



JILPT REPORT

No. 1
2004

**The Mechanism for Establishing and Changing
Terms and Conditions of Employment /
The Scope of Labor Law and the Notion of Employees**

— 2004 JILPT Comparative Labor Law Seminar —

The Japan Institute for Labour Policy and Training

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Foreword

The Japan Institute for Labour Policy and Training (JILPT) was established on October 1, 2003, as an independent administrative institution. The Institute's objective is to contribute to the planning of labor policies and work toward their effective and efficient implementation. In addition, we seek to promote the livelihood of workers and develop the national economy by conducting comprehensive research projects on labor issues and policies, both domestically and internationally, and use the fruits of such research to sponsor training programs for administrative officials.

JILPT is successor to the Japan Institute of Labour (JIL) and the Personnel Training Institute of the Ministry of Health, Labour and Welfare. Upon its establishment, the new institute took over the research activities of JIL. Therefore, the comparative labor law seminars initiated by JIL, which have been held bi-annually since 1991, are now organized by JILPT.

For the current seminar, we planned cross-national discussion and analysis on two themes: re-demarcating the scope of labor laws given an increasingly diversifying workforce, and reconsidering the mechanism used to regulate working conditions in light of a more diversified and individualized workforce and the decline of the influence of trade unions. These themes are related to two of our nine core research projects, projects which we have just begun to seriously undertake and whose duration will last three years from October 1, 2003.

This is the background to the Seventh Comparative Labor Law Seminar held on March 9-10, 2004 in Tokyo. We invited seven scholars from Europe, the United States and Australia to present national papers on the above-mentioned themes. Professor Araki and Professor Ouchi explained the concepts of the themes and presented national papers on Japanese labor legislation as our research projects leaders.

This Report is a collection of the papers presented to the seminar. The substance of these papers and the discussion will be contained in our research projects' final reports. We expect the fruitful discussion at the seminar lead to significant results that can be used for future research projects.

We would like to express our sincere gratitude to the guests who submitted excellent national papers and we are deeply grateful to Professor Araki and Professor Ouchi for their work in coordinating the seminar, and also to the Japanese researchers for their participation.

April 2004

Akira Ono
President

The Japan Institute for Labour Policy and Training

Table of Contents

Foreword Introduction

Takashi Araki, Professor, University of Tokyo
Senior Research Fellow, JILPT
Shinya Ouchi, Professor, Kobe University
Senior Research Fellow, JILPT

PART I

The Mechanism for Establishing and Changing Terms and Conditions of Employment

1. Japan

The System of Regulating the Terms and Conditions of Employment in Japan

Takashi Araki
University of Tokyo 3

2. United States

Individual Bargaining, Collective Bargaining and Protective Legislation: Determining the Terms and Conditions of Employment in the Modern American Employment Relationship

Kenneth G. Dau-Schmidt (presentator)
Indiana University – Bloomington
Carmen L. Brun
Indiana University – Bloomington 21

3. Australia

The Framework of Australian Labour Law and Recent Trends in ‘Deregulation’

Joo-Cheong Tham
La Trobe University 37

4. United Kingdom

Reconsidering the Mechanism to Regulate Working Conditions in the Light of Diversified and Individualised Employees and the Declining Labour Unions

Catherine Barnard
Trinity College, Cambridge 51

5. Germany

The Mechanism for Establishing and Changing Terms and Conditions of Employment

Rolf Wank
Ruhr-Universität Bochum 59

6. France

The Framework of French Labour Law and Recent Trends in Regulation

Pascal Lokiec
University Paris X-Nanterre 73

7. Italy

Recent Changes in the Italian Labour Law

Michele Tiraboschi
University of Modena and Reggio Emilia
Maurizio Del Conte (presentator)
Bocconi University 85

8. Sweden	Mechanisms for Establishing and Changing Terms and Conditions of Employment in Sweden Mia Rönmar Lund University	95
<u>PART II</u>		
<u>The Scope of Labor Law and the Notion of Employees</u>		
1. Japan	Labor Law Coverage and the Concept of ‘Worker’ Shinya Ouchi Kobe University	111
2. United States	The Definition of “Employee” in American Labor and Employment Law Kenneth G. Dau-Schmidt (presentator) Indiana University - Bloomington Michael D. Ray Indiana University - Bloomington	117
3. Australia	The Scope of Australian Labour Law and the Regulatory Challenges Posed by Self and Casual Employment Joo-Cheong Tham La Trobe University	125
4. United Kingdom	The Personal Scope of the Employment Relationship Catherine Barnard Trinity College, Cambridge	131
5. Germany	Diversifying Employment Patterns – the Scope of Labor Law and the Notion of Employees Rolf Wank Ruhr-Universität Bochum	137
6. France	The Scope of Labour Law and the Notion of Employee: Aspects of French Labour Law Pascal Lokiec University Paris X-Nanterre	145
7. Italy	Employment Contract: Disputes on Definition in the Changing Italian Labour Law Michele Tiraboschi University of Modena and Reggio Emilia Maurizio Del Conte (presentator) Bocconi University	153
8. Sweden	The Personal Scope of Labour Law and the Notion of Employee in Sweden Mia Rönmar Lund University	159

List of Participants

Introduction

I. The 7th Comparative Labor Law Seminar (Tokyo Seminar)

This report contains papers submitted to the Seventh Comparative Labor Law Seminar (Tokyo Seminar), which dealt with two themes: the mechanism used to establish and change the terms and conditions of employment (1st project), and labor law coverage and the concept of “employee” (2nd project). The seminar was organized by the Japan Institute for Labour Policy and Training (formerly the Japan Institute of Labour) and held on 9 and 10 March in Tokyo, Japan.

The two themes which the seminar addressed are currently both the most important and the most controversial regarding labor policy, not only in Japan but also in other countries as well (Australia, France, Germany, Italy, Sweden, United Kingdom and United States). The objective of the seminar was, through concentrated and intensive discussion on specific topics using comparative analysis, to produce something fruitful that can be used in future academic research as well as in developing labor policy. The session on the first day focused on legal framework, actual situations and trends regarding mechanisms used to establish and change the terms and conditions of employment; the second session was devoted to tackling the definition of a “worker” as covered under labor laws.

All the invited guests submitted very well prepared papers. Their concise and well-focused presentations paved the way to very fruitful and lively discussions in the seminar. Young Japanese scholars who specialize in labor and social security laws also made excellent comments on the foreign guests’ presentations. There is no doubt these comments helped clarify certain points and raised the quality of discussion.

II. Main Issues Covered by the Submitted Papers

We asked invited guests to cover the following points in their country papers.

1st project

1. General overview of labor laws and legal means regulating the terms and conditions of employment

(1) Basic laws regulating working conditions and industrial relations such as a constitution, labor protective laws, laws regulating individual and collective labor relations, laws concerning worker representation, etc.

(2) Legal means that regulate the terms and conditions of employment (collective bargaining agreements, agreements with employee representatives, individual contracts, etc.), and their legal effects of the different legal means.

(3) The most important means to regulate actual working conditions.

(4) The difference between labor unions and employee representatives.

2. Recent changes in labor protective and labor contract laws regulating individual labor relations and the reasons behind those changes.

(1) An explanation of whether or not labor laws have been deregulated and “re-regulated.” A list of the factors which contributed to such changes: structural changes in industry, intensification of global competition, change in corporate governance, diversified and individualized workers, demographic changes, need to balance work with family life, weaker labor unions, etc. Description of the situation in the presentator’s country.

(2) Traditional labor laws place greater emphasis on collective bargaining between a trade union and a company to regulate working conditions rather than relying on individual contracts between employer and employee. The papers addressed the question of whether or not the increase in white-collar workers, more educated workers and more market-competitive workers has resulted in revision of this basic premise.

3. A description of significant changes in collective labor relations laws and collective bargaining patterns in recent years, if these have taken place.

(1) An explanation of the mechanisms which allow parties involved in labor and employment relations (both collective and individual, such as employers, labor unions, employee representatives, and individual employees) to deviate from legal norms, and an explanation of the reasons behind this and the conditions.

(2) Discussions concerning the concept of “more favorable conditions” for workers. If lower wages can save a worker’s job, is it possible for the worker to agree to lower his/her wages to save his/her job, thereby violating collective agreements ?

(3) An explanation of trends, if any, towards decentralization of collective bargaining or a shifting from collective bargaining at the national or sector (industry) level to bargaining on the company or establishment level. A description of discussions in favor of and opposed to such trends. An explanation of the reasons behind such trends, such as a decline in the influence of labor unions, an absence of their representative legitimacy, the rigidity and ineffectiveness of centralized bargaining, or other reasons.

4. The extent and manner in which labor laws should intervene in the labor market.

2nd project

1. An explanation of how the laws in particular countries delineate the scope of labor laws. Do the laws rely on the concept of an “employee?”

2. An investigation as to whether or not in different countries the concept of employee is different in the various pieces of labor legislation. In Japan, the concept of an employee in the collective labor laws is broader than that in individual labor laws.

3. An identification of the concrete factors or criteria used to determine whether a person is considered an employee, if the concept of employee is a key criterion in applying the labor laws.

4. An explanation of the debates concerning the demarcation between employee and self-employed, and the mechanisms to avoid such disputes.

5. An examination of whether a self-employed person or a quasi-employee enjoys the same protection or benefits as an employee, and whether the workers’ compensation scheme for work-related accidents applies to the self-employed in certain situations, as it does in Japan.

6. An examination of whether the concept of employee used in labor law is different from that used for in social security and tax laws.

7. An explanation of whether or not there is discussion regarding protection for people working for non-profit organizations, or unpaid workers?

III. Discussion Summaries

1st project

The theme for the first day was “The mechanism to establish and change the terms and conditions of employment.” Although mechanisms and legal means regulating working conditions are different in every country, significant reforms of labor laws can be universally observed in all countries. Generally speaking, there is a sharp contrast between the reforms carried out in the Anglo-Saxon countries (the U.S.A., Australia and the U.K.) and those on the European Continent (Germany, France, Italy and Sweden).

In Anglo-Saxon countries, the main legal means that governs terms and conditions of employment is the individual employment contract, and de-collectivization is commonly observed. In the United States, the traditional method of providing workers with protection has been collective bargaining between an employer and a labor union elected as the exclusive representative. In accordance with the decline in labor unions, however, the scope of collective bargaining has narrowed and the vast majority of employees are left without an effective way to address their needs inside the employment relationship. Thus, the importance of labor protective statutes which provide individual workers with statutory rights has surfaced. In the U.K., where collective bargaining agreements generally are not legally binding unless legal requirements are

satisfied, the individual contract has been an important legal means in regulating working conditions. In recent years, the decline of labor unions, the influence of EC law, and the emergence of the Labor government have combined to trigger new legislation and increased the significance of labor protective laws. Australia, once having a compulsory conciliation and arbitration system which issued awards establishing minimum working standards, has experienced more apparent forms of de-centralization and de-collectivization under the deregulation policy, shifting emphasis from collective to individualized bargaining.

In contrast, countries on the Continent have continued to maintain collective bargaining agreements as a major legal means regulating working conditions. Although labor law reforms targeting decentralization of collective bargaining can be universally observed, decentralization is not tantamount to de-collectivization or individualization. Labor law reform in the European countries focuses on the content of decentralization: how to give more power to the parties on the company or workplace level or how to introduce new forms of employee representation that is different from the traditional sector level trade unions. However, in European countries, collective control appears to be thought indispensable in striking a fair balance between flexibility and security.

Japan seems to fall somewhere between the Anglo-Saxon countries and the European Continental countries. Because of the custom of long-term employment and case law restrictions on unreasonable dismissals, working conditions are not directly regulated by the external labor market nor by individual bargaining. Collective bargaining mostly occurs at the decentralized level as most unions are enterprise based. It is the work rules, established by employers, that are the most important legal means regulating working conditions in Japan. The basic feature of Japanese law seems to be active intervention by the courts through the reasonableness test on work rules to strike a fair balance between security and flexibility.

The countries discussed during the seminar face similar challenges, such as global competition, industrial structural changes, weakening labor unions, and a diversification and individualization of employees. These challenges require reform of the labor laws in the respective countries. However, the content of these reforms are different, in particular the extent to which labor law entrusts working condition regulations to the market.

2nd project

In the countries mentioned during the seminar, the concept of “employee” is determined by taking various factors into consideration. But which factors take precedent over others is not clear and factor dependent and case-by-case approach are widespread. No theoretical basis has been established to help clarify what criteria should be used when approaching this question. In this respect, the teleological approach advocated by Prof. Wank should be noted.

The concept of “subordination” is closely connected to that of “employee” in Germany, France, Italy and Japan, and is very controversial in these countries. Traditionally the concept of “subordination” has been equivalent to the “personal” subordination, which means that an employee is directed and controlled by his/her employer. However, the diversification of working styles has made it difficult to determine whether or not a “personally” subordinate relationship exists in each case. On the other hand, in some cases the concept of “economic” subordination has been used, but this concept is not widely accepted. On the contrary, in the U.K. and U.S.A., both of which have adopted various tests to decide whether an individual is employee or not, economic circumstances are taken into account, such as the “economic reality tests” in the U.K.

In any case, deciding how to define an “employee” is a delicate task. If you extend the protection offered by labor laws in order to respond to the needs of various types of workers, independent or dependent, the concept of an employee will inevitably be vague and ambiguous. We were very skeptical that this problem can be overcome. In this regard, the new system in Italy, a certification procedure determining whether one qualifies as an “employee,” is very interesting, but it is too early to say that such a unique method will be effective.

As for the scope of labor laws, there was debate as to whether individual derogation should

be permitted. Traditionally, labor laws have been paternalistic. Even though an employee doesn't need protection, the law forcibly intervenes in the employment relationship. This can limit the freedom of employees to choose the terms and conditions of an employment contract according to their diversified requirements. Many seminar participants, however, were opposed to the introduction of an individual derogation mechanism, because it is highly probable that employers will force employees to renounce protection afforded by labor laws; namely there is a danger of exploitation.

Regarding the scope of labor laws, there is also a problem in the opposite direction; namely expansion of labor laws over non-employees. In some countries, protection granted by labor laws reserved for employees has been extended to cover non-employees. For example, German law has created an intermediate status between employee and the self-employed. The French approach is a mix of extending employment status and assimilating non-employees into employee categories.

Countries with more protective labor laws have more problems in determining the coverage of these laws. In these countries, there is a striking gap between an employee protected under labor legislation and a non-employee who is excluded from such protection, so in these countries it is controversial whether or not the economically dependent self-employed should be covered by these laws. On the other hand, in countries with few labor protective laws, the need to expand coverage offered by labor laws does not appear to be strong.

The trend toward flexibilization, individualization and derogation from the labor standards may bring about radical changes in labor legislation. The diversification of working styles may require a new concept and a new framework of labor law. In any event, the countries reported on during the seminar face similar problems, but often adopt different solutions. We hope that the experiences of the eight countries described in this report will provide necessary and useful insights to those concerned with labor legislation and policy.

March 2004

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PART I

The Mechanism for Establishing and Changing Terms and Conditions of Employment

The System of Regulating the Terms and Conditions of Employment in Japan

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The conspicuous feature of the system regulating working conditions in Japan lies in that the Japanese system enables flexible modification in accordance with the changing situations. This is the compensatory mechanism for Japan's long-term employment system where numerical adjustment of the workforce is restrained. Through flexible modification of terms and conditions of employment or flexible deployment of workers, Japanese companies have coped with changing socio-economic circumstances while maintaining employment security.

After the collapse of bubble economy in the early 1990s, however, employment is becoming more unstable and atypical or non-regular employment is increasing. In 1990, non-regular employees made up 20.2% of the Japanese work force, whereas in 2002 this had risen to 29.8%. To cope with increased lateral mobility, the Japanese government has provided a series of measures to activate the external labor market. In accordance with the structural changes occurring in Japanese society, labor law is experiencing drastic reforms.

This article first overviews the general framework of the Japanese labor law. Second, it explains the four legal tools regulating terms and conditions of employment: 1) minimum standards of working conditions fixed by mandatory laws, 2) individual contracts of employment, 3) work rules established by employers, and 4) collective agreements. Third, the enforcement mechanism is overviewed. Finally, after reviewing recent legislative developments in labor law, this article provides some comments on the future direction of Japanese labor law.

1. Overview of the Japanese Labor Law System

Japanese labor law was traditionally understood to be comprised of two major branches: individual labor relations law and collective labor relations law. However, an increasing number of scholars have begun to recognize a third branch, namely labor market law.¹ These three branches have their legislative grounds in the Constitution promulgated in 1946.

1.1. The Constitution

The Japanese Constitution guarantees fundamental social rights in Articles 25 to 28. Article 25, commonly called the "right to live" provision, proclaims the principle of the welfare state.² Article 26 establishes people's right to, and obligation of, education.³ Articles 27 and 28 deal directly with labor and employment relations as seen below.

These provisions on the fundamental social rights were influenced significantly by the *Weimar* Constitution in Germany. These social rights provisions in the Constitution provided an important political and legislative basis to develop social policy in Japan.

1.2. Labor Market Law

Article 27 Paragraph 1 of the Constitution ("All people shall have the right and the

¹ Kazuo Sugeno (Leo Kanowitz Trans.), *Japanese Labor and Employment Law*, (University of Tokyo Press, 2002).

² Article 25: "All people shall have the right to maintain the minimum standards of wholesome and cultured living. In all spheres of life, the State shall use its endeavors for promotion and extension of social welfare and security, and of public health."

³ Article 26: "All people shall have the right to receive an equal education correspondent to their ability, as provided by law. All people shall be obliged to have all boys and girls under their protection receive ordinary education as provided for by law. Such compulsory education shall be free."

obligation to work.”) has been interpreted to require two political obligations of the state.⁴ First, the state shall intervene in the labor market so as to enable workers to obtain suitable job opportunities. Second, the state bears a political obligation to guarantee the livelihood of those workers who cannot obtain such opportunities.⁵ This Article forms the basis of “labor market law.”

Corresponding to the first legislative mandate, various statutes were enacted. The Employment Security Law of 1947 regulates employment placement services, recruitment and labor supply businesses. The Employment Measures Law of 1966 proclaims the general principles of labor market policies. Other examples include, the Law Promoting the Development of Occupational Ability of 1969, the Disabled Employment Promotion Law of 1960, and the Older Persons’ Employment Stabilization Law of 1971. Corresponding to the second mandate, the Unemployment Insurance Law of 1947 and its successor, the Employment Insurance Law of 1974, were enacted.

1.3. Individual Labor Relations Law

Article 27 Paragraph 2 of the Constitution (“Standards for wages, hours, rest and other working conditions shall be fixed by law.”) requires the state to enact laws to regulate terms and conditions of employment. This Article provides the legislative ground for individual labor relations law.⁶

After World War II, when Japan was in economic and material ruin, the establishment of economic security and protection of minimum standards of living was the most prioritized task for the government. Thus, the government established the Ministry of Labor in 1946 and enacted a series of employee protective laws. In 1947, the Labor Standards Law, the Workers’ Accident Compensation Insurance Law, the Employment Security Law and the Unemployment Insurance Law were enacted. Among these, the Labor Standards Law (LSL) is the most important and comprehensive piece of protective labor legislation, establishing minimum standards of working conditions.

