (Chapters 1-4) is concerned with 'Explaining the Centrality of Labour within

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Capitalism, Part 2 (Chapters 5-7) with 'Explaining Workers' Resistance and Organisation', and Part 3 (Chapters 8-10) with 'Workers Organising in the Global World'.

Spencer (Chapter 1: 'Marx and Marxist views on work and the capitalist labour process') reminds the reader of the usefulness of Marx's writings for the analysis of working life. Marx challenged the classical economists' view of work as 'toil and trouble', and argued that creative work could be liberating, except that its organisation and control in capitalist society creates the alienation of workers from their work, from the product of their work, and from each other. According to Marx, reforming capitalism would not render work non-exploitative; to achieve that capitalism would have to be abolished. Marx's relevance to the capitalist labour process was revived by Braverman in the 1970s, particularly with his emphasis on de-skilling as a means of capitalists increasing the subordination of workers, although Spencer feels that Braverman neglected the importance of the creation and management of consent, central to the subsequent labour process debate – how labour power is converted to labour.

According to Silver (Chapter 2: 'Theorising the working class in twenty-first-century global capitalism'), historically four key strategies by capitalists in response to labour-capital conflict stand out: the 'spatial fix', the 'technological fix', the 'product fix', and the 'financial fix', respectively relocating production to lower wage regions, adopting labour saving technology, distributing the gains from productivity increases, moving capital from one economic activity into a more innovative one, and pulling capital out of trade and production and putting it into finance and speculation. Silver claims that each of these 'fixes' only succeed in rescheduling capitalist crises and have brought about 'a new deep crisis of legitimacy for capitalism', which requires 'A radical rethinking of everything'.

'Who is the working class?' asks van der Linden (Chapter 3: 'Wage Earners and other labourers'). Descriptions have emphasised structural, socio-economic characteristics, but the Marxist historian E. P. Thompson 'considered "class" subjectively, 'as an outcome of experience, emerging out of those socio-economic characteristics', and therefore always different, never predictable. With class awareness modern wage labour struggles for its interests in diverse ways, through trade unions, political parties 'even paramilitary units'. Now there are calls for a more inclusive interpretation of the working class than the nineteenth century concept of the proletariat, one that includes peripheral and 'hidden' wage labour, the lumpenproletariat, the precariat, subsistence labourers and household workers. Van der Linden calls this class of people, including slaves, indentured labourers within capitalism the 'extended or subaltern working class' i.e. those whose labour is commodified but not

conceptualised as wage labour by Marx and resistance to exploitation has taken forms other than the strike. In similar vein Federici (Chapter 4: 'The reproduction of labour power in the global economy and the unfinished revolution') offers a feminist critique of Marx, for ignoring the unpaid reproductive work of women. This chapter completes the explanations of the centrality of labour within capitalism; Chapters 5-7 each focus on explanations and examples of workers' resistance to capitalism.

Darlington (Chapter 5: 'The role of trade unions in building resistance: theoretical, historical and comparative perspectives') has written an essay on trade unionism predicated on the resurgence of collective action and reaction by trade unions to post-GFC austerity, the Arab Spring, and the Occupy movement, and, more generally, the neo-liberal project. The essay applies the double-edged sword metaphor of justice and defending workers' interests. This dichotomy is reflected in the selection of references – from Marx and Engels to Flanders and Hyman, and in the topics of revolutionary potential and the inbuilt limitations of trade unionism. Cohen (Chapter 6: 'Workers organising workers: grass roots struggle as the past and future of trade union renewal') continues with the ambiguity of trade unionism, here 'institution' versus 'movement', and questions some assumptions in the literature. Tracing the historical correlation between surges in strikes and growth in trade union memberships the author draws the reader's attention to the significance of grassroots spontaneity in industrial action. Another contest of the capitalist work relations has taken a variety of forms of workers control. However, from one perspective workers' control is the 'deviant' antithesis of the accepted 'natural' order of things, i.e., management control; from another perspective workers' attempts at alternatives within the capitalist system undermine the revolutionary potential of workers' control of production. As Atzeni (Chapter 7: 'The workers' control alternative') expresses it, 'Paradoxically, the idea of a more motivating and inclusive work environment, which has been promoted in many industries as a way to capture the knowledge and creativity of workers, has been central to the interests of capital rather than labour'.

Mollona (Chapter 8: 'Informal labour, factory labour or the end of labour? Anthropological reflections on labour value') reflects on the distinction between 'work' and 'labour', in particular 'formal' and 'informal' work, and how societies have valued them. Following accounts and analyses of developments in Africa, of Toyotism (in the North and in the South) and of the BRICS he concludes that 'the dialectics of formal and informal labour reproduces (sic) the oscillatory dynamics of capitalism'. Also globally, or rather 'transnationally', Gall (Chapter 9: 'New forms of labour conflict: a transnational view') surveys 'New arenas of contestation' --the return of the

general strike; industrial action short of striking; occupations; individual acts – but warns that what may appear new is really a different context.

*Workers and Labour in a Globalised Capitalism* does not offer a concluding chapter but the final chapter by Ness (Chapter 10: ‘Labour migration and emergent class conflict: corporate neo-liberalism, worker mobility and labour resistance in the US’) fulfils that function in that the role of migrants within the labour movement, although recurrent, is a significant feature of the global economy. Particularly significant is the temporary migration of so called ‘guest workers’. Ness concludes that ‘Labour unions must form to consolidate the power of migrant working class militancy’ and that despite the efforts of the ITUC and the ILO ‘little will become [of them] without sustained union support’. Labour migration is deserving of its inclusion in a book devoted to the study of conflictual visions of work.

*Workers and Labour in a Globalised Capitalism* is unlikely to be read by researchers, scholars and practitioners committed to ‘non-conflictual visions of work associated with Human Resource Management’, but if read by those nurtured on the conflict view of industrial capitalism whose radicalism has waned under the intellectually enervating effect of neo-liberalism, it could refresh and energise them.

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