Subsequently, two chapters contained in the LSL were separated and became independent statutes: the Minimum Wages Law of 1959 and the Industrial Safety and Health Law of 1972. Other labor protective legislation followed, including the Security of Wage Payment Law of 1976, the Equal Employment Opportunity Law of 1985, the Child Care Leave Law of 1991 and so forth. The LSL underwent large scale amendments in 1987, 1998 and 2003 to modernize its regulations.

Labor protective norms have also been established by the courts through an accumulation of judgments. As mentioned above, the role of such case law is sometimes more important than enacted legislation in the context of Japanese employment relations.

1.4. Collective Labor Relations Law

Collective labor relations are mainly regulated by Japan’s Constitution, the Trade Union Law of 1949 and the Labor Relations Adjustment Law of 1946.

The Constitution of Japan guarantees workers’ fundamental rights. Article 28 of the Constitution reads, “the right of workers to organize and to bargain and act collectively is guaranteed.” Any legislative or administrative act that infringes upon these rights without reasonable justification is therefore unconstitutional and void. Workers are immune from any criminal or civil liability for their engagement in proper union activities. Article 28 is understood to stem from the provision in the *Weimar* Constitution of 1919, which guaranteed the

⁴ Sugeno, *supra* note 1, 15.

⁵ Art. 27, Para. 1 also mentions the obligation to work. The literal meaning of the phrase implies industrial conscription. However, since that interpretation is not appropriate, “obligation to work” is interpreted to mean the state has no obligation to countenance those who do not have an intention to work. Thus, the availability of unemployment benefits is confined to those who intend to work.

⁶ Art. 27 Para. 3 of the Constitution, concerning prohibition of child labor, (“Children shall not be exploited.”) is incorporated into the child labor protective provisions of the LSL of 1947.

freedom of association and created the “third-party effect” (*Drittwirkung*) regulating relations between private citizens. Thus, in the opinion of most, Article 28 is construed as regulating not only relations between the state and private citizens, but also relations between employers and workers. Consequently, workers have a cause of action against an employer who infringes upon their union rights. For instance, a dismissal of a worker by reason of his/her legal union activities is deemed as null and void because it amounts to a violation of the constitutional norm.⁷

Article 28 is further interpreted to entrust the Diet to enact statutes to effectuate basic union rights. Accordingly, the TUL sets requirements for “qualified” unions,⁸ establishes the unfair labor practice system prohibiting employers’ anti-union actions, gives collective bargaining agreements normative effect, and establishes the Central and Local Labor Relations Commissions.

The Labor Relations Adjustment Law was also enacted in 1946 to facilitate the resolution of collective labor disputes. Under this Law, the Labor Relations Commissions are entrusted with the conciliation, mediation and arbitration of labor disputes.

From a comparative perspective, it is noteworthy that Japanese law not only gives civil and criminal immunity to proper acts of trade unions, but also encourages collective bargaining by imposing a duty to bargain on employers and by sanctioning it through the unfair labor practice system.

Major Laws Regulating Labor and Employment Relations in Japan

Constitution

Art. 27: right to work, mandate to establish minimum standards of working conditions by statutes

Art. 28: right of workers to organize and to bargain and act collectively

Individual Labor Relations Laws

Labor Standards Law

Minimum Wages Law

Security of Wage Payment Law

Industrial Safety and Health Law

Workers’ Accident Compensation Insurance Law

Equal Employment Opportunity Law

Child Care and Family Care Leave Law

Labor Contract Succession Law

⁷ See Satoshi Nishitani, *Rodo Kumiai Ho (Trade Union Law)*, 36 (1998); Nobuyoshi Ashibe, *Kenpo shinpan (Constitutional Law, new ed.)*, 248 (1997). Other human rights provisions in the Constitution are generally understood as regulating exclusively the relations between the state and individuals, and thus, have no “third-party effect” on private relationships. Accordingly, fundamental rights provisions may have legal effect on relations between private individuals only through the “public policy” concept found in Article 90 of the Civil Code, which invalidates legal acts violating public order and good morals. Some influential labor law scholars apply the same theory to Article 28 too. According to certain of these scholars, dismissals for union activities can be nullified because such dismissals are in violation of the public policy reflecting the norms expressed in Article 28 of the Constitution. See Sugeno, *supra* note 1, 20.

⁸ The TUL sets forth five requirements for a labor organization to enjoy statutory rights and remedies. First, the organization must be “primarily formed by workers.” (TUL Art. 2) Second, the organization must be independent of the employer. Third, the main purpose of the organization must be “to maintain and improve the working conditions and to raise the economic status of workers.” (TUL Art. 2) Therefore, an organization which has the limited objective of “mutual aid or conducting other welfare activities” (TUL Art. 2 Proviso No. 3) or which “mainly aims at political or social movements” (TUL Art. 2 Proviso No. 4) is not a qualified union under the TUL. Fourth, the organization must be an “organization or a federation thereof.” (TUL Art. 2) To be deemed an organization, there must be more than two members. Finally, the organization must establish a union constitution which includes the enumerated items in the Article 5 Paragraph 2 of the TUL. Most of the enumerated items concern the democratic administration of the internal affairs of the Union, such as the equal treatment of union members, and secret ballot elections for union officers or for strike decisions. Other than the foregoing prerequisites, there are no further requirements. Majority support of the workers is not required. Neither is a minimum number of members, or registration with a governmental agency. In short, Japan has few requirements for the organization of a union.

Civil Code Art. 623-631.

Collective Labor Relations Laws

Trade Union Law
Labor Relations Adjustment Law

Labor Market Laws

Employment Measures Law
Employment Security Law
Worker Dispatching Law
Part-time Work Law
Employment Insurance Law
Older Persons' Employment Stabilization Law
Disabled Persons' Employment Promotion Law
Regional Employment Development Promotion Law
Human Resources Development Promotion Law

2. Minimum Standards of Working Conditions Fixed by Mandatory Statutes

2.1. Worker Protective Laws

The individual employment relationship between an employer and a worker is regulated by protective laws such as the Labor Standards Law, the Minimum Wages Law, the Security of Wage Payment Law, the Industrial Safety and Health Law, the Workers' Accident Compensation Insurance Law, the Equal Employment Opportunity Law, and the Worker Dispatching Law.

As mentioned already, the most fundamental and important is the Labor Standards Law which establishes minimum working standards. The LSL regulates fundamental rights of workers, payment of wages, working hours, paid leave, special protection of young workers and pregnant women, workers compensation for work-related accidents, work rules, and so forth.

Until the 1998 LSL revision, the applicable establishments were enumerated in Article 8. Though almost any business fell under the listed establishments, some businesses were not covered, such as election campaign offices. However, they were not intentionally exempted with concrete justification, but rather inadvertently not included in the list. Therefore the 1998 LSL revision deleted Article 8. Consequently, all establishments which engage in employment of workers are subject to the LSL. The remaining exceptions are family businesses which employ family members only (LSL Art. 116 Para. 2), domestic workers (LSL Art. 116 Para. 2) and other employment relations for which special regulations apply, namely seamen (LSL Art. 116 Para. 1) and some civil servants. From a comparative perspective, the Labor Standards Law is very broad in its coverage.

Working conditions set forth by employment contracts, work rules and collective agreements that are inferior to the standards set by the Labor Standards Law are void and replaced by the Law's mandatory legal norms (LSL Art. 13⁹).

Minimum standards prescribed in worker protective laws are enforced by the Labor Standards Inspection Offices, in addition to sanction by the criminal penalties.

2.2. Derogation from the Mandatory Norm through Labor-management Agreements (Majority-representative Agreement)

To provide flexibility, the LSL allows derogation from the mandatory norms based upon a "labor-management agreement" or "majority-representative agreement." A labor-management agreement is a written agreement between an employer and the "representative of the majority

⁹ Article 13 of the Labor Standards Law stipulates that "A labor contract which provides for working conditions which do not meet the standards of this Law shall be invalid with respect to such portions. In such a case the portions which have become invalid shall be governed by the standards set forth in this Law."

of workers at an establishment,” namely a union organizing a majority of the workers in the establishment or a person representing a majority of the workers in the absence of a majority union. Deviation from the mandatory minimum standards is allowed when the Law explicitly prescribes such derogation. For instance, the LSL requires a labor-management agreement for deduction of wages, hours-averaging schemes or overtime work.

Where a majority union exists, there will be few problems. However, where no such union exists, an individual chosen to represent the majority of workers plays an important role and bears much responsibility. In spite of such significant responsibility, for years the LSL and bylaws did not provide any provisions concerning qualifications of a person representing the majority of workers or procedures to select such a person.

It was thus criticized that, as a consequence in practice, persons controlled by the management were appointed to be the majority representatives and employers' derogation proposals were rubber stamped. Faced with such criticism, the Ministry of Labour issued administrative guidance concerning the proper selection of the majority representative in 1988. In ten years' time, the 1998 revision of the LSL explicitly incorporated the contents of the guidance into the Enforcement Order (Art. 6-2). The revised Enforcement Order requires that the majority representative cannot be a person in a position of supervision or management and such person must be elected by voting, raising of hands and other procedures.

A labor-management agreement concluded between an employer and a majority representative is totally different from a collective agreement concluded between an employer and a labor union. A labor-management agreement is a written agreement to simply allow derogation from the minimum legal standards and have no normative effect on employment contracts of workers in the establishment. In other words, when a labor-management agreement allows, for instance, overtime, it merely provides the employer with the immunity from criminal sanctions when the employer orders his/her workers to work overtime. It does not create any right or obligation to work overtime. Since a majority representative who concludes a labor-management agreement has no mandate to establish terms and conditions of employment of workers, as a principle, it has no normative effect on their employment contracts. Therefore, in order to be in a position to compel workers to work overtime, an employer is required to establish contractual grounds through an individual contract, work rules or a collective agreement.

3. Employment Contracts

The LSL requires the employer to clarify the working conditions to the worker when concluding an employment contract (LSL Art.15). Article 5 of the Enforcement Order of the LSL enumerates matters which shall be clarified. In particular, the clarification pertaining to the place of work, content of work, work hours, payment of wages, and retirement must be made in writing (EOLSL Art. 5, Para. 2).

It is, however, rather rare for an employer and a worker to make a written contract and prescribe concrete working conditions in detail. Workers merely agree orally that they will work for the company. To satisfy the requirement to clarify working conditions, the employer usually presents the worker with the work rules, which cover most items to be clarified. As long as the worker raises no objection to the content of the work rules, he is regarded as having agreed to the conditions. Thus, the conditions stipulated in the work rules become the substantive content of employment contracts.

Flexible modification of working conditions in accordance with socio-economic changes are made possible by the practice in which the parties to an employment contract do not specify the conditions of employment, particularly the place and type of work, in the employment contract. In Japan, the clarification of place or types of work at the conclusion of an employment contract is not construed as specification of terms which cannot be modified without the worker's consent. Employers, in drafting the work rules, reserve and prescribe particular rights to deploy workers, including the right to order transfers which entail changes in the place and/or type of work based on business necessity. Therefore, the employer unilaterally orders a change of place

and/or type of work without obtaining the worker's consent, though modifications in the place and/or type of work are reviewed for their validity by the courts since such changes can cause workers significant personal inconvenience.

4. Work Rules

Work rules are the most important legal tools to regulate terms and conditions of employment in Japan.

4.1. Duty to Draw up Work Rules

Work rules are a set of regulations set forth by an employer for the purpose of establishing uniform rules and conditions of employment at the workplace. Article 89 of the LSL prescribes that the employer who continuously employs ten or more workers¹⁰ must draw up work rules on the following matters: 1) the time at which work begins and ends, rest periods, rest days, leaves, and matters pertaining to shifts, 2) the method of decision, computation and payment of wages, date of payment of wages and matters pertaining to wage increases, 3) retirement including dismissals, 3-2) retirement allowances, 4) extraordinary wages and minimum wages, 5) cost of food or supplies for work, 6) safety and health, 7) vocational training, 8) accident compensation, 9) commendations and sanctions, and 10) other items applicable to all workers at the workplace. Items 1 to 3 are absolutely mandatory matters which must be included in the work rules. Items 3-2 to 10 are conditionally mandatory matters which must be included in the work rules when the employer wants to introduce regulations concerning these matters.

When the employer institutes the work rules for the first time or when the work rules are altered, the employer must submit those new rules to the competent Labor Standards Inspection Office. The rules must also be made known to the workers by conspicuous posting, distribution of printed documents or setting up accessible computer terminals (LSL Art. 106, EOLSL Art. 52-2). The duties for drawing up, submitting and displaying work rules are sanctioned by criminal provisions (LSL Art. 120).

In drawing up or modifying the work rules, the employer is required to ask the opinion of a labor union organized by a majority of the workers at the workplace or, where no such union exists, the opinion of a person representing a majority of the workers. However, a *consensus* is not required. Even when the majority representative opposes the content of the work rules, the employer may submit them to the Labor Standards Inspection Office with such an opposing opinion and the submission will be accepted. In this sense, the employer can unilaterally establish and modify work rules.

4.2. The Legal Effect of Work Rules and Their Unfavorable Modification

The work rules apply to all workers in a workplace or establishment. Work rules cannot violate enacted laws or collective agreements applicable to the establishment (LSL Art. 92, Para. 1). The LSL gives work rules an imperative and direct effect on individual employment contracts. Namely, the Law states that employment contracts that stipulate working conditions inferior to those provided in the work rules shall be invalid and that such conditions are to be replaced by the standards in the work rules (LSL Art. 93). By contrast, the Law remains silent regarding the effect of work rules when they set inferior standards to those in individual employment contracts. This leads to a difficult legal question when an employer facing economic difficulties modifies work rules unfavorably vis-à-vis the workers. The binding effect of such modified work rules has been challenged in courts.

The majority of theorists argued that work rules modified by the employer unilaterally or without the consent of the worker concerned, cannot have a binding effect on individual employment contracts. According to this view, therefore, the employer must seek a worker's

¹⁰ Though it is not clear from the provision, it is generally interpreted that "ten or more workers" should be calculated not in the enterprise but in the establishment, on the rationale that work rules apply in each establishment and procedures for drawing up work rules presuppose each establishment as a unit (LSL Art. 90).

individual consent or conclude collective agreements with the labor union if one exists, in order to modify the working conditions in a manner unfavorable to the workers concerned.

4.3. Case Law on a “Reasonable Modification” of Work Rules

The Supreme Court took a different position and established a unique rule applicable to unfavorable modifications in the work rules. According to this rule, a “reasonable modification” of the work rules has a binding effect on all workers, including those who were opposed to the modification itself.¹¹ In spite of the severe criticism asserting that there was no legal ground for recognizing such a binding effect, the Supreme Court has adhered to this rule and reconfirmed its position repeatedly.¹² This rule has accordingly become the established case law.

Underlying this ruling is a consideration for employment security and the necessity of adjusting working conditions. The traditional contract theory dictates that a worker who opposes the modifications of working conditions be discharged. However, according to the established Japanese case law, such a dismissal may well be regarded as an abuse of the right to dismiss.¹³ On the other hand, because the employment relationship is a continuous contractual relationship, modification and adjustment of the working conditions is inevitable. In light of these circumstances, Japanese courts have given unilaterally modified work rules a binding effect on the condition that the modification is reasonable. The implication of this rule is that courts give priority to employment security, and in exchange therefor, workers are expected to accept and be subject to reasonable changes in the working conditions. This is a manifestation of internal or qualitative flexibility of the employment relationship through flexible modifications of the working conditions compensating for the lack of external or quantitative flexibility grounded in employment security.¹⁴

4.4. Criteria for “reasonableness”

The principal test for “reasonableness” is weighing the disadvantage to the worker by the modification against the business necessity for changing the working conditions. Simultaneously, courts take other matters surrounding the modification into consideration, such as whether compensatory measures to mitigate the disadvantages to the workers were or are being taken, whether similar treatment is common in other companies in the same industry, or whether the majority union or the majority of the workers agreed to the modification. Recent Supreme Court cases¹⁵ suggest that consent of the majority union weighs heavily in a court’s determination that a work rules modification is reasonable. This position respecting the consent of the majority workers is supported by commentators for the following reasons.¹⁶ First, the nature of the issue of work rules modification is more a dispute of interests rather than a dispute of right since the modified work rules establish a new terms and conditions of employment for

¹¹ The *Shuhoku Bus* case, 22 *Minshu* 3459 (Supreme Court, December 25, 1968).

¹² The *Takeda System* case, 1101 *Hanrei Jiho* 114 (Supreme Court, November 25, 1983); The *Omagari-shi Nokyo* case, 42 *Minshu* 60 (Supreme Court, February 16, 1988); The *Dai-ichi Kogata Haiya* case, 1434 *Hanrei Jiho* 133 (July 13, 1992); The *Asahi Kasai Kaijo Hoken* case, 50 *Minshu* 1008 (March 26, 1996); The *Daishi Ginko* case, 51 *Minshu* 705 (Supreme Court, February 28, 1997); The *Michinoku Ginko* case, 54 *Minshu* 2075 (Supreme Court, September 7, 2000).

¹³ However, one lower court decision in 1995 held that the employer could discharge workers who had opposed the proposed new working conditions under certain conditions. As for the critical analysis on this case, see Takashi Araki, *Modification of Working Conditions Through Dismissals?: A Comparative Analysis of the SAS Case*, 34-8 *Japan Labor Bulletin* 5 (1995).

¹⁴ Takashi Araki, “Accommodating Terms and Conditions of Employment to Changing Circumstances: A Comparative Analysis of Quantitative and Qualitative Flexibility in the United States, Germany and Japan”, in C. Engels & M. Weiss (Ed.), *Labour Law and Industrial Relations at the Turn of the Century, Liber Amicorum in Honour of Prof. Dr. Roger Blanpain*, 509 (Kluwer Law International, 1998).

¹⁵ The *Dai-ichi Kogata Haiya* case, July 13, 1992, *Hanrei Jiho* no. 1434 p. 133; The *Daishi Ginko* case, Supreme Court, February 28, 1997, *Minshu* vol. 51 no. 2 p. 705.

¹⁶ Kazuo Sugeno, “Shugyo Kisoku Henko to Roshi Kosho (Work Rules Modification and Labor-Management Negotiation)”, 718 *Rodo Hanrei* 6 (1997); Takashi Araki, *Koyo Sisutemu to Rodojoken Henko Hori (Employment systems and Variation of Terms and Conditions of Employment)*, 265 (Yuhikaku Publishing, 2001).

the future. Thus, it is more appropriate to respect the negotiating parties' attitude than for the court to intervene and review the reasonableness of the substantive content of newly established working conditions from the judges' standpoint. Second, the most significant defect of the case law rule is its legal instability or lack of predictability of reasonableness. A position that presumes reasonableness when a majority union agrees on the modification is an attempt to enhance the predictability of the reasonableness test. Simultaneously, such position respecting the majority union's attitude gives the parties an incentive to negotiate in good faith and reach an agreement.¹⁷

However, several Supreme Court decisions¹⁸ issued in 2000 suggest that the Supreme Court does not necessarily respect the majority unions' attitude towards a work rules modification and it actively reviews the reasonableness of the modification on the basis of its own criteria. Therefore it is premature to state that the established judicial stance is to respect the attitude of majority unions.

5. Collective Agreements

The fourth vehicle for regulating the content of individual employment contracts is a collective bargaining agreement between the employer and the union.

5.1. Normative Effect

According to Article 16 of the TUL, any portion of an individual labor contract is void if it contravenes the standards concerning conditions of work and other matters relating to the treatment of workers that are provided for in a collective agreement. In such a case, the invalidated parts of the individual contract are governed by the standards set forth in the collective agreement. Similarly, if there are matters that the individual employment contract does not cover, the same rule applies.

Therefore, the "normative effect" actually consists of two legal effects: an imperative effect that nullifies the portion of an individual contract that contravenes the standards contained in the collective agreement, and a direct regulating effect that alters provisions of the individual contract.

Collective agreements not only supersede individual contracts but also invalidate work rules that contravene the collective agreement (LSL Art. 92).

5.2. Enterprise-level Bargaining and Legal Effect of Collective Agreements

Almost all collective agreements in Japan are concluded at the enterprise level because unions are normally organized on an individual company basis. Consequently, in contrast to the practices in Western Europe, collective agreements can regulate not minimum, but actual working conditions. Therefore, according to the accepted interpretation,¹⁹ the normative effect of collective agreements invalidates not only disadvantageous individual contracts but also advantageous contracts unless the collective bargaining agreement itself allows such contracts. In other words, *Günstigkeitsprinzip*, or the principle which permits more favorable individual agreements, is not generally accepted. Decentralized collective bargaining enables the parties concerned to adjust and determine working conditions in a particular company swiftly and appropriately.

5.3. Limitation in Collective Bargaining Autonomy

When such a binding effect is given to collective agreements, unfavorable modifications of working conditions through collective agreements becomes possible. In fact, in the 1970s when

¹⁷ Yasuo Suwa, "Shugyo Kisoku no Kozo to Kino (Structure and Function of Work Rules)" 71 *Nihon Rodoho Gakkai-shi* 19 (1988); Araki, *supra* note 16, 267.

¹⁸ The *Michinoku Ginko* case, *supra* note 12; the *Ugo (Hokuto) Ginko* case, 788 Rodo Hanrei 23 (Supreme Court, September 12, 2000); The *Hakodate Shinyo Kinko* case, 788 Rodo Hanrei 17 (Supreme Court, September 22, 2000).

¹⁹ Kazuo Sugeno, *Japanese Labor Law*, p. 514 (1992)

Japan's economy entered a low economic growth period, the courts faced claims which contested the validity of collective agreement provisions that had imposed unfavorable working conditions or a new obligation on union members. Some lower courts invalidated these provisions on the grounds that a labor union's main purpose is "maintaining and improving working conditions and raising the economic status of workers (TUL Art. 2)." However, this interpretation was severely criticized because collective bargaining is a "give and take" exchange and the invalidating of disadvantageous provisions curtails tremendously a union's function in industrial relations. For example, this interpretation makes it impossible for a union in collective bargaining to accept a pay cut in exchange for maintaining high employment levels. In addition, it is not easy to determine what is advantageous and disadvantageous to union members in the long run.²⁰ In response to these criticisms, the courts no longer strike down disadvantageous provisions using the reason that a union's purpose is to improve working conditions.

More recently, a debate is now occurring on how to maintain collective bargaining autonomy while protecting individual union member's interests. Courts tend to proactively review the reasonableness of collective agreement provisions, and some scholars support such scrutiny to protect the interests of individuals or a minority group in the union. Others contend that in order to respect autonomous collective bargaining, court intervention should be confined to exceptional cases such as when the collective agreement violates public policy, a union attempts to usurp an individual's vested rights, or where there exists evidence of a violation of the internal procedure for decision making. Recently, the Supreme Court recognized the binding effect of a disadvantageous collective agreement on a union member who contested the binding effect after considering the reasonableness of the regulations as a whole and the lack of intent to treat certain union members unfavorably.²¹

5.4. Employer's Duty to Bargain Collectively

In most industrialized countries, because employers have no duty to bargain, labor unions must put economic pressure on employers to make them come to the bargaining table. In contrast, the Trade Union Law imposes upon an employer a duty to bargain with a union in good faith, and a refusal to bargain is prohibited as an unfair labor practice (TUL Art. 7 no. 2).

The duty to bargain in good faith is not synonymous with the duty of co-determination. The employer must bargain in good faith, but he is not forced to make concessions or to reach an agreement. Therefore, when the employer and the union are at an impasse, a collective agreement is not concluded. In this case, the employer can regulate or change working conditions through unilateral modification of the work rules.²² Hence, the judge-made law which mandates "reasonableness" in the unilateral modification of work rules is one of the most important rules in Japanese labor law.

As to the introduction of the unfair labor practice system, the Trade Union Law of Japan is modeled on the Wagner Act in the United States. However, the TUL does not adopt an exclusive representation system. Each union that meets statutory requirements enjoys full-fledged rights to bargain collectively and go on strike. Therefore, in Japan, there are neither elections to choose an exclusive representative of workers nor the notion of a bargaining unit. Even a union that organizes a few workers in a single company has an equal bargaining right as a union that organizes the majority of workers in the company (plural representation system).

A second difference is that, unlike the Taft-Hartley Act in the United States, the TUL does not impose a duty to bargain on labor unions.

5.5. Plural Unionism and Establishment of Uniform Working Conditions

Although the Trade Union Law modeled on the Wagner Act in the United States as far as the

²⁰ Id.

²¹ The *Asahi Kasai Kaijo Hoken* (Ishido) Case, Supreme Court (March 27, 1997), 713 *Rohan* 27.

²² As mentioned above, asking an opinion of the majority representative is required but its opposition may not block employer's modification of the work rules. See 3.1 Duty to draw up work rules.

introduction of the unfair labor practice system, the collective bargaining system in Japan significantly differs from the American model.

The Japanese labor law does not incorporate the exclusive representation principle as seen in the United States. To be a lawful union, it is not required to be elected by the majority of workers. It is possible that multiple unions exist in a single company. Even if a company has an enterprise union organizing the majority of workers, another union within the company, or even an outside union that unionizes just one worker of the company, has the full-fledged right to bargain with the employer and the right to strike (plural representation system). Therefore, in Japan, there are neither elections to choose an exclusive representative of workers nor the notion of a bargaining unit.

Under this legal framework, there can be multiple collective agreements within a single company or establishment. A collective agreement is, as a general rule, applicable only to union members. Therefore, multiple working conditions can co-exist. This situation causes difficulties for the employer because most working conditions require uniform treatment. Accordingly, the employer attempts to establish uniformity by negotiating for the same working conditions with all the existing unions. If this is not possible, he endeavors to apply the collective agreement concluded with the majority union to other union members. Article 17 of the TUL provides for a system to expand the effect of a collective agreement to those who are not covered by the agreement when the agreement applies to more than three-fourths of the workers of a similar kind in the establishment. However, according to the majority opinion in academic circles and court precedents, this provision cannot apply to members of other unions because such an expansion to minority union members would be an infringement on the minority union's right to bargain.

Therefore, a practical way to establish uniform working conditions in a situation with multiple unions is for the employer to first conclude a collective agreement with the majority union. Then, the employer, while negotiating with the minority union in good faith so as not to violate his duty to bargain, may refuse to agree to any different agreements with the other minority unions. Where no agreement is reached with the minority union, the employer may then modify the work rules according to the agreement with the majority union. Such a modification of work rules to transpose the collective agreement with the majority union tends to be regarded as reasonable. This is a common situation in which the "reasonable modification rule" concerning work rules applies.

6. Enforcement Mechanism of Labor Law

6.1. Court System

Japan has no courts specially designated for labor litigation. All labor and employment related lawsuits must be filed in ordinary courts. The judges are professional jurists. Lay judges who are common in labor courts in European countries, such as *Arbeitsgerichte*, Employment Tribunals, and *conseil des prud' hommes*, do not exist in Japan. There is no special procedure for labor litigation.

Japan has a three-tiered court system: district courts, high courts and the Supreme Court. The district court in each prefecture is usually the court of first instance.²³ A party may appeal from a judgment of the district court to the competent High Court. It is possible for a party who is not satisfied with the judgment to further appeal to the Supreme Court. However, the grounds for appeal to the Supreme Court are limited to errors of interpretation of the Constitution or other violations of the Constitution in the original judgment (Code of Civil Procedure, Art. 312 Para. 1). The Supreme Court also has discretion to accept appeals where the original judgment contradicts the precedents of the Supreme Court or involves other significant matters

²³ Cases whose amount of controversy does not exceed 900,000 yen must be filed in the summary court. The cases filed in the summary court can be appealed to a district court and to an appellate court, but not to the Supreme Court.

concerning the interpretation of law (Code of Civil Procedure, Art. 318 Para. 1).²⁴

The number of labor cases is extremely small compared to other countries (see Table 1-1). The number of labor-related cases newly filed in Japanese local courts in 2002 was 3,271 (12,307 ordinary civil cases; 811 provisional disposition cases; and 151 administrative cases).²⁵ Compared to the number in Germany, the labor cases in Japan was only one two-hundredth of those in Germany. The statistically small amount of litigation triggers debate on the effectiveness of case law.

Table 1-1: Number of Labor Cases (Newly filed, 1st Instance)

Japan	Germany	France
3,120 (2002)	568,469 (1999)	163,218 (2000)

6.2. Administrative Agencies of the National Government

The Ministry of Labour was responsible for the administration of labor law and labor policy until the end of 2000. However, as a part of the reform of Japan's central bureaucracy, the Ministry of Labour and the Ministry of Health and Welfare were merged and the Ministry of Health, Labour and Welfare (MHLW) was established in January 2001. Within the MHLW, several bureaus are in charge of administration and implementation of labor laws. The MHLW maintains Prefectural Labor Bureaus in each of the 47 prefectures to implement the laws at the local level.

The Labour Standards Bureau within the MHLW administers labor standards established by the Labour Standards Law, the Minimum Wages Law, the Industrial Safety and Health Law. The Labour Standards Bureau also administers the Workers' Accident Compensation Law. Actual implementation of this labor protective legislation occurs through the Labor Standards Inspection Offices in each prefecture. Approximately 3,500 Labor Standards Inspectors work at 343 Labor Standards Inspection Offices throughout Japan. The Labor Standards Inspectors are authorized to inspect workplaces, to demand the production of books and records, and to question employers and workers (LSL Art. 101). Furthermore, with respect to a violation of the LSL, Labor Standard Inspectors shall exercise the duties of judicial police officers under the Criminal Procedure Law (LSL Art. 102).

A worker may report violation of labor protective laws to the Labor Standards Inspection Office. Dismissal and other disadvantageous treatment by reason of such worker's having made a report is prohibited by criminal sanctions (LSL Art. 104, 119 No.1).

The Equal Employment Opportunity Law is administered by the Equal Employment, Children and Family Bureau within the MHLW. Under its Prefectural Labor Bureaus, the Equal Employment Offices (*Koyo Kinto-shitsu*) are responsible for the daily enforcement of the laws related to employment equality and harmonization of work and family life.

The Employment Measures Law, the Employment Security Law, the Worker Dispatching Law and other labor market policy and regulations are administered by the Employment Security Bureau within the MHLW. The Public Employment Security Offices are responsible for public placement services, vocational guidance, and the employment insurance system including distribution of benefits and grants to workers, as well as firms.

6.3. Labor Offices Established by Local Government

Apart from the above-mentioned organs established by the national government, local governments often establish Labor Offices (*Rosei Jimusho*). A Labor Office provides consultation, conciliation and other administrative support for resolution of individual and collective labor disputes.

²⁴ Oda, *Japanese Law*, 64ff (2nd. ed. 1999).

²⁵ 55-8 *Hoso Jiho* 27 (2003).

6.4. Labor Relations Commission (*Rodo Inkai*)

The Central Labor Relations Commission at the national level and the Local Labor Relations Commissions in each prefecture deal with collective labor disputes. This commission is an independent administrative committee comprised of an equal number of commissioners representing employers, workers and the public interests.

The Labor Relations Commission has two main functions. First, it engages in adjustment of collective labor disputes through conciliation, mediation and voluntary arbitration. Second, it adjudicates unfair labor practice cases and issues remedial orders when it finds that an unfair labor practice was committed by an employer.

6.5. Support for Individual Labor Dispute Resolution

The above-mentioned small number of labor lawsuits does not indicate a scarcity of employment disputes in Japan. In the 1990s, corporate reorganizations, diversification of personnel and human resource management, and increased labor mobility resulted in an increasing number of labor disputes being brought to national and local government's labor offices and labor lawyers' counseling desks. The need to establish a new dispute resolution mechanism that is more efficient than the current system was generally recognized. Since the late 1990s, various reform plans have been proposed. Labor unions advocated giving the Labor Relations Commissions the competence to deal with individual labor disputes.²⁶ The employers proposed to utilize civil mediation procedures at ordinary courts rather than the Labor Relations Commissions.²⁷ However, the Ministry of Labour chose to expand the function of the Prefectural Labor Bureaus to include individual labor dispute resolution. Consequently, the Individual Labor Disputes Resolution Law (ILDRL) was enacted in July 2001 and put into effect as of October 1, 2001.

Although the ILDRL confirms the importance of voluntary resolution by the parties, the Law allows Prefectural Labor Bureaus to take part in the resolution of individual labor disputes. In order to help people to find suitable channels for labor dispute resolution, 250 general counseling desks were established across the nation, thereby providing a kind of "one-stop service" to give general guidance and counseling to handle various questions about labor issues. In addition, the Law authorizes the Director of Local Labor Bureau to give the necessary advice or guidance when asked for such support by workers, job seekers, and employers involved in an individual labor dispute. The ILDRL also authorizes the Director to establish a Dispute Adjustment Committee (*Funso Chosei Inkai*) consisting of academic members to offer conciliation as requested. Under the ILDRL, "individual labor dispute" is broadly defined as dispute between individual workers, including job seekers, and employers concerning working conditions and other labor related matters (ILDRL Art. 1). Therefore, the Prefectural Labor Bureau has jurisdiction over a wide variety of disputes. However, its jurisdiction does not extend to disputes between a labor union and an employer or to disputes between workers.

This dispute resolution system by the Prefectural Labor Bureau does not preclude other dispute resolution routes. Therefore, it is possible for parties concerned to bring the case directly to courts, to seek dispute resolution at local government labor offices, or to resort to other channels.

7. Recent Developments in Labor Legislation

7.1. Structural Changes

From the mid-1980s, the situation surrounding labor and employment relations in Japan has been experiencing structural changes. The labor force structure is changing drastically because

²⁶ RENGO (Japan Trade Union Confederation), *Atarashii Roshi Funso Kaiketsu Shisutemu no Kenkyu (Study on the new System for Labor Dispute Resolution)* (1998).

²⁷ Nikkeiren (Japan Federation of Employers' Association), *Rodo Inkai Seido no Arikata ni Tsuite (On the System of the Labor Relations Commissions)* (1998).

of increased longevity and a continuously declining birth rate. The structure of the Japanese labor force is becoming more and more diversified. Individualism is more prevalent than before among workers. Changing corporate behavior resulting from severe competition in the globalized market also affects current employment practice. After the collapse of the bubble economy in the early 1990s, Japan experienced an unprecedented economic slump. To compete with resurgent American industries and rapidly growing Asian industries in the globalized market, Japanese industries engaged in restructuring and re-engineering.

These structural changes effecting the labor market, workers, and employers, coupled with the political drives for deregulation, inevitably affect labor laws designed about fifty years ago. Reforms and modernization of labor laws are required to accommodate changed situations. Modernization means abolishing obsolete regulations and, at the same time, introducing new forms of regulations to cope with new situations. As a result, the picture of the current Japanese labor law reforms presents a mixture of both deregulation and re-regulation.

7.2. Deregulation of Labor Market Law

To respond to the structural changes in the labor market, the government introduced a substantial amount of legislation. In 1985, the Worker Dispatching Law was enacted to properly regulate temporary work services and to provide protection of temporary workers. After the bubble economy, labor market deregulation was further accelerated. The Worker Dispatching Law was drastically deregulated by the 1999 revision. The 1999 revision of the Employment Security Law also lifted general ban on fee-charging employment placement business. The 2003 revisions of the Worker Dispatching Law and Employment Security Law furthered deregulation. In particular, the revision of the Worker Dispatching Law lifted a ban on worker dispatching for the production site and deregulated the period of worker dispatching.

To cope with the aging of the Japanese society, several re-regulation measures were introduced, the Older Persons' Employment Stability Law of 1986 was enacted. The Law was intensified by the 1994 amendment which prohibits setting a mandatory retirement age below 60 years of age. Currently the government is proposing a Bill to revise the Law in order to promote employment of those between 60 and 65 years of age.

To modernize the occupational training system, the Occupational Training Law of 1969 was drastically revised and renamed the Law Promoting the Development of Occupational Ability of 1985.

7.3. Modernization of Individual Labor Relations Law

In response to the diversification and individualization of workers, traditional regulatory measures on individual employment relations are experiencing mixed reforms: deregulation on the one hand and reshaping on the other.

First, the Equal Employment Opportunities Law (EEOL) was enacted in 1985. The Labor Standards Law prohibits wage discrimination on the ground of sex but does not prohibit different treatment of men and women. The 1985 EEOL expanded prohibition of sex discrimination to workers' education and training, fringe benefits and termination. However, the 1985 EEOL was severely criticized as a toothless law because it imposed simply a "duty to endeavor" to treat women equally with men as regards to recruitment, hiring, assignment and promotion. Responding to such criticism, the 1997 amendment of the EEOL prohibits discrimination against women concerning recruitment, hiring, assignment and promotion. At the same time, prohibition on night work in the LSL was abolished in order to eliminate obstacles for women to develop their working career.

In 1991, to support harmonizing work and family life, the Child Care Leave Law was enacted to provide workers with a right to take childcare leave of up to one year. In 1995, The Law was revised and introduced family care leave for three months. Thus, the Law was renamed as the Child Care and Family Care Leave Law and took effect in 1999. The CCFCLL was further strengthened by the 2001 revisions.

As for the LSL, in 1987, the Japanese government implemented the large-scale revision of the working hour regulations in the Labor Standards Law. The revised Law reduced the

maximum workweek from 48 hours to 40.²⁸ Simultaneously, the revised Law introduced various working hours averaging systems and the systems of conclusive presumption on hours worked. Eleven years later, the LSL underwent further amendments to cope with individualization and mobilization of workers.²⁹ The 1998 LSL revision relaxed the employment contract limitation on the one hand, however, it introduced new regulations such as requiring written clarification of working conditions including not only wages but also working hours and other items designated by the Enforcement Order (1998 LSL Art. 15). It also requires the employer to issue a certificate concerning the reasons for termination of employment including those for dismissal upon the worker's request (1998 LSL Art. 22).

The 2003 revision of the Labor Standards Law (LSL) made the case law rule on abusive dismissals an explicit provision in the Law. A new provision (Art. 18-2) was inserted into the LSL: "In cases where a dismissal is not based upon any objectively reasonable grounds, and is not socially acceptable as proper, the dismissal will be null and void as an abuse of right." The 2003 revision of the LSL also introduced provisions requiring clarification of grounds for dismissals (Art. 89 No. 3) and obliging the employer to deliver a certificate stating the reasons for dismissals upon the employee's request even during the period between the notice of dismissal and the date of leaving employment (Art. 22 Para. 2).

Faced with slow recovery from the business slump after the bubble economy, the government introduced a series of new laws to encourage and facilitate corporate restructuring.³⁰ The final measure was an introduction of corporate division scheme through the revision of the Commercial Code in May 2000. To counterbalance the significant impact of the corporate division scheme, the Labor Contract Succession Law was enacted simultaneously.

7.4. Collective Labor Relations Law

Apart from the privatization of public sector corporations,³¹ collective labor relations law has remained untouched for the last two decades. However, the unionization rate has continuously declined since 1975 and finally reached below 20% (19.6% in 2003). Further, the diversification of the workforce has led to questions as to the representative legitimacy of enterprise unionism. Traditionally enterprise unions solely organized regular employees and non-regular workers such as part-time workers and fixed-term contract workers remained unorganized. However, currently 30% of all employees are non-regular employees. The target of corporate restructuring in the 1990s concentrated on middle management employees. Employees promoted to middle management are supposed to leave unions. Therefore they are provided little protection by labor law and labor unions. These circumstances require reconsideration of the channel conveying the voice of employee. Some scholars contend that Japan should introduce an employee representation system like the works council in Germany (*Betriebsrat*) which represents all the employees in the establishment irrespective of union membership.

The 1998 revision of the LSL introduced a new representation system called a *roshi iinkai* (labor-management committee). Half of the members of this committee must be appointed by the labor union organized by a majority of workers at the workplace concerned, or with the

²⁸ The reduction to a 40-hour workweek was, however, put into effect stage by stage. The maximum duration of the workweek was set as 46 hours in 1988, as 44 hours in 1991 and as 40 hours in 1994.

²⁹ Ryuichi Yamakawa, "Overhaul After 50 Years: The amendment of the Labour Standards Law" 37-11 *Japan Labor Bulletin* 5 (1998).

³⁰ In June 1997, the revision of the Anti-Monopoly Law liberalized genuine holding companies. In August 1999, the revision of the Commercial Code introduced a system for the exchange and transfer of stocks between companies. In August 1999, the Industry Revitalization Law was enacted which was followed by the enactment of the Civil Rehabilitation Law in December 1999.

³¹ In the arena of collective labor relations, three public corporations, the Telephone and Telecommunication Public Corporation, the Tobacco Monopoly Corporation, and the National Railway were privatized in the course of an administrative reform in the early 1980s. As an ironic result, those workers in the privatized corporations who had resorted to the strike for the right to strike of the workers in the public sector in 1975 were given the very right through the privatization.

person representing a majority of the workers where no such union exists. The labor-management committee must be established when the employer intends to introduce the discretionary work scheme (management planning type),³² which functions as a Japanese counterpart of the white-collar exemption from overtime regulations. The labor-management committee is the first permanent organ with equal membership for labor and management that represents all the employees in the establishment. Therefore, this committee can be regarded as the embryonic form of a Japanese works council, although the jurisdiction of this committee is currently confined to regulation of working hours and its establishment is not compulsory.

Since the procedures to adopt the discretionary work scheme are very complicated, currently there are very few labor-management committees. However, the 2003 revision of the LSL simplified the procedure to introduce the discretionary work scheme. Previously, decision making in the committee was by unanimous agreement, but under the revised LSL, it can be achieved by four-fifths majority among the committee members. Although it remains to be seen whether the labor-management committee will become more common and solidify as a system of employee representation, the introduction of this embryonic form of representation by recent legislative change is noteworthy.

8. Future of Japanese Labor Law

8.1. Balanced Flexibility in both the Internal and External Labor Market

Faced with the structural changes described above, employment practice is being modified considerably. So, will the Japanese employment system disappear? Considering the various surveys and attitudes of labor and management, the author expects that seniority based employment management will be drastically modified but the employment system based upon employment security will, though its role will diminish slightly in importance, remain central to Japan's employment relations, at least for the foreseeable future. The drastic modification of the seniority based wage system can be interpreted as an attempt to maintain the long-term employment system.

However, employment security will not remain unchanged. Present employment security is maintained through flexible adjustment of working conditions and flexible deployment of workers. Such an employment system relies heavily on internal or functional flexibility which sometimes imposes inconveniences on individuals in return for employment security. Increasingly diversified and individualized workers may regard such inconveniences as irrational and execute employment contracts specifying concrete terms and conditions of employment including a place and type of work. Under such a contract, it is difficult to afford the employer flexibility through the adjustment of working conditions and the flexible deployment of workers, thereby avoiding economic dismissals.³³ In order to keep employment relations and the labor market adaptable to changing circumstances, reduced internal flexibility must inevitably be compensated for by external or numerical flexibility through the relaxation of dismissal regulations. This will be, however, an adjustment or re-balancing of internal and external flexibility centering on the long-term employment practice and, thus, not a revolutionary change but a gradual evolution.

8.2. New Measures for Diversified and Individualized Workers

Even if the employment security remains the basis of Japan's labor and employment relations, diversification and individualization of workers will require significant policy changes. Traditional labor laws presupposed weak homogeneous workers who needed direct state intervention to protect them. Now we have increasingly individualized workers with differing orientations and various bargaining powers. Given this situation, the following

³² There are two types of discretionary work schemes: professional work type and management planning type. For details, see Takashi Araki, *Labor and Employment Law in Japan*, 94 (2002).

³³ Takashi Araki, *Koyo Shisutemu to Rodo-Joken Henko-hori (Employment Systems and Variation of Terms and Conditions of Employment)*, 224 (Yuhikaku, 2001).

measures will be necessary in the future.

First, to support individual transactions in the external labor market, measures to enhance labor market performance should be taken. Deregulation of fee-charging employment services and dispatched work businesses are typical measures for this purpose.

Second, in individual employment relations law, the mode of state intervention or the content of protective legislation should be reconsidered. When the state sets uniform mandatory norms and applies them to a diversified workforce, such universal intervention will inevitably infringe on some individuals' freedom of self-determination. In order to avoid such infringement, first, the coverage of the LSL sanctioned by criminal provisions should be confined to traditional workers with weaker bargaining powers. As for workers with stronger bargaining powers in the labor market as individuals, more flexible and less interventional legislation without penal provisions should be considered. The 2003 LSL revision transforming established case law rules concerning dismissals into statutes without criminal sanction is a good example. The government is also planning to enact an employment contract law without criminal sanction incorporating established case law rules concerning probation, transfer of workers, legality of employers' disciplinary measures and other issues arising from employment relations. Such a statute could also satisfy the need for transparency by making the law more accessible to the public. A second change in the mode of state intervention could be a shift from substantive norms to procedural requirements. For example, rather than establishing substantive requirements for derogation from the minimum standards, the state should merely establish procedural requirement. This will protect workers' interests without unduly limiting employers' flexibility.

Third, in the collective labor relations law, a continuous decrease in the union density will require the reconsideration of the role of labor unions. Some advocate enacting statues establishing works councils or employee representatives to represent various interests among diversified workers at the workplace level. However, since Japan's enterprise unions have already played the double roles of both labor union and works council, a careful deliberation will be indispensable for the new measures.

Fourth, deregulation and respect of individuals' choice means a policy shift from ex ante regulations to ex post facto adjustments through dispute resolution mechanisms. Japan, however, does not have any labor courts or agencies specializing in individual labor disputes. Therefore, to efficiently cope with conflicts arising from individual employment relations, accessible, expeditious and low-cost dispute resolution systems are urgently needed.

If these measures are required in the future, the traditional concept of labor law, characterized by the protection of mandatory, interventional labor standards and by the right to apply collective pressure, will no longer be sufficient. Reflecting the emergence of diversified and individualized workers, labor law in the future must provide diversified regulations ranging from traditional interventional measures to less interventional, optional measures.

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The traditional Japanese employment system has relied too much on internal flexibility coupled with employment security and excessively restricted external flexibility. Given the changed circumstances surrounding contemporary employment relations, a new balance between the two types of flexibility needs to be struck. The problem of the traditional Japanese employment system is that it provides only two options: one is a "regular worker model" coupled with employment security and high internal or functional flexibility, and the other is a "non-regular worker model" which simply provides external or numerical flexibility. What is required for the future is diversification of employment models with various combinations of internal and external flexibility allowing for individual choice.

Future employment relations will be accompanied by greater external flexibility than exists today. Reforms should be designed to cope with the changing environment of employment relations. However, it is by no means enough to leave everything to the functioning of the external labor market and negate the role of labor law. Labor law plays a pivotal role in providing a framework that allows for an optimum combination of the two types of flexibility.

The law must keep both the labor market and employment relations flexible enough to adapt to changing socio-economic circumstances while maintaining necessary protections for working people.

Individual Bargaining, Collective Bargaining and Protective Legislation: Determining the Terms and Conditions of Employment in the Modern American Employment Relationship

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I. INTRODUCTION

Globalization has changed the face of the American workplace. With increased competition from corporations around the globe, the United States has responded by dramatically changing the way it does business in order to remain competitive. Systems have been implemented to increase both productivity and quality of output while reducing overall costs.¹ Additionally, companies are relying less on full-time workers; instead they are increasing the use of “contingent workers,” which include part-time, casual, and temporary workers.² All of these changes are affecting the methods used to address conflicts in the employment relationship.

The primary method of addressing such conflicts in the United States has always been through individual negotiations and contract.³ In comparison with other countries, this has produced some “harsh” results for American employees since our law governing individual employment contract has emphasized “freedom of contract” and flexibility with respect to the agreements employers can negotiate with individual employees.⁴ This can be seen even today in our common law “employment at-will” doctrine, our employee “duty of loyalty” doctrine, and the absence of any implied covenant of good faith and fair dealing in the majority of our jurisdictions. However, the use of individual negotiation and contract rights has been tempered over the course of our history by some reliance on collective bargaining and on federal and state regulation of the employment relationship.

During the Great Depression, when individual bargaining was clearly failing to meet the needs of workers, the United States Congress and President decided that it would be in the workers’ and the country’s interest to adopt federal laws protecting and encouraging collective bargaining as an important means of addressing workers’ needs. Accordingly, in 1935 Congress passed the Wagner Act⁵ (more commonly known as The National Labor Relations Act) to promote “equity in bargaining power between labor and management,” and to promote “industrial peace.”⁶ The idea was that, although workers might not be able to individually bargain with employers to achieve higher wages and benefits and achieve greater input into the running of their firms and society, they could bind together to accomplish these tasks through collective bargaining agreements.⁷

Throughout the 1940s and 50s, the perception grew among the American populace that

¹ Hoyt N. Wheeler & John A. McClendon, *Employment relations in the United States*, in INTERNATIONAL & COMPARATIVE EMPLOYMENT RELATIONS [hereinafter “INT’L RELATIONS”] 63 (Greg J. Bamber & Russell D. Lansbury eds., 1998).

² *Id.* at 63.

³ An employment contract can be either express or implied and is not required to be in writing. ALVIN L. GOLDMAN, LABOR AND EMPLOYMENT LAW IN THE UNITED STATES 58 (Kluwer Law Int’l Student ed. 1996).

⁴ State courts have often struck down “labor protective legislation on freedom of contract grounds.” MATTHEW W. FINKIN ET AL., LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE 22 (3rd ed. 2002).

⁵ 29 U.S.C. §§ 141-187 (2003).

⁶ See Wheeler & McClendon, *supra* note 1, at 65-66.

⁷ See generally JULIUS G. GETMAN ET AL., LABOR MANAGEMENT RELATIONS AND THE LAW 1-5 (2d ed. 1999).

unions had grown too strong under the legislative scheme of the Wagner Act as many industries became rife with labor strikes.⁸ Consequently, major amendments to the Act were adopted in the Taft-Hartley Amendments of 1947⁹ and the Landrum-Griffin Act¹⁰ of 1959 to uphold the “right of employees NOT to organize” and to limit union power.¹¹ As a result of changes in the federal statutory scheme and changes in the American economy, unions began a long and steady decline in importance in industrial relations in the United States that continues until this day.¹²

The decline of unions and the renewed focus on individual rights has led the United States Congress and state legislatures to rely increasingly on specific statutory rights as a way of addressing the perceived inadequacies of individual bargaining in meeting the needs of workers. Although the existing scheme of statutory protections had its origin at the turn of the last century and received a significant boost during the legislative heyday of the New Deal, the reliance on specific statutory provisions to give individual workers rights exploded during the Civil Rights era of the 1960s and 70s and continues today.¹³

Among the three primary means of addressing the needs of workers--individual bargaining, collective bargaining and protective legislation--each has its own advantages and disadvantages. Individual bargaining can provide the most individualized solution of meeting the needs of the parties. It also enjoys relatively low administrative costs. Unfortunately, market failures and lack of bargaining power¹⁴ mean that individual bargaining often results in an impoverished solution for many workers that fails to address many of their basic needs.

Collective bargaining allows for an individualized solution on the basis of a company or an industry and can solve many of the market imperfection problems of individual bargaining.¹⁵ Unfortunately, because so few workers are organized in the United States, relying on collective bargaining leaves the vast majority of employees without an effective way to address their needs in the employment relationship. As a practical matter, employees who undertake to organize are also subject to employer retaliation.

Protective state and federal legislation provides the least individualized way of addressing employees’ needs. It is also administratively costly. However, protective legislation can be used to provide all workers with at least some relief from the problems of individual bargaining. Moreover, the system of individual rights and enforcement used with most protective legislation coincides well with the American legal system and ideals of individualism.¹⁶

A secondary means of addressing the needs of workers is through the common law. The law of individual contracts is primarily shaped through state judicial decision although federal common law governs the enforcement of collective bargaining agreements.¹⁷ Unfortunately, the cost of litigation and the inconsistent application of common law across states prevent this method from becoming one of the primary ways to address employee demands.¹⁸

For the indefinite future, the United States will undoubtedly continue to undertake a mixed system of individual bargaining, collective bargaining, and individual statutory rights in governing the employment relationship with the primary emphasis on individual bargaining and individual statutory rights.

⁸ *Id.* at 5.

⁹ 29 U.S.C. §§ 151-61 (2003).

¹⁰ 29 U.S.C. §§ 401-531 (2003).

¹¹ *See generally*, GETMAN, *supra* note 7, at 5-6.

¹² *Id.* at 13-16.

¹³ For a history of federal legislation regulating the employment relationship, *see* GOLDMAN, *supra* note 3, at 38-46.

¹⁴ *See* Kenneth G. Dau-Schmidt, *Meeting the Demands of Workers into the Twenty-First Century: The Future of Labor and Employment Law*, 68 IND. L. J. 685, 688-92 (1993). Market failures include imperfect information, imperfect processing of information, and public goods. For instance, an individual is unable to bargain for public goods, such as the air quality and lighting at the workplace, because improvement of these goods enjoyed by one worker cannot be to the exclusion of the other workers. *Id.* at 690.

¹⁵ *See generally id.* at 692-695 (discussing the advantages and disadvantages of collective bargaining).

¹⁶ *See generally id.* at 696-698 (discussing the advantages and disadvantages of protective legislation).

¹⁷ Goldman, *supra* note 3, at 49.

¹⁸ *See* Dau-Schmidt, *supra* note 14, at 699-700.

II. INDIVIDUAL BARGAINING AND RIGHTS

A. OVERVIEW

As previously stated, the primary means of addressing American workers' needs is through individual bargaining. In contrast to other industrialized countries, two facets of the system of individual contract rights in the United States stand out as truly exceptional--the employment-at-will doctrine and our reliance in individual employment contracts for the provision of health insurance. In the evolution of these doctrines, United States constitutional protections have played an important, but merely supporting role in establishing a strong legal environment for the presumption of freedom of contract. State and federal statutes have also played a largely supporting role in the development of both the employment-at-will doctrine and health insurance provisions providing either some specific prohibitions against discharge¹⁹ or prescribing certain forms and protections for employee health benefits if offered by the employer (ERISA).²⁰

B. THE EMPLOYMENT-AT-WILL DOCTRINE

i. Development of the doctrine

In the United States, an employment contract for an indefinite term is presumed to be at-will unless the parties expressly state otherwise.²¹ The establishment of the employment-at-will doctrine met the growing labor needs of the large "manufactory" employers in the mid to late nineteenth century. This "freedom of contract" based doctrine heavily favored the employer who was entitled to terminate the employee for good, bad, or no cause.²² Courts were initially so protective of this doctrine that they "regularly struck down as unconstitutional any federal or state legislative intrusion on the prerogative of employers to terminate the relationship."²³ This trend continued until the mid-twentieth century.

Today, most American workers are employed without a formal contract or without explicit job security clauses and are thus employed-at-will.²⁴ However, the employment-at-will doctrine has changed so substantially from its inception during the industrialization period that, in most American jurisdictions, employers are commonly prohibited from dismissing an at-will employee under certain circumstances. In *Woolley v. Hoffmann-LaRoche, Inc.*, the Court "clearly announced its unwillingness to continue to adhere to rules regularly leading to the conclusion that an employer can fire an employee-at-will, with or without cause, for any reason whatsoever."²⁵ The exceptions to the doctrine provide certain job security to the employee while still preserving overall freedom of contract.

¹⁹ Many federal and state statutes providing rights and benefits to employees also protect them from discharge by the employer when the employee seeks the protection or enforcement of the statute. These statutes include: state workers' compensation plans, the Americans with Disabilities Act (ADA), Title VII of the 1964 Civil Rights Act, the Occupational Safety and Health Act (OSHA), the Motor Carrier Act, Title III of the Consumer Protection Act of 1970, and the Fair Labor Standards Act (FLSA). See GOLDMAN, *supra* note 3, at 73. Protection from discharge is given to employees under the various whistleblower statutes. See HENRY H. PERRITT, JR., 2003 EMPLOYMENT LAW UPDATE 113-26 (2003). Employees are also insulated from termination that contravenes clear and established public policy. See *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 877 (Mo. Ct. App. 1985) (holding that "employers...are not free to require employees, on pain of losing their jobs, to commit unlawful acts or acts in violation of a clear mandate of public policy expressed in the constitution, statutes and regulations." *Id.*).

²⁰ 29 U.S.C. §§ 1001-1461 (2003).

²¹ See *Payne v. The West. & Atl. RR Co.*, 81 Tenn. 507 (1884).

²² *Id.* at 519-20. Over one-hundred years later, the basic doctrine still persists. In *Murphy v. American Home Prods. Corp.*, the plaintiff was terminated by the defendant company after twenty-three years of employment when the plaintiff reported corporate accounting improprieties. The Court confirmed that the termination was proper because "where an employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason." 448 N.E.2d 86, 89 (N.Y. 1983).

²³ PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 48 (1990) (citing *Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915)).

²⁴ GOLDMAN, *supra* note 3, at 64.

²⁵ *Woolley v. Hoffmann-LaRoche, Inc.*, 491 A.2d 1257, 1260 (N.J. 1985).

ii. Exceptions to the at-will doctrine

The second half of the twentieth century brought tremendous change to both contract and civil rights laws. These changes produced exceptions to the employment-at-will doctrine which subsequently transferred some of the original bargaining power from the employers to the employees in the form of increased job security and limited protection from arbitrary discharge.

The most common exception to the employment-at-will doctrine is the public policy exception which permits recovery in tort by an at-will employee who has been dismissed in violation of a clear and substantial public policy.²⁶ “Public policy’ is that principle of law which holds that no one can lawfully do that which tends to be injurious to the public or against the public good.”²⁷ This exception includes protection from discharge for whistleblowers,²⁸ for employees who refuse to perform illegal acts,²⁹ and for employees who are engaging in lawful activities such as jury duty or seeking public office.³⁰ As of October 1, 2000, forty-three states permitted recovery based on the public policy exception³¹ although many of these courts require that the public policy be grounded in a specific constitutional, statutory, or regulatory provision rather than just “judicially recognized fundamental policies.”³²

Contract law has generated another exception to the at-will doctrine where an implied contract has been created, most frequently in cases involving employee handbooks and manuals. In *Woolley*, the plaintiff-employee filed a successful breach of contract claim against his employer subsequent to his discharge. The plaintiff alleged that the employer’s handbook contained an implied promise that an employee could only be fired for cause, and even then, only after certain disciplinary procedures were followed.³³ The Court held that “absent a clear and prominent disclaimer, an implied promise contained in an employment manual that an employee will be fired only for cause may be enforceable against an employer even when the employment is for an indefinite term and would otherwise be terminable at will.”³⁴ In 2000, thirty-eight states recognized an implied contract exception to the at-will doctrine.³⁵ In some jurisdictions, an employee handbook is considered to establish an implied in fact contract while in others, courts require the employee to show proof that he/she had “actual knowledge” of the invoked provision.³⁶ To effectively show an implied contract from a handbook, “the provision governing job security must be sufficiently definite to constitute a contractual commitment.”³⁷

A third exception to the at-will doctrine was recognized in 1980. The implied covenant of good faith and fair dealing ensures that “neither party will do anything which will injure the right of the other to receive the benefits of the agreement.”³⁸ The original purpose of the implied covenant of good faith and fair dealing doctrine was to protect the expectations of the

²⁶ FINKIN, *supra* note 4, at 172. See also GOLDMAN, *supra* note 3, at 71.

²⁷ FINKIN, *supra* note 4, at 172.

²⁸ See *Harless v. First Nat’l Bank in Fairmont*, 246 S.E.2d 270 (W.Va. 1978) (holding that an employee-at-will who was terminated for reporting violations by his employer of the state Consumer Credit and Protection Act has a valid cause of action).

²⁹ See *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985) (allowing recovery by an employee who had been dismissed after refusing to pump bilges into the water, which was illegal under federal law).

³⁰ FINKIN, *supra* note 4, at 175.

³¹ Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 1, 2001, Exhibit 1. See also GOLDMAN, *supra* note 3, at 71.

³² GOLDMAN, *supra* note 3, at 71.

³³ *Woolley*, 491 A.2d at 286-87.

³⁴ *Id.* at 285-86.

³⁵ Muhl, *supra* note 31, at exhibit 1. Many of the courts that deny this exception do so because of “the lack of consideration and the want of a ‘bargained-for’ exchange.” FINKIN, *supra* note 4, at 92. An extension of this exception is made in circumstances where an employer attempts to hide behind the employment-at-will doctrine in order to terminate an employee who was fraudulently induced to accept employment. See *Berger v. Sec. Pac. Info. Sys., Inc.*, 795 P.2d 1380 (Colo. Ct. App. 1990).

³⁶ FINKIN, *supra* note 4, at 91.

³⁷ *Id.* at 93. See, e.g., *Heidick v. Kent Gen. Hosp, Inc.*, 446 A.2d 1095 (Del. 1982); *Miles v. Bibb Co.*, 339 S.E.2d 316 (Ga. Ct. App. 1985).

³⁸ *Cleary v. American Airlines, Inc.*, 168 Cal. Rptr. 722, 728 (Cal. Ct. App. 1980) (quoting *Comunale v. Traders & General Ins. Co.*, 328 P.2d 198 (Cal. 1958)).

parties to the contract and ensure that the parties' intentions were realized.³⁹ The covenant was not necessarily designed to protect a public policy interest.⁴⁰ Although the covenant started in traditional contract law,⁴¹ it was extended into the employment realm when a California court noted the continuing trend of contract principles applying to the employment relationship.⁴² As of 2000, this exception to the at-will doctrine had been recognized by only eleven states,⁴³ including Massachusetts and California. Recovery under this exception is generally in contract and not tort.

When the covenant of good faith and fair dealing exception was first applied by the courts to the employment relationship, it was predicted that the exception would be accepted by a majority of states in a fashion similar to their acceptance of the public policy and implied contract exceptions. However, many courts have refrained from applying this exception until either the state legislature or the state's highest court acts.⁴⁴ Other courts refuse to apply the doctrine because they find it too vague and broad, and because they feel it often leads to arbitrary and inconsistent applications.⁴⁵ Still other courts are leery to apply the exception for fear that it will be misapplied to convert an employment-at-will relationship into a just cause relationship.⁴⁶

In the minority of states that do recognize the implied covenant exception, there is wide divergence as to when and how it is applied.⁴⁷ Some courts permit the use of the doctrine for recovery only where termination has deprived the employee of earned wages or commissions from a past performance.⁴⁸ Other states recognize the implied covenant when termination contravenes public policy.⁴⁹ The doctrine has been used where termination by the employer is motivated by bad faith, malice, or retaliation⁵⁰ or where the employer's conduct constitutes fraud, deceit, or misrepresentation.⁵¹ A small number of states allow the use of the covenant to protect the right to job security⁵² or when a special relationship exists between the contractual parties.⁵³ California permits perhaps the broadest use of the exception where an employee's length of service, "together with the expressed policy of the employer, operate as a form of

³⁹ See *Foley v. Interactive Data Corp.*, 765 P.2d 373, 389-90 (Cal. 1988).

⁴⁰ See *id.* at 394.

⁴¹ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (providing that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Id.*); U.C.C. § 1-203 (1998) (requiring that "every contract or duty within this Act [U.C.C.] imposes an obligation of good faith in its performance or enforcement." *Id.*).

⁴² *Cleary*, 168 Cal. Rptr. at 729.

⁴³ See Lynn Marx, *At Will Employment*, OLR RESEARCH REPORT (March 1, 2001), available at <http://www.cga.state.ct.us/2001/rpt/olr/htm/2001-r-0246.htm> (last visited Feb. 19, 2004).

⁴⁴ 27 AM. JUR. 2D *Employment Relationship* § 66 (2003). See also *Ward v. 84 Lumber*, 758 F. Supp. 355, 336 (D. Md. 1991); *Edelman v. Franklin Iron & Metal Corp.*, 622 N.E.2d 411, 414 (Ohio Ct. App. 1993).

⁴⁵ J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law*, 81 IOWA L. REV. 347, 362-63 (1995). See also Seth William Goren, *Looking for Law in All the Wrong Places: Problems in Applying the Implied Covenant of Good Faith and Fair Dealing*, 37 U.S.F. L. REV. 257, 267 (2003); FINKIN, *supra* note 4, at 182.

⁴⁶ Parker, *supra* note 45, at 355, 363.

⁴⁷ FINKIN, *supra* note 4, at 182.

⁴⁸ *Henderson v. L.G. Balfour Co.*, 852 F.2d 818, 822 (5th Cir. 1988).

⁴⁹ *Lewis v. Cowen*, 165 F.3d 154, 167 (2nd Cir. 1999). Critics argue that applying the covenant to further public policy will dilute the doctrine. Instead they suggest that courts should require that these claims be brought under the public policy exception in tort. Parker, *supra* note 45, at 368. See also Jason Randal Erb, *The Implied Covenant of Good Faith and Fair Dealing in Alaska: One Court's License to Override Contractual Expectations*, 11 ALASKA L. REV. 35, 46 (1994).

⁵⁰ *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551 (N.H. 1974).

⁵¹ *Merrill v. Crothal-American, Inc.*, 606 A.2d 96, 101 (Del. 1992).

⁵² 82 AM. JUR. 2D *Wrongful Discharge* § 69 (2003). See also *Cleary*, 168 Cal. Rptr. at 729.

⁵³ 82 AM. JUR. 2D *Wrongful Discharge* § 71 (2003). *But see* Cyndi M. Benedict et al., *Employment and Labor Law*, 50 SMU L. REV. 1101, 1134 (1997) (discussing the Texas Supreme Court's decision in *McClendon v. Ingersoll-Rand Co.* where the court failed to find that the special relationship in the employment context was similar to that in the insurance realm and thus refused to uphold the implied covenant in the employment setting).

estoppel, precluding any discharge of such an employee by the employer without good cause.”⁵⁴

One final exception to the at-will doctrine that has been granted in a few states permits employees to recover in tort if the manner in which they were terminated was wrongful, regardless as to whether the employer had the right to terminate the employee.⁵⁵ To successfully prove intentional infliction of emotional distress, the employee must show that the conduct of the employer during the termination was “extreme and outrageous,” the employer acted intentionally or recklessly, and the employer’s conduct caused the employee to suffer from severe emotional distress.⁵⁶

iii. United States and international at-will doctrine developments

Despite the development and expansion of the above exceptions, the employment-at-will doctrine is still the predominate form of employment relationship in the United States. Only Montana, Puerto Rico, and the Virgin Islands have statutorily eliminated the doctrine and have made remedies available to employees who are dismissed without good cause.⁵⁷ By contrast, most other industrialized nations, including many European countries, Japan, Canada, and other countries in Asia and Africa, provide statutory protection against unjust discharge.⁵⁸ In most European Union countries, for instance, strict rules require employers to comply “with rigid procedures and time limits, as well as the payment of certain benefits. Any termination in violation of the procedures may be challenged, and courts generally tend to rule in favor of the dismissed employee.”⁵⁹ The International Labour Organization has also supported the prohibition against unjust discharge.⁶⁰ Article 4 of the ILO Convention and Recommendation on Termination of Employment of 1982 (No. 158) seeks to eliminate the employment-at-will doctrine and to require employers “to specify a valid reason for the termination of their employees.”⁶¹

iv. Current trends in the application of the at-will doctrine

As previously mentioned, globalization has made dramatic changes to the American workplace since the birth of the employment-at-will doctrine. Companies are constantly retooling their businesses to ensure that productivity is maximized while streamlining costs. The length of employment relationships is being shortened as many permanent employees are being replaced by part-time and casual employees and subcontractors.⁶² The union movement has also steadily declined in the United States.⁶³ While still the predominate form of the individual employment relationship, the at-will doctrine has been somewhat reduced in strength because of an increase in governmental regulation and the development of the at-will exceptions.⁶⁴

⁵⁴ See Cleary, 168 Cal. Rptr. at 729. See also West’s hr-esource.com, *Legal Guide to Human Resources: Employment At Will and Employment Contracts* § 8.02(3) at <http://www.hr-esource.com/index.asp?rightframe=hresources/sampleChapters/lghSampleChapter.html>.

⁵⁵ GOLDMAN, *supra* note 3, at 74.

⁵⁶ FINKIN, *supra* note 4, at 247 (quoting *Margita v. Diamond Mortgage Corp.*, 406 N.W.2d 268, 271 (1987)).

⁵⁷ GOLDMAN, *supra* note 3, at 64-65.

⁵⁸ Comm. on Lab. & Emp., The Ass’n of the Bar of the City of New York, *At-Will Employment and the Problem of Unjust Dismissal*, 36 REC. B. CITY N.Y. 170, 175 (1981).

⁵⁹ Annette M. Schüller et al., *Doing Business in the European Union: An Overview of Common Legal Issues*, COLO. LAW., June 2002, at 18.

⁶⁰ Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 IND. L. J. 83, n.89 (2001).

⁶¹ Cindy Barber, *Comparison of International and U.S. Employment Termination Procedures: How Far Have We Come? – A Step in the Right Direction*, 19 SYRACUSE J. INT’L L. & COM. 165, 184 (1993).

⁶² Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L. J. 1, 13 (2001).

⁶³ Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 361 (2002). In 1950, 31.5% of the nonagricultural labor force was unionized. *Id.* (citing U.S. Dep’t of Labor, Bureau of Labor Statistics 1980b, at 412 tbl.165, in MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* 10 tbl.1 (1987)). By 2003, only 12.9% of wage and salary workers were union. U.S. Dep’t of Labor, Bureau of Labor Statistics, *Union Members in 2003* (Jan. 21, 2004), available at <http://www.bls.gov/news.release/pdf/union2.pdf>.

⁶⁴ Befort, *supra* note 63, at 378.

The current at-will system clearly has some deficiencies. Unlike American labor law, “the legal rules governing the employment relationship consist of a crazy quilt of regulation emanating from a variety of sources—federal and state, legislative and judicial. These regulations, in turn, bear little relationship to one another.”⁶⁵ Unlike labor law where enforcement is through the specialized labor court (NLRB), judges of general jurisdiction do not specialize in employment law. With the growing amount of statutory and at-will exception claims that can be made to challenge termination, the number of employment cases is rapidly increasing.⁶⁶ Employers and employees are finding the current system of litigation involving these individual exceptions to be costly and time consuming.⁶⁷ Because of these factors, there is a movement towards arbitration either by individual agreement or statute. Arbitration has been found to be both quicker and cheaper than the current litigation system.⁶⁸

Some analysts have argued that American legislators should to adopt statutory schemes for discharge that are similar to those found in some European countries.⁶⁹ Under such a system, employers can discharge employees without cause, but only if they pay the employee some set amount of severance pay, for example one month’s pay for each two years of service. The employer could avoid making the severance payments, only if he or she could show just cause for dismissal. Such adjudications could be handled through arbitration, or before unemployment compensation panels.⁷⁰ These analysts also argue that adopting such a statute on the federal level would ensure that all workers across the United States receive the same legal protection.⁷¹

C. HEALTH INSURANCE BENEFITS

Until the 1940s, health care coverage in the United States was predominately the responsibility of the patient. Fewer than 10% of Americans had health care coverage.⁷² During the 1950s, however, unions began to bargain for insurance and the federal government offered tax incentives for employers to adopt private health insurance plans, so that by 2000, 64.1% of Americans received employment-based health insurance.⁷³ Employer-sponsored health plans are covered by the federal Employee Retirement Income Security Act (ERISA). ERISA does not mandate that employers provide health insurance to employees nor does it require employers who offer health insurance to either absorb all medical expenses or provide for complete medical coverage.⁷⁴ Therefore, medical coverage, if offered at all, and the cost to employees can vary significantly among employers. Whether an employee receives health benefits is left to individual or collective bargaining.

Several problems exist within the current United States health care system. In 2002, only 61.3% of Americans received employment-sponsored health insurance while federally funded health insurance plans, Medicare and Medicaid, cover an additional 25.7% of the population. More than 43.6 million Americans (15.2% of the population) were without any health insurance throughout 2002.⁷⁵ Lack of insurance can have a profound effect on human health which will inevitably affect the quality of life and. Productivity in the United States.⁷⁶

⁶⁵ *Id.* at 397.

⁶⁶ *Id.* at 397-400. The number of employment claims has grown ten times faster than other types of civil litigation. *Id.* at 400.

⁶⁷ *Id.* at 400-02.

⁶⁸ *See id.* at 403-04.

⁶⁹ *Id.* at 406.

⁷⁰ *Id.* at 405-06.

⁷¹ *Id.* at 408.

⁷² FINKIN, *supra* note 4, at 754. *See also* PERRITT, *supra* note 19, at 144-151 (for history of health care benefits in the U.S).

⁷³ FINKIN, *supra* note 4, at 754-55.

⁷⁴ *Id.* at 755-56. *See also* GOLDMAN, *supra* note 3, at 125.

⁷⁵ Robert J. Mills & Shailesh Bhandari, *Health Insurance Coverage in the United States: 2002*, U.S. CENSUS BUREAU, Sept. 2003, available at <http://www.census.gov/prod/2003pubs/p60-223.pdf>.

⁷⁶ Sara R. Collins & et al., *Health Care Reform Returns to the National Agenda: The 2004 Presidential Candidates’ Proposals 15*, THE COMMONWEALTH FUND, at http://www.cmwf.org/programs/insurance/collins_reformagenda_671.pdf (last revised Feb. 20, 2004)

The rapidly rising cost of health care in the United States put many employers at a competitive disadvantage. Within the United States, health care costs vary by state. In 2003, New Hampshire State Senators proposed legislation that would reform the state's small-group insurance market enabling New Hampshire businesses to better compete with other states.⁷⁷ American businesses are also at a competitive disadvantage in the world economy. The private sector in the United States spends over 7.7% of gross domestic product on health care while the private sector in countries like Canada spends only 2.8%. This difference occurs because much of the health care expenditures in other countries are paid out of the state's general revenues.⁷⁸

The rising cost of health care and the lack of universal coverage will need to be addressed by the United States in the near future. National health care reform has become a major issue in the current presidential campaign. Unfortunately, three of the four major plans proposed by the candidates do not extend coverage to all uninsured.⁷⁹ One possible solution would be for the United States to adopt a "two-tiered" health insurance system similar to that enjoyed by Germany. Under such a system the government guarantees and pays for a basic health insurance program for all citizens, which is then supplemented by private employer provided insurance for higher wage workers. However, there is some doubt that a long term tax-sponsored universal plan will be accepted by the majority of Americans.⁸⁰ Instead, a compromise between universal coverage and our current system could be implemented which will expand the capacity of public programs to cover more of the uninsured, for example everyone under the age of 18, while also providing increased tax benefits for continued private insurance.⁸¹

III. COLLECTIVE BARGAINING

A. OVERVIEW

During the course of the last fifty years, collective bargaining has declined in importance as a method of addressing the needs of American workers. The percent of labor organized in the private sector has declined from 40% in the 1950s to 8.2% in 2003.⁸² Although other countries have suffered declines in the percent organized over the same period, others have enjoyed increases, and none, except perhaps Australia, has experienced such a precipitous decline.⁸³ This decline in the percent organized in the United States has not only affected the methods by which workers address their needs, but it has also swung the political balance in favor of employer interests.⁸⁴ Where American workers in collective bargaining agreements once had a

⁷⁷ News Release, New Hampshire State Senate, Senators Propose Insurance Reform (Mar. 17, 2003), available at <http://www.gencourt.state.nh.us/senate/press/2003/prescottreform.html>.

⁷⁸ Daniel Gross, *Whose Problem is Health Care?*, N.Y. TIMES, Feb. 8, 2004, at sec. 3 p.6.

⁷⁹ Collins, *supra* note 76, at vii.

⁸⁰ Critics of President Clinton's 1994 proposed health reform program were opposed to the establishment of new bureaucracies and the reduction of choice by both physicians and patients. PERRITT, *supra* note 19, at 174.

⁸¹ Before extensive reform is made on the national level, it is probable that more immediate work will be done to "cover prescription drug costs and to increase coverage of population groups especially at-risk by extending state programs associated with Medicaid." *Id.* at 199.

⁸² WEILER, *supra* note 23, at 105; U.S. Dep't of Labor, *supra* note 63, at 7.

⁸³ Union membership in the U.K. has fallen by more than a third since 1979. John Goodman et al., *Employment Relations in Britain*, in INT'L RELATIONS, *supra* note 1, at 35. In Australia in 1953, 65% of the population was unionized whereas by 1996, only 31% was unionized. Edward M. Davis & Russell D. Lansbury, *Employment Relations in Australia*, in INT'L RELATIONS, *supra* note 1, at 115. In Sweden, the union movement remained strong throughout the 1990s and is currently one of the densest in the world with 90% of blue-collar employees and 80% of white-collar employees unionized. Olle Hammarström & Tommy Nilsson, *Employment Relations in Sweden*, in INT'L RELATIONS, *supra* note 1, at 230. For an overview of union development throughout ten countries, see Oliver Clarke et al., *Conclusions: Towards a Synthesis of International and Comparative Experience in Employment Relations*, in INT'L RELATIONS, *supra* note 1, at 298-99. See also RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 222 (1984).

⁸⁴ Union influence once extended into the non-union environment by encouraging non-union employers to adopt wage and benefit packages similar to those in the union environment in order to attract good, non-union workers. However, with the decline in unionization, unions no longer have this effect on non-union employers. Befort, *supra* note 63, at 391, 394. Today, courts are also likely to favor the employer and view collective bargaining as "an interference with the benevolent working of the market." GETMAN, *supra* note 7, at 14.

strong bargaining position, they now have only limited workplace decision-making capability.⁸⁵ Once again, Constitutional law plays primarily a background role with respect to the law on organizing, at least in the private sector, since Constitutional rights in the United States are primarily a check on government power rather than on the acts of private individuals.⁸⁶

B. NATIONAL LABOR RELATIONS ACT

The primary law governing collective bargaining in the United States is the National Labor Relations Act (NLRA). As previously mentioned, this act is made up of the original Wagner Act (1935) and the Taft-Hartley Amendments (1947). Section 7 of the NLRA states the basic rights granted to employees—the right to organize or be free from organization. Section 7 states that “employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...”⁸⁷ To be covered under the act, the employee’s actions must be conducted “in concert” with those of at least one other employee or be based on rights within the collective bargaining agreement.⁸⁸

Section 8 regulates the conduct of both employers and unions that interferes with employees’ Section 7 rights and requires that the parties bargain “in good faith.” Section 8(a) regulates employer unfair labor practices. Section 8(a)(1) prohibits employers from interfering, restraining, or coercing employees in their exercise of guaranteed rights under Section 7 while Section 8(a)(2) prohibits the employer from dominating employee organizations. Sections 8(a)(3) and (4) prohibit the employer from retaliating against union employees. Section 8(b) regulates the conduct of unions and requires unions to bargain in good faith.⁸⁹

Section 9 outlines the election procedures for selecting the collective bargaining representative and specifies that the majority representative is the “exclusive representative” of all of the employees in the bargaining unit, whether union member or not.⁹⁰ Section 9 is very unusual in comparison with the labor laws of other countries. With the exception of the United Kingdom’s recent efforts to adopt a system for determining representation, no other industrialized country has a similar election procedure and few, if any, have a similar concept of exclusive representation.⁹¹ Finally, Section 10 grants authority to the NLRB to investigate unfair labor practices and provide remedies if required.⁹²

C. CURRENT STATUS OF COLLECTIVE BARGAINING

i. Reasons for the decline of collective bargaining in the United States

Several factors have led to the drastic decline of collective bargaining in the United States. The global economy has wrought significant changes on the United States labor market by shifting America’s reliance from traditional union-heavy manufacturing industries to traditional non-union service industries.⁹³ Furthermore, since 1940 there has been tremendous growth in the managerial and professional workforce which is exempt from coverage under the NLRA.⁹⁴

⁸⁵ Befort, *supra* note 63, at 410.

⁸⁶ See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1580 (2002).

⁸⁷ 29 U.S.C. § 157 (2003).

⁸⁸ GOLDMAN, *supra* note 3, at 168.

⁸⁹ GETMAN, *supra* note 7, at 6.

⁹⁰ *Id.* at 7.

⁹¹ See Kenneth G. Dau-Schmidt, *Labor Law and Industrial Peace: A Comparative Analysis of the United States, the United Kingdom, Germany, and Japan under the Bargaining Model*, 8 TUL. J. INT’L & COMP. L. 117, 134, 136-37 (2000).

⁹² GETMAN, *supra* note 7, at 7. See also Befort, *supra* note 63, at 364-65.

⁹³ FREEMAN & MEDOFF, *supra* note 83, at 224.

⁹⁴ Donna Sockell, *The Future of Labor Law: A Mismatch Between Statutory Interpretation and Industrial Reality?*, 30 B.C. L. REV. 987, 995 (1989). In 1940, only 33% of the workforce was classified as managerial or professional. In 1985, the percentage of managerial and professional workers had grown to 55%. By comparison, the operatives, craftsmen, and laborers groups declined from nearly 40% in 1950 to 28% in 1985. *Id.* at 995-96.

The changing demographics of the workforce also contribute to the decline. Younger workers born after World War II are less likely to favor union representation.⁹⁵ Similarly, a significant number of women and minorities who traditionally have not supported unionization are entering the workforce. In 1980, only 18.9% of women were unionized compared to 31% of men.⁹⁶ Unionization has also suffered in the wake of corporate America's recent reliance on short-term employees, including contractors and part-time and casual employees, who have only modest attachment to the workplace.⁹⁷ Inadequate penalties and weak enforcement of many provisions of the NLRA have also contributed to the decline.⁹⁸ The provisions of the NLRA have been untouched since 1959 and, therefore, have not kept pace with the increasing importance of the global market.⁹⁹ Finally, the increasing cost of union organizing campaigns and the often strong employer resistance offer further explanation to the decline of collective bargaining in the United States.¹⁰⁰

ii. Addressing employee needs in the global economy

Despite the decline in collective bargaining, there is still a need for employees' collective voice. Public goods in the workplace, such as the quality of air, light, safety, and speed of the assembly line, must still be negotiated collectively to ensure efficiency in their production.¹⁰¹ Another reason for supporting collective action is to provide the employees with extra legal protection from termination. The risk still exists today that an individual at-will employee could be terminated for expressing his or her true workplace preferences to the employer.¹⁰²

Companies can also benefit from the collective voice of employees with improvements in quality, safety, production, and work environment. Because employees are on the front lines, they are often best-suited to provide management with unique insight into the overall operation.¹⁰³ Over the last two decades, a growing number of companies have implemented programs that allow employees to directly participate in the operation of the business.¹⁰⁴ These "employee involvement plans," including the often used "quality circles," traditionally involve smaller groups of employees and often management. The EIPs encourage employers and employees to rid themselves of the traditional adversarial relationship and instead adopt one that is more cooperative, providing benefits to all parties.¹⁰⁵ Often, EIPs tackle workplace issues and develop plans to improve safety, output, quality, and the like. Some of the groups also specifically address the needs of the workers and the work environment.¹⁰⁶ A few businesses have even given some employee groups significant responsibility and autonomy and have empowered them to decide on their own "issues such as how and when work is to be done, who will become members of the team through hiring or transfer, when and from whom parts and materials will be obtained, and which team members performed well enough to merit bonuses or selection for team leader roles."¹⁰⁷

There are significant challenges when implementing EIPs in the United States. Although several court decisions have upheld the use of EIPs,¹⁰⁸ such arrangements can be found to be unlawful domination and assistance or "company unions" in violation of NLRA Section

⁹⁵ Samuel Estreicher, *The Dunlap Report and the Future of Labor Law Reform*, 12 LAB. LAW. 117, 118 (1996).

⁹⁶ Befort, *supra* note 63, at 365-66. Although in 2003 a greater percentage of men than women were unionized, the gap between unionization of men and women has decreased significantly from 1980. U.S. Dep't of Labor, *supra* note 63, at 2, 4.

⁹⁷ Befort, *supra* note 63, at 367-68.

⁹⁸ *Id.* at 371-72.

⁹⁹ Estreicher, *supra* note 95, 118.

¹⁰⁰ FREEMAN & MEDOFF, *supra* note 83, 228-39.

¹⁰¹ Dau-Schmidt, *supra* note 62, at 21 (citing FREEMAN & MEDOFF, *supra* note 83, at 8-9).

¹⁰² FREEMAN & MEDOFF, *supra* note 83, at 9.

¹⁰³ Dau-Schmidt, *supra* note 62, at 21.

¹⁰⁴ WEILER, *supra* note 23, at 191.

¹⁰⁵ *Id.* at 192.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Sockell, *supra* note 94, at 1004.

8(a)(2).¹⁰⁹ Commentators argue that some flexibility must be instilled into the labor laws, especially NLRA Section 8(a)(2),¹¹⁰ to allow American companies to more quickly respond to changes in the global market. Numerous scholars have argued that Section 8(a)(2) should either be repealed or amended to allow for employer-sponsored EIPs.¹¹¹ Additionally, other commentators have argued that the entire NLRA requires a complete overhaul.¹¹² Inflexible provisions imposed upon management that prohibit it from effectively competing in the global economy should be either eliminated or amended.¹¹³ Furthermore, there has been considerable criticism about the declining effectiveness of remedies for unfair labor practices.¹¹⁴ The remedies are often too low to effectively dissuade employers from violating the NLRA.¹¹⁵ Accordingly, to ensure that the union is properly balanced with the employer, penalties for violation of the NLRA must be increased to deter parties from committing unfair labor practices.¹¹⁶

Scholars have proposed various alternatives that would revive the collective bargaining process and ensure that the much needed employees' collective voice is heard in the workplace. These alternatives include Matthew Finkin's proposed system of "minority representation" allowing for unions to represent a "significant minority of the employees,"¹¹⁷ Michael Harper's "two-tiered system" which gives unions either full representation through traditional elections or limited representation acquired through "an abbreviated employee-selection procedure without employer input or resistance,"¹¹⁸ Michael Gottesman's proposed solution of empowering individual employees with the same rights that they would traditionally receive through collective bargaining such as protection from employer reprisal,¹¹⁹ and finally, Paul Weiler's proposal of the government-mandated "Employee Participation Committees," modeled on the "West German *Betriebsrat*, or Works Council," which gather information and consult with the employer on certain issues.¹²⁰ Without significant effort to rejuvenate the opportunities for expression of collective voice in the American work place, it appears that this method of addressing the interests of workers will continue to stagnate, and perhaps suffer further decline in the United States.

IV. INDIVIDUAL STATUTORY RIGHTS

A. OVERVIEW

Individual employment demands in the United States are also addressed through statutory

¹⁰⁹ See Estreicher, *supra* note 95, at 121-22 (citing *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994); *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893 (1993)).

¹¹⁰ See WEILER, *supra* note 23, at 192-93, 201.

¹¹¹ Dau-Schmidt, *supra* note 62, at 22. See also Sockell, *supra* note 94, at 1002-07; Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125 (1994); Bruce E. Kaufman, *Does the NLRA Constrain Employee Involvement and Participation Programs in Nonunion Companies?: A Reassessment*, 17 YALE L. & POL'Y REV. 729 (1999).

¹¹² The text of the NLRA has remained practically the same since 1959 and much of it is "open-textured, and susceptible of a range of interpretations." Estlund, *supra* note 86, at 1535.

¹¹³ WEILER, *supra* note 23, at 187-88. Current "American-style unionism" closely regulates the operation of the business which inhibits management's ability to "respond to changes in its environment—either in its product market, its technology, or its work force and their sentiments." *Id.* at 188. Often, collective bargaining agreements can run up to 500 pages (whereas many 1930s agreements were only one page in length) and some even give unions the power to regulate business inside the firm. *Id.*

¹¹⁴ Sockell, *supra* note 94, at 1013.

¹¹⁵ See Dau-Schmidt, *supra* note 62, at 22; Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 506-09 (1992). The NLRB may only award remedies and may not punish. *Id.* at 506.

¹¹⁶ Dau-Schmidt, *supra* note 115, at 508.

¹¹⁷ Dau-Schmidt, *supra* note 62, at 22-23 (citing Matthew W. Finkin, *The Road Not Taken: Some Thoughts on NonMajority Employee Representation*, 69 CHI.-KENT L. REV. 195 (1993)).

¹¹⁸ *Id.* at 23 (citing Michael C. Harper, *A Framework for the Rejuvenation of the American Labor Movement*, 76 IND. L. J. 103, 124-28 (2001)).

¹¹⁹ *Id.* (citing Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 71-85 (1993)).

¹²⁰ *Id.* (citing WEILER, *supra* note 23, at 284-97).

regulation. Individual state and federal statutory rights in the employment relationship have enjoyed a boom in the face of the decline of collective bargaining in the United States. Although many important federal statutes have their origins in the first half of the twentieth century, including workers' compensation statutes,¹²¹ the Fair Labor Standards Act (FLSA) of 1938, and the Social Security Act of 1935, it was during the Civil Rights era of the 1960s that federal legislation protecting individuals exploded. Legislation has been enacted to discourage discrimination (Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act of 1967, and Equal Pay Act of 1963), promote worker health and safety (OSHA, 1970), regulate employee pensions and benefits (ERISA, 1974), provide notice of plant closing and major layoffs (WARN, 1988), provide protection from lie detector testing (EPPA, 1988), provide job protection for whistle blowers, provide job protection during family and medical leaves (FMLA, 1993), remove barriers in the workplace for workers with disabilities (ADA, 1990), provide protection to employees whose wages have been garnished (Title III of the Consumer Protection Act of 1970), and provide protection for workers who have filed for bankruptcy (Bankruptcy Reform Act §525). In part this rise in reliance on protective legislation has occurred because of the decline of unionization in the United States, but also because reliance on individual rights rather than collective action fits the reliance of both the American people and our judicial system on individualism.¹²² Furthermore, the reliance on protective legislation can be attributed to changes in the global economy that have led to greater bargaining inequality between employees and employers. With the imbalance growing and the often "harsh" enforcement of the at-will doctrine, these new government regulations help to address the most egregious treatment of individual workers by their employers.¹²³

B. STATUTORY SCHEME AND PROTECTIONS AFFORDED

As discussed above, American employers are subject to various state and federal statutory constraints. This section describes the most important of these statutes.

i. Anti-discrimination statutes

Title VII of the Civil Rights Act of 1964¹²⁴ prohibits employers and governments from discriminating against any employee or applicant on the basis of race, religion, national origin, or sex. Title VII also prohibits a company from employing facially neutral practices that have a disproportionate effect on one of the protected classes unless the company can provide a compelling business interest.¹²⁵ All Title VII suits are brought forth by the Equal Employment Opportunity Commission.¹²⁶ Three other statutes also prohibit discrimination by employers and are enforced by the EEOC.¹²⁷ The Age Discrimination in Employment Act of 1967 prohibits employers from discriminating against employees or applicants over the age of forty on the basis of age;¹²⁸ the Equal Pay Act of 1963 protects both men and women covered under the FLSA and prohibits pay differentials based on sex;¹²⁹ and the American with Disabilities Act of 1990 prohibits employers from discriminating against disabled employees or applicants who are capable of performing the job with or without reasonable accommodation.¹³⁰ A final anti-

¹²¹ In 1908, Congress enacted a workers' compensation law covering some government workers. FINKIN, *supra* note 4, at 616. All states adopted workers' compensation legislation between 1911 and 1948. *Id.* at 617 (citing E. BERKOWITZ & M. BERKOWITZ, CHALLENGES TO WORKERS' COMPENSATION: AN HISTORICAL ANALYSIS IN WORKERS' COMPENSATION BENEFITS 158-60 (Worrall & Appel eds., 1985)).

¹²² See Befort, *supra* note 63, at 376-77. "Unionization...is a matter of collective action. The dominant American self-image, in contrast, is squarely grounded in the cult of the individual." *Id.* at 377.

¹²³ *Id.* at 384.

¹²⁴ 42 U.S.C. §§ 2000e-1-17 (2003).

¹²⁵ Befort, *supra* note 63, at 379 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971)).

¹²⁶ GOLDMAN, *supra* note 3, at 150.

¹²⁷ See Equal Employment Opportunity Commission, Discriminatory Practices, *available at* http://www.eeoc.gov/abouteeo/overview_practices.html (last modified Aug. 13, 2003).

¹²⁸ 29 U.S.C. §§ 621-634 (2003). See also Befort, *supra* note 63, at 379.

¹²⁹ 29 U.S.C. §§ 206(d) (2003). See also GOLDMAN, *supra* note 3, at 153.

¹³⁰ 42 U.S.C. §§ 12101-12213 (2003). See also Befort, *supra* note 63, at 379. Employers need not provide accommodation if it would create an undue hardship on the employer. *Id.*

discrimination statute, the Uniformed Services Employment and Reemployment Rights Act (1994), protects military reservists from workplace discrimination upon return from reserve or active duty.¹³¹

ii. Anti-retaliation and whistleblower statutes

State and federal whistleblower statutes prohibit employer retaliation against an employee who has reported a wrongdoing committed either by the company or a company officer.¹³² State whistleblower laws can vary significantly with regards to the amount of protection, the type of employee that is protected, and the remedy provided.¹³³ There are also numerous federal statutes providing protection to employees who report violations by their employers under these acts.¹³⁴ For instance, the major environmental acts, including the Clean Air Act,¹³⁵ OSHA,¹³⁶ and the Clean Water Act,¹³⁷ provide protection to whistleblowers. Government employees are protected from employer retaliation under the Federal Whistleblower Protection Act of 1989.¹³⁸ The anti-discrimination acts mentioned in the section above as well as other federal statutes, such as the FMLA, ERISA, FLSA, and the NLRA, also provide special protection for those employees who report employer violations of the acts.¹³⁹

The new Sarbanes-Oxley Act of 2002, enacted in the wake of recent accounting scandals in the United States, contains two provisions, one civil and one criminal, which prohibit an employer from retaliating against an employee of a publicly traded company for reporting “improper conduct regarding securities fraud and corruption” that could hurt innocent securities investors.¹⁴⁰ An effect of this Act is to provide uniform and consistent application throughout the United States because, as previously mentioned, state whistleblower legislation can vary among states. With the Sarbanes-Oxley Act, employees of a public company that operates in several states will be treated similarly, regardless of the state in which the employee works.¹⁴¹

iii. Statutes mandating workplace standards

Several federal statutes mandate minimum workplace standards. The Occupational Safety and Health Act (OSHA) requires an employer to maintain certain health and safety standards and provide a work environment that is free from dangerous hazards. Businesses are subject to government inspection under OSHA.¹⁴² The Employee Retirement Income Security Act (ERISA) regulates employee retirement and welfare benefit plans.¹⁴³ Although ERISA requires the employer to meet various provisions relating to pension plans, it does not compel an employer to provide health benefits nor does it regulate the content of any welfare benefits offered.¹⁴⁴ The Worker Adjustment and Retraining Notification Act (WARN)¹⁴⁵ compels employers with more than one-hundred full-time employees to give at least sixty days notice to employees who will be affected by either a plant closing or a massive layoff.¹⁴⁶ The Family and Medical Leave Act (FMLA)¹⁴⁷ requires larger employers to allow employees to take up to twelve weeks unpaid leave each year to care for a new child, one’s own serious illness, or a

¹³¹ 38 U.S.C. §§ 4301-4333 (2003).

¹³² GOLDMAN, *supra* note 3, at 73.

¹³³ FINKIN, *supra* note 4, at 186-87. Of the thirty-seven states that have whistleblower laws, twenty provide protection only for government employees while the remaining seventeen protect government and non government alike. GOLDMAN, *supra* note 3, at 74.

¹³⁴ PERRITT, *supra* note 19, at 113.

¹³⁵ 42 U.S.C. § 7622 (2003).

¹³⁶ 29 U.S.C. § 660(c) (2003).

¹³⁷ 33 U.S.C. § 1367 (2003).

¹³⁸ 5 U.S.C. §§ 1201-22 (2003).

¹³⁹ PERRITT, *supra* note 19, at 118-22.

¹⁴⁰ *Id.* at 101. See also 18 U.S.C. §§ 1514A, 1513(e) (2003).

¹⁴¹ PERRITT, *supra* note 19, at 101.

¹⁴² GOLDMAN, *supra* note 3, at 409.

¹⁴³ 29 U.S.C. §§ 1001-1461 (2003).

¹⁴⁴ Befort, *supra* note 63, at 380.

¹⁴⁵ 29 U.S.C. §§ 2101-2109 (2003).

¹⁴⁶ Befort, *supra* note 63, at 380.

¹⁴⁷ 29 U.S.C. §§ 2601-2654 (2003).

family member with a serious medical condition.¹⁴⁸ Finally, state workers' compensation statutes require employers to cover the cost of medical treatment and rehabilitation for employees injured on the job, regardless as to fault of injury. Employers are also compelled to provide some monetary relief for lost wages.¹⁴⁹ Employers are generally prohibited from retaliating against employees who file workers' compensation claims.¹⁵⁰

C. CURRENT ISSUES AND RECOMMENDATIONS

A serious problem facing the United States, and for that matter all countries in the global market, will be whether a nation-state can maintain a system of substantial individual worker rights in the face of international competition. Where countries regulate an employer to the point where the costs to the employer are significant, the employer will relocate to a country with fewer regulations.¹⁵¹ In the race for global market domination, countries have incentive to minimize regulation of employers resulting in a "race to the bottom."¹⁵²

There are four strategies, each with advantages and disadvantages, which nations can adopt to avoid the "race to the bottom" and maintain adequate regulatory protection.¹⁵³ Countries can establish treaties with trading partners establishing regulatory criteria that will preempt national law.¹⁵⁴ While this solution would give workers the same rights across a range of countries, reaching a consensus on adequate standards¹⁵⁵ and enforcement mechanisms would be problematic. The second method elaborates upon the first by negotiating treaties with trading partners that establish minimum standards but permit states to gradually implement the treaty requirements within a specific time period.¹⁵⁶ This method provides additional flexibility to countries by allowing them more time and latitude to develop and implement low-cost regulatory solutions that meet the specific need of their people.

The third alternative is to trade only with countries that have similar, and acceptable, regulatory systems. Stronger trading countries with more stringent regulatory standards might be able to "encourage" others to increase their regulatory standards.¹⁵⁷ Unfortunately, monitoring the enforcement of these labor standards in foreign countries will be difficult.¹⁵⁸ Finally, a country may choose to apply its regulatory employment statutes extraterritorially.¹⁵⁹ While traditionally American laws have not applied outside the United States, there have been some recent examples in commercial law where American laws have been applied abroad.¹⁶⁰ Congress has also shown some recent inclinations towards extending the application of the NLRA, ADEA, and Title VII to American corporations employing United States workers overseas.¹⁶¹

The changing face of the American worker has also created problems for the regulatory regime. As previously discussed, American companies have replaced many full-time workers with part-time, casual, and temporary employees and contractors. Because many of these employees are not as connected to their employers, they are unlikely to have the same length of service as full-time employees. Unfortunately, these employees are unable to take advantage of many of the regulatory statutes.¹⁶² A few statutes, such as the FMLA and ERISA, require

¹⁴⁸ GOLDMAN, *supra* note 3, at 121.

¹⁴⁹ *Id.* at 41.

¹⁵⁰ *Id.* at 73.

¹⁵¹ Dau-Schmidt, *supra* note 62, at 25.

¹⁵² *Id.* at 25 (citing Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 988-89 (1995)).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 26.

¹⁵⁶ *Id.* (citing Van Wezel Stone, *supra* note 153, at 1001).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 27.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* (citing Van Wezel Stone, *supra* note 153, at 1018).

¹⁶² Befort, *supra* note 63, at 416.

employees to work for a specific length of time before certain benefits may accrue. Some statutes only apply to employees who work a minimum number of hours per year, while others apply only to employers over a certain size. Furthermore this type of “contingent employee” might fall outside the legal definition of “employee” in various statutes.¹⁶³

One means of extending regulatory protection to contingent employees would be to change the relevant statutory definitions of who is a covered “employee.” For example, employment laws in Canada, Sweden, Germany, and the Netherlands have recognized a category of worker that falls between employee and independent contractor.¹⁶⁴ These “dependent contractors,” while not legally employees, occasionally receive “employee-like legal protections by virtue of working in positions of economic dependence.”¹⁶⁵ While these countries do not extend all protections to “dependent contractors,” they do extend those where “basic societal interests are at stake,” such as statutes relating to health, safety and discrimination.¹⁶⁶ Another solution that has been proposed to extend regulatory benefits to contingent workers is to allow contingent workers to accrue periods of service across several employers in order to meet the statutory requirements.¹⁶⁷ Of course, the cost of the benefits provided would have to be prorated and allocated among the various employers.¹⁶⁸

V. CONCLUSION

There has been a significant amount of change in the American labor market since the 1950s when collective bargaining was at its peak. In 2004, the employment-at-will doctrine is still strong, albeit with a growing number of exceptions. Moreover, the enactment of individual statutory protections has exploded, at the expense of collective bargaining. Congress seems to have all but given up on collective bargaining and has focused instead on expanding individual statutory rights.¹⁶⁹ But, Congress must not rest. As the global economy continues to force companies to change their business practices, the laws must adapt as well. A form of collective action is still essential to meet the needs of many workers. United States labor laws must be reformed to address both the modern worker’s requirements and the changing corporate environment. The relationship must change so that it is less adversarial and instead, more cooperative in providing needed benefits to both the employer and the employee.¹⁷⁰

Even with significant reform of our laws governing the process of collective bargaining, it seems unlikely that unions will ever represent even a majority of American workers. Therefore, Congress must find solutions that will provide greater individual protections to the employees while being mindful of the effects these will have on American companies in the global market. Congress should also be attentive to the effect an increase in individual protections will have on the judicial system.¹⁷¹ A move towards labor-specific courts or alternative dispute resolutions (ADRs) for labor and employment cases would relieve much of the pressure on federal and state courts and would provide for quicker, cheaper, and more consistent adjudication of claims. United States labor and employment laws must be given new flexibility to protect both employees and employers in the twenty-first century.

¹⁶³ *Id.* at 416-17.

¹⁶⁴ *Id.* at 454-55.

¹⁶⁵ *Id.* at 454.

¹⁶⁶ *Id.* at 455.

¹⁶⁷ *Id.* at 458-59.

¹⁶⁸ *Id.* at 459.

¹⁶⁹ William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 *BERKELEY J. EMP. & LAB. L.* 259, 272 (2002).

¹⁷⁰ WEILER, *supra* note 23, at 192.

¹⁷¹ Corbett, *supra* note 170, at 274.

The Framework of Australian Labour Law and Recent Trends in ‘Deregulation’

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I. INTRODUCTION

For most of the twentieth century, the Australian labour law framework centred on the compulsory conciliation and arbitration system. At the heart of this system was an independent industrial tribunal which possessed compulsory powers over industrial disputes including the power to issue binding determinations described as awards. Two other fundamental characteristics of this system were the integration of trade unions into the system and severe restrictions on industrial action.¹

Amid the economic difficulties of the 1980s, a strong coalition of political forces emerged advocating, in various ways, the ‘deregulation’ of Australian labour law.² Under the auspices of the Australian Labor Party federal government (‘ALP government’), such pressure bore fruit with a significant reduction of the role of the compulsory conciliation and arbitration system. In 1996, the Liberal-National Party Coalition federal government (‘the Coalition government’) was elected to office proposing further ‘deregulation’ of Australian labour law.

This paper has two key aims. First, it sets out the present framework of Australian labour law. Moreover, it canvasses recent trends in the ‘deregulation’ of Australian labour law.

II. FRAMEWORK OF AUSTRALIAN LABOUR LAW

The framework of Australian labour law comprises:

- the constitutional context;
- the federal award system;
- statutory agreements;
- legislative minimum conditions; and
- common law contracts of employment.

These various sources of labour regulation will be discussed in turn.

A. Constitutional context

In Australia, the provisions of the federal Constitution do not directly prescribe working conditions. Being primarily concerned with a division of legislative powers between the federal and State Parliaments, the Constitution’s importance in the realm of labour regulation is in providing the federal Parliament with the power to make laws relating to labour conditions.

Even then, only one of the heads of power is explicitly concerned with labour regulation, namely, the power to provide for ‘(c)onciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.’³ Far from being a general power to regulate labour conditions, this power is confined in significant respects. Its use must involve a particular process, conciliation and arbitration. Moreover, this process must be

¹ Richard Mitchell, ‘Juridification and Labour Law: A Legal Response to the Flexibility Debate in Australia’ (1998) 14 *International Journal of Comparative Labour Law and Industrial Relations* 113, 116.

² Australian Centre for Industrial Relations Research and Training (‘ACIRRT’), *Australia at Work: Just Managing?* (1999) Chapter 2.

³ *Commonwealth of Australia Constitution Act 1900* s 51(35). For a review of the power and the federal award system, see Breen Creighton, ‘One Hundred Years of the Conciliation and Arbitration Power: A Province Lost?’ (2000) 24(3) *Melbourne University Law Review* 839-865.

It should be noted that section 117 of the Constitution prohibits discrimination on the basis of a citizen’s residence in a particular State. This provision has had the effect of invalidating State occupational requirements which discriminated against out-of-State Australian citizens, see *Street v Queensland Bar Association* (1989) 168 CLR 461.

animated by a specific purpose, that is, the prevention and settlement of inter-state disputes.

Despite these confines, the conciliation and arbitration power is of historic significance. Its significance lies in the use of this power to support one of the mainstays of Australian labour regulation, the federal conciliation and arbitration system, more commonly known as the federal award system. At its height, the federal award system covered nearly a third of the Australian workforce.⁴ More importantly, this system, in exercising a deep influence on state award systems, functioned as a pacesetter for Australian labour regulation. Against this background, it is not surprising that one commentator has characterised the conciliation and arbitration power as the Constitution's promise of industrial citizenship.⁵

While the conciliation and arbitration power is the only head of power which is explicitly concerned with labour regulation, other heads of power have been relied upon in enacting industrial statutes. In particular, the constitutional powers to legislate with respect to '(f)oreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'⁶ ('corporations power') and with respect to '(e)xternal affairs' ('external affairs power') have become increasingly prominent.⁷ The corporations power, for example, is the constitutional basis for two streams of agreements provided under the *Workplace Relations Act 1996* (Cth) (*Workplace Relations Act*), the principal federal industrial statute.⁸ Meanwhile the external affairs power has been used primarily to enact international labour standards into domestic law. A key instance of such use is the implementation of the International Labour Organisation's Family Responsibilities Convention through the enactment of a statutory scheme of unpaid parental leave.⁹

B. Federal award system

The federal award system is presided over by an independent tribunal, the Australian Industrial Relations Commission ('AIRC').¹⁰ In essence, the AIRC conciliates and arbitrates industrial disputes within its jurisdiction. Such jurisdiction is defined by both constitutional and statutory provisions. For instance, the AIRC is empowered to act only with respect to 'industrial disputes'. The statutory definition of this phrase, while incorporating the constitutional limitations, further restricts it to disputes about 'matters pertaining to the relationship between employers and employees.'¹¹ In other words, the AIRC's jurisdiction is limited to persons in employment relationships.

Once the AIRC's jurisdiction is invoked, typically by virtue of the existence or possibility of an 'industrial dispute,' the AIRC is obliged to settle such disputes.¹² It initially attempts to do so through conciliation.¹³ If unsuccessful, it then proceeds to arbitration.¹⁴

The order made by the AIRC upon the completion of arbitration is known as an award. After being made, an award binds the parties to the industrial dispute with the force of subordinate

⁴ W. B. Creighton, W. J. Ford and R. J. Mitchell, *Labour Law: Text and Materials* (1993, 2nd ed) 698.

⁵ Ronald McCallum, 'Collective Labour Law, Citizenship and the Future' (1998) 22(1) *Melbourne University Law Review* 42, 58.

⁶ *Commonwealth of Australia Constitution Act 1900* s 51(20)

⁷ *Commonwealth of Australia Constitution Act 1900* s 51(29).

⁸ See generally Andrew Stewart, 'Federal Labour Law and New Uses for the Corporations Power' (2001) 14(2) *Australian Journal of Labour Law* 145-168.

⁹ *Workplace Relations Act* s 170KA and Schedule 14.

¹⁰ For further discussion on the compulsory conciliation and arbitration system as contained in the *Workplace Relations Act*, see Marilyn Pittard, 'Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements' (1997) 10 *Australian Journal of Labour Law* 62, 65-79.

¹¹ *Workplace Relations Act* s 4. There is a strong argument that Section 51(35) of the Australian Constitution allows the AIRC to conciliate and arbitrate with respect to disputes between employers and non-employees, for instance, between employers and independent contractors: Breen Creighton and Andrew Stewart, *Labour Law: An Introduction* (2000, 3rd ed) 80.

¹² *Workplace Relations Act* s 89.

¹³ *Ibid* ss 100 & 102.

¹⁴ *Ibid* s 104.

legislation.¹⁵ The effect of this is that the award will operate as a floor of minimum employment conditions as between the parties, typically the employer/s and the trade union/s. So, for example, if an employer contracts to hire a worker at a wage lower than the award rate, this contractual provision will be void because of illegality¹⁶ and the worker will have recourse to statutory avenues to recover award wages.¹⁷ As a floor, a federal award does not generally prevent the making of contracts providing for conditions superior to those contained in such awards or those dealing with matters not covered by the award.¹⁸

It should be noted that the *Workplace Relations Act* imposes restrictions upon the matters that can be included in an award.¹⁹ Generally, the subject matter of an award is restricted to twenty allowable award matters. These include rates of pay and leave entitlements.²⁰ Moreover, the AIRC must exercise its award-making power so that awards act as a 'safety net of fair minimum wages and conditions of employment.'²¹

Notwithstanding these content-restrictions, a typical award will still cover a wide range of employment conditions. For example, a key federal award, the Hospitality Industry award contains clauses dealing with classifications and wage rates, hours of work, leave entitlements and procedures to avoid industrial dispute.²²

Apart from these content-restrictions, the AIRC's power to make awards is subject to further limitations. Importantly, when parties are engaged in formal negotiations for an enterprise agreement under the Act, the AIRC, while able to employ its conciliation powers, is precluded from arbitrating on matters at issue.²³

Despite the various restrictions that presently apply to the federal award system, awards still remain an important source of labour regulation with 20.5% of the Australian workforce having the main part of their pay set by an award.²⁴

C. Statutory agreements

The various restrictions on the AIRC's award-making powers were deliberately imposed to encourage regulation by statutory agreements.²⁵ There are three types of such agreements: enterprise agreements preventing or settling industrial disputes ('industrial dispute' enterprise agreements); enterprise agreements involving corporations²⁶ ('corporations' enterprise agreements') and statutory individual agreements known as Australian Workplace Agreements ('AWAs').²⁷

These agreements can only be made in specific circumstances. These circumstances, firstly, reflect the constitutional bases of these agreements. The making of 'industrial dispute' enterprise agreements, as its name suggests, is contingent on the existence of an 'industrial

¹⁵ Ibid s 149.

¹⁶ *Kilminster v Sun Newspapers Ltd* (1931) 45 CLR 284.

¹⁷ *Workplace Relations Act* s 179.

¹⁸ This is unless the award states that no further agreements should be made.

¹⁹ Previously, the restrictions on the subject matter of an award were largely constitutional, see Creighton *et al*, above n 4, Chapters 14-8.

²⁰ *Workplace Relations Act* s 89A. It should be noted that the Act makes provision for the AIRC to include non-allowable award matters in 'exceptional matters' awards: *ibid* s 89A(7).

²¹ This is the combined effect of ss 3(d)(ii), 88A(b) & 88B(1) of the *Workplace Relations Act*.

²² Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998 [AW783479].

²³ *Workplace Relations Act* s 170N. Curiously, there is no equivalent prohibition with respect to formal negotiations for an AWA.

²⁴ Australian Bureau of Statistics, *Employee Earnings and Hours, Australia* (Cat. No. 6306.0, March 2003). It should be noted that this figure does not distinguish between state and federal awards.

²⁵ See *Workplace Relations Act* s 3(d)(i).

²⁶ Enterprise agreements are described as certified agreements in the Act.

²⁷ While AWAs can be collectively negotiated (s 170VE of the *Workplace Relations Act*), they are designed to be, and in reality are, individually completed. For a brief discussion of employers' choices of agreements under the Act, see Ron McCallum, 'Individuals and Agreement-Making: The Legal Options' in Australian Centre for Industrial Relations Research and Training (ACIRRT), *New Rights and Remedies for Individual Employees: Implications for Employers and Unions: 5th Annual Labour Law Conference Proceedings* (1997) 3, 6-7.

dispute.²⁸ On the other hand, the making of ‘corporations’ enterprise agreements and AWAs largely²⁹ depend on the employer being a constitutional corporation.³⁰

These agreements also differ on the level of the agreement and the necessity for trade union involvement. The first-two mentioned agreements are pitched at the enterprise level³¹ whereas AWAs exist at the level of an individual employee. It is only enterprise agreements settling industrial disputes which require trade union involvement. The other agreements allow but do not necessitate such involvement.

Some general observations can be made about these agreements. They are confined to employers and employees. Moreover, the *Workplace Relations Act* formalises the process of negotiating such agreements by laying down the required procedures for employees’ approval of the agreements³² and providing limited protection for industrial action including lock-outs.³³

The completion of an agreement by the parties does not immediately result in the agreement taking effect.³⁴ That occurs only when the agreement is certified or approved.³⁵ The central requirement for certification and approval is the ‘no- disadvantage’ test. This test is passed if the agreement does not, on the whole, compare unfavourably with the terms and conditions of the relevant award.³⁶ It is important to note that this test does *not* protect employees from statutory agreements which are less favourable than their *existing* conditions which could be governed by common law contracts, collective agreements *as well as* awards.

The body which certifies enterprise agreements is the AIRC³⁷ whereas the primary body in the approval of AWAs is the Employment Advocate. When the Employment Advocate has concerns whether the no-disadvantage test is satisfied by a proposed AWA, he or she is required to refer the proposed AWA to the AIRC for approval.³⁸

Once certified or approved, all the agreements will prevail over any award to the extent of any inconsistency.³⁹ Generally, an AWA prevails over any enterprise agreement which is made after the making of the AWA.⁴⁰ In other respects, these agreements have the force of awards.⁴¹

These agreements vary in terms of their importance as sources of labour regulation. AWAs

²⁸ *Workplace Relations Act* ss 170LN-LP. This requirement is to bring the agreements within Section 51(35) of the Australian Constitution.

²⁹ The *Workplace Relations Act* does rely upon other constitutional head of powers with respect to enterprise agreements involving corporations and AWAs, for instance, the head of power found in Section 51(1) with respect to ‘(t)rade and commerce with other countries, and among the States’. This is reflected in section 170VC(d)-(f) (AWAs).

³⁰ *Workplace Relations Act* s 170LI (enterprise agreements involving corporations) and s 170VC (AWAs). This brings the making of such agreements within the scope of Section 51(20) of the Commonwealth Constitution, the corporations power. Strictly speaking, Section 51(20) of the Commonwealth Constitution does not confer power on the Commonwealth legislature to regulate all corporations. It is only power with respect to ‘trading, financial and foreign corporations,’ see further W J Ford, ‘Reconstructing Australian Labour Law: A Constitutional Perspective’ (1997) 10(1) *Australian Journal of Labour Law* 20-30.

³¹ See *Workplace Relations Act* s 170LI (enterprise agreements involving corporations); s 170LO (‘industrial dispute’ enterprise agreements) and s 170VF (AWAs) of the Act.

³² Such procedures are most relevant to ‘industrial dispute’ enterprise agreements (ibid s 170LR) and enterprise agreements involving corporations (ibid s 170LJ-LK).

³³ See Division 8 of Part VIB (enterprise agreements) and Division of Part VID (AWAs) of the Act.

³⁴ For enterprise agreements, agreement by a valid majority of the employees to be covered by the agreement is sufficient to represent agreement on the employees’ side (ibid ss 170LJ(2); 170LK(1) & 170LR(1)). A ‘valid majority’ is usually a majority of the employees who cast a vote in the poll deciding whether to support a proposed enterprise agreement (ibid s 170LE).

³⁵ For a discussion of the certification process of these agreements, see Marilyn Pittard, ‘Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements’ (1997) 10 *Australian Journal of Labour Law* 62, 83-4 and Richard Naughton, ‘New Approaches in the Vetting of Agreements’ in ACIRRT, above n 27, 18-23.

³⁶ *Workplace Relations Act* s 170XA.

³⁷ Ibid ss 170LT-LW.

³⁸ Ibid s 170VPB.

³⁹ Ibid s 170LY (enterprise agreements) and § 170VQ(1) (AWAs).

⁴⁰ Ibid s 170VQ(6).

⁴¹ *Workplace Relations Act* ss 170M-MA (enterprise agreements) and 170VT(1) (AWAs).

are relatively unimportant with only 1.4% of all employees are covered by AWAs.⁴² 36.1% of the Australian workforce, however, have the main part of their pay set by registered collective agreements.⁴³

D. Legislative minimum conditions

Unlike federal awards, legislative minimum conditions are generally non-derogable with no provision for either an employer or a worker to contract or opt out of such regulation. The relative strictness of such regulation is due in no small part to the fact that federal labour legislation is sparse in terms of minimum working conditions.

This is apparent from a brief survey of the provisions of the *Workplace Relations Act*. The key minimum conditions under this Act are:

- entitlement to unpaid parental leave;
- protection against unfair and unlawful dismissals; and
- provisions promoting freedom of association.

Under this Act, workers are entitled to 12 months of unpaid parental leave if they meet various conditions of eligibility. There are two key conditions. First, a worker must be an employee who is neither a casual nor seasonal employee. Second, the worker must have had 12 months' of continuous service with her or his employer.⁴⁴

The Act also provides for some protection with respect to termination of employment at the initiative of the employer.⁴⁵ Such protection can be broadly divided into two categories: the right to remedies in relation to unfair dismissals and, secondly, unlawful dismissals.⁴⁶

With respect to the former, the Act generally confers rights on certain categories of employees to apply to the AIRC and/or a court for compensation and other orders⁴⁷ on the ground that his or her termination of employment was 'harsh, unjust or unreasonable.'⁴⁸

The unlawful dismissal provisions differ in form from those relating to unfair dismissals in that they are cast in terms of prohibitions; infringement of which would give rise to unlawfulness as well as remedies on the part of the aggrieved party. The most significant of these statutory provisions is that proscribing an employer from terminating the employment of an employee for a prohibited reason.⁴⁹ Prohibited reasons include the employee's trade union membership, race, sex, sexual preference and disability.⁵⁰ Another proscription prevents an employer from terminating the employment of an employee in breach of AIRC orders which give effect to Articles 12 and 13 of the Termination of Employment Convention.⁵¹

Not all employees have a right to seek a remedy in relation to unfair and unlawful

⁴² Mark Wooden, *Industrial Relations Reform in Australia: Causes, Consequences and Prospects*, Inaugural Lecture, Melbourne Institute of Applied Economic and Social Research, University of Melbourne, 14 August 2000 as cited in Anthony Forsyth, *Re-regulatory Tendencies in Australian and New Zealand Labour Law* (2001) 7.

⁴³ Australian Bureau of Statistics, *Employee Earnings and Hours, Australia* (Cat. No. 6306.0, March 2003). It should be noted that this figure does not distinguish between registered collective agreements made under federal or state statutes.

⁴⁴ *Workplace Relations Act* Schedule 14.

⁴⁵ While the Act typically uses the phrase 'termination of employment,' it is defined to mean termination of employment at the initiative of the employer: *ibid* s 170CD(1). This has been held to occur when an employer's action results directly or consequentially in the termination of employment: *Pawel v. AIRC* (1999) 94 FCR 231, 237-8 (adopting *Mohazab v. Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200 with respect to the *Workplace Relations Act*. For a discussion of these entitlements, see Anna Chapman, 'Termination of Employment Under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 89 and Creighton and Stewart, above n 9, 313-20, 324-29.

⁴⁶ For use of a similar distinction between harsh, unjust or unreasonable dismissals and unlawful terminations, see Chapman, above n 45, 91.

⁴⁷ The regime governing the enforcement of these rights is complex and will not be discussed in this article. For discussions of this issue, see *ibid* 104-11.

⁴⁸ *Workplace Relations Act* Subdivision B, Division 3 of Part VIA.

⁴⁹ *Ibid* Subdivision C, Division 3 of Part VIA.

⁵⁰ *Ibid* s 170CK(2).

⁵¹ *Ibid* s 170CN.

dismissals.⁵² Moreover, access to the unfair and unlawful dismissal provisions differ. Subject to restrictions imposed by regulations discussed below, the classes of employees which can access unfair dismissal provisions are limited to:

- Commonwealth public sector employees;
- Territory employees;
- employees employed by constitutional corporations;⁵³
- employees who are engaged in interstate transport industries and are covered by an award, enterprise agreement or AWA; and
- employees who have applied to the AIRC with respect to unlawful terminations.⁵⁴

In contrast with the provisions relating to unfair dismissals, all employees have access to the unlawful dismissal provisions.⁵⁵ This again is subject to restrictions on access imposed by regulations.

The *Workplace Relations Regulations*⁵⁶ exclude certain classes of employees from accessing both the unfair and unlawful dismissal provisions. The excluded classes include employees:

- engaged on fixed-term contracts;⁵⁷
- engaged on task-based contracts;
- engaged on a casual basis for a short period;⁵⁸ as well as
- not covered by an award, enterprise agreement or AWA whose remuneration is more than \$71,200 per year.⁵⁹

The third set of minimum conditions provided by the *Workplace Relations Act* is contained in Part XA which is headed 'Freedom of Association.'⁶⁰ This Part essentially makes it an offence for employers, employees and trades unions to engage in various conduct, described as 'prohibited conduct,' for 'prohibited reasons.' For instance, it is an offence for employers to refuse to employ or otherwise prejudice workers, whether they be employees or independent contractors, on the ground of them failing to be members of a trade union.⁶¹ This Part also makes it illegal for an employer to induce employees or independent contractors to cease being officers or members of a trade union.⁶²

Apart from the minimum working conditions prescribed by the *Workplace Relations Act*, the other set of legislative minimum conditions worthy of mention are those contained in federal anti-discrimination statutes.⁶³ These statutes apply generally to both employees and independent

⁵² The unfair and unlawful dismissal provisions are confined to the termination of employment of an 'employee.' It is usually believed that the meaning of 'employee' in this context is identical to the common law meaning of 'employee,' see, for instance, Creighton and Stewart, above n 11, 313-8. The Full Federal Court has, however, recently interpreted the term 'employee' in equivalent provisions of the *Industrial Relations Act 1988* (Cth) as being broader than the common law meaning of the term: *Konrad v Victoria Police* (1999) 165 ALR 23, 51-2 per Finkelstein J (with whom Ryan and North JJ agreed on this point).

⁵³ The restriction of coverage to those employed by corporations results from the use of the corporations power, s 51(20) of the Australian Constitution, to support the unfair dismissal provisions. For a detailed discussion of this issue, see Ford, above n 30, 24.

⁵⁴ *Workplace Relations Act* ss 170CB(1), (2).

⁵⁵ *Ibid* s 170CB(3).

⁵⁶ *Ibid* s 170CC.

⁵⁷ See, generally, Russell Blackford, 'Unfair Dismissal Law and the Termination of Contracts for Specified Periods' (1999) 12 *Australian Journal of Labour Law* 217.

⁵⁸ *Workplace Relations Regulations* (Cth) reg 30B. This regulation also defines being engaged 'for a short period.'

⁵⁹ This figure applies only in relation to the 2000/2001 financial year. The applicable figure is adjusted annually according to changes in average weekly earnings: *ibid* regs 30BB & 30BF.

⁶⁰ See generally Richard Naughton, 'Sailing into Uncharted Seas: The Role of Unions Under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 112.

⁶¹ *Workplace Relations Act* s 298K(1).

⁶² *Ibid* s 298M.

⁶³ *Racial Discrimination Act 1975* (Cth) (covers race, colour, descent, national or ethnic origin); *Sex Discrimination Act 1984* (Cth) (covers sex, marital status, pregnancy or potential pregnancy, dismissal on the ground of family responsibilities); *Human Rights and Equal Opportunity Commission 1986* (Cth) (provides for conciliation in relation to a list of grounds: age, medical record, criminal record, impairment and disability, marital status, nationality, sexual preference, trade union activity); *Disability Discrimination Act 1992* (Cth) (covers disability).

contractors.⁶⁴ The grounds covered under the different statutory schemes include race, ethnicity, national origin, sex, marital status, family responsibilities, disability, sexual preference, age and trade union activity. The concept of discrimination is defined in the Australian legislation as including a concept of direct discrimination (disparate treatment) and indirect discrimination (disparate impact).⁶⁵

These statutes contain a number of exemptions to the prohibition on direct and indirect discrimination. Where an exemption is applicable, it takes effect to exonerate otherwise unlawful discriminatory behaviour. The range and scope of exemptions differs from Act to Act. The provisions containing exemptions are numerous and include:

- unjustifiable hardship in relation to claims of discrimination on the ground of disability;
- steps taken in order to comply with other legislation; and
- the religious practices of religious bodies.⁶⁶

In addition to the provisions relating to direct and indirect discrimination, the *Sex Discrimination Act 1984* (Cth) prohibits sexual harassment in workplaces. Sexual harassment is defined in the legislation in terms of an unwelcome sexual advance or request for sexual favours, or other unwelcome conduct of a sexual nature, that a reasonable person would anticipate, in those circumstances, would offend, humiliate or intimidate the person harassed.⁶⁷ The exemptions noted in the previous paragraphs are not applicable in relation to issues of sexual harassment in workplaces.

E. Common law contracts of employment

These contracts are a long-standing type of individual agreements that were not displaced by the federal award system. Indeed, it formed the ‘cornerstone of the system.’⁶⁸ It was so in two ways. The contract of employment ‘triggered’ the system.⁶⁹ Put simply, such a contract was required before the award system and other sources of labour regulation came into play.⁷⁰

More important for this paper is the second way in which these contracts figured in Australian labour regulation. They determined working conditions through their terms. Such terms can be expressly agreed upon by the parties. Importantly, these contracts also contained standardised terms implied by the courts. Some of these terms confer significant power on the employer. For instance, every employee is under an implied duty to obey the lawful and reasonable orders of his or her employer.⁷¹ Others impose obligations on the employer like the duty of an employer to exercise reasonable care in providing a safe working environment.⁷²

⁶⁴ The definitions of employment in most of the statutes are defined to include a ‘contract for services.’ This phrase means a non-employee type relationship. See, for example, *Racial Discrimination Act 1975* (Cth) s 3(2) definition of employment; *Sex Discrimination Act 1984* (Cth) s 4(1) definition of employment; *Human Rights and Equal Opportunity Commission Act 1986* (Cth) 3(1) definition of discrimination; *Disability Discrimination Act 1992* (Cth) s 4(1) definition of employment.

⁶⁵ Direct discrimination is based on a model of equality that aims for equal (same) treatment. Direct discrimination is defined to mean less favourable treatment on the grounds of an attribute. Indirect discrimination arises where a requirement, practice or policy that exists in a workplace has the effect of substantially disadvantaging a group of employees identified by a protected ground in circumstances in which it is not reasonable to impose the requirement. Indirect discrimination provides a framework from which to challenge dominant norms in workplaces where it can be shown that they substantially disadvantage a segment of the workforce. This model is based on an ideal of substantive equality. See generally Rosemary Hunter, *Indirect Discrimination in the Workplace* (1992) 3-8.

⁶⁶ See generally, Chris Ronalds, *Discrimination Law and Practice* (1998) Chapter 11.

⁶⁷ See for example, *Sex Discrimination Act 1984* s 28A.

⁶⁸ Breen Creighton and Richard Mitchell, ‘The Contract of Employment in Australian Labour Law’ in Lammy Betten (ed), *The Employment Contract in Transforming Labour Relations* (1995) 129, 136.

⁶⁹ Breen Creighton, ‘Reforming the Contract of Employment’ in Andrew Frazer, Ron McCallum and Paul Ronfeldt (eds), *Individual Contracts and Workplace Relations* (1998) 77, 81.

⁷⁰ For more detailed discussion of how the contract of employment forms the touchstone of Australian labour law, see Joo-Cheong Tham, *The Scope of Australian Labour Law and the Regulatory Challenges posed by Self and Casual Employment*, paper presented to the Japan Institute for Labour Policy and Training’s International Seminar on Comparative Labour Law, 9-10 March 2004.

⁷¹ *R v Darling Island Stevedore & Lighterage Co Ltd; Ex parte Halliday and Sullivan* (1938) 60 CLR 601, 621-2.

⁷² See, for example, *Wright v TNT Management Pty Ltd* (1989) 85 ALR 442, 449-50.

Because the contract of employment is the touchstone of Australian labour regulation, such contracts will *necessarily* co-exist with other forms of labour regulation. In this, a worker must generally be an employee before s/he can be covered by a federal award or statutory agreement.⁷³

The presence of other forms of labour regulation does not preclude the contract of employment supplying terms of the working arrangement. For instance, such a contract can provide for conditions superior to those found in the award or statutory agreement so long as the latter does not explicitly prohibit the provision of more generous conditions. Further, the implied terms of the contract of employment still perform an important role. It is settled that such terms remain in force unless expressly circumscribed or ousted. For instance, an award that regulates the exercise of managerial prerogative in certain areas still leaves intact the implied duty of an employee to obey the lawful and reasonable orders of the employer in unregulated areas. In the event of inconsistency between the terms of the contract and the award or the statutory agreement/s, however, the latter prevails to the extent of the inconsistency.

Lastly, it should be noted that contracts of employment are *increasingly* important as a source of labour regulation in terms of its coverage of workers.⁷⁴ Wooden has argued that the proportion of non-managerial employees whose working conditions are determined by individual agreements has increased from 12% in 1995 to 15% in 1998.⁷⁵ According to the same commentator, the overwhelming majority of such agreements in 1998 were common law contracts of employment.⁷⁶

The increasing importance of contracts of employment is hardly a benign development for workers. First, the law of contract presumes parties to be bargaining on an equal footing. It is this presumption which leads to a significant degree of agnosticism concerning the substantive fairness of the terms of the contract of employment.⁷⁷ Such equality, however, is usually chimerical in the labour market where the worker bargains with the employer which is more often than not a corporation. As Higgins J, the second President of the Conciliation and Arbitration Court, put it, 'the power of the employer to withhold bread is a much more effective weapon than the power of the employee to refuse to labour.'⁷⁸ In the context of the labour market, the formal equality presumed by the contract of employment paves the way for unequal terms.

At the same time, the contract of employment is also a direct source of unequal terms. So much so that one commentator has questioned whether the contract of employment is, in substance, a contract.⁷⁹ As noted above, this type of contract contains standardised terms implied by the courts. The point to be made is that these implied terms arm employers with significant managerial prerogative largely through the implied duty of obedience which applies to employees.⁸⁰

⁷³ For a more detailed discussion, see Tham, above n 70.

⁷⁴ These contracts are also increasingly important in terms of their effect on working conditions, see text below n 95.

⁷⁵ Mark Wooden, *The Transformation of Australian Industrial Relations* (2000) 76. See Stephen Deery and Janet Walsh, 'The Character of Individualised Employment Arrangements in Australia: A Model of "Hard" HRM' in Stephen Deery and Richard Mitchell (eds), *Employment Relations: Individualisation and Union Exclusion: An International Study* (1999) 115-29; Amanda Roan, Tom Bramble and George Lafferty, 'Australian Workplace Agreements in Practice: The 'Hard' and 'Soft' Dimensions' (2001) 43(4) *Journal of Industrial Relations* 387-401 and Richard Mitchell and Joel Fetter, 'Human Resource Management and Individualisation in Australian Labour Law' (2003) 45(3) *Journal of Industrial Relations* 292-325 for characteristics of such agreements.

⁷⁶ Wooden, above n 75, 88.

⁷⁷ see Barry Leon, Barry Reiter and Cheryl Waldrum, 'Fairness Issues in Employment Contracts' (1993) 6 *Journal of Contract Law* 191.

⁷⁸ *Federated Engine-Drivers and Firemen's Association of Australia v Broken Hill Proprietary Company Limited* (1911) 5 CAR 9, 27.

⁷⁹ I.T.Smith, 'Is Employment Properly Analysed in terms of a Contract?' (1975) 6 *New Zealand Universities Law Review* 341.

⁸⁰ *R v Darling Island Stevedore & Lighterage Co Ltd; Ex parte Halliday and Sullivan* (1938) 60 CLR 601, 621-2.

III. RECENT TRENDS IN THE ‘DEREGULATION’ OF AUSTRALIAN LABOUR LAW

As noted above, the Coalition government was elected to office proposing further ‘deregulation’ of Australian labour law. The key legislative vehicle for its platform has been the *Workplace Relations Act*. This part will canvass the ‘deregulatory’ changes ushered in by the *Workplace Relations Act*.⁸¹ This is followed by a discussion of how the government’s agenda has stalled since the passage of this Act with most of its legislative proposals failing to make the statute books.

Both sections proceed upon a specific understanding of the term, ‘deregulation’ or ‘deregulationist agenda’ as the author prefers to call it.⁸² The agenda is clearly not aimed at either the absence of regulation/law⁸³ or necessarily less regulation/law.⁸⁴ The deregulationist agenda is, in fact, a proposal for different kind of labour law. In this, the agenda possesses two separate facets, the *decentralisation* and *decollectivisation* of labour regulation.

The agenda, firstly, seeks to *decentralise* the primary locus of the determination of working conditions. In the Australian labour law framework, this has meant shifting the power to determine working conditions away from the federal award system. This power has been increasingly transferred to the level of the enterprise, in the case of enterprise bargaining, and, at the extreme, to the level of the individual employer and worker. In the latter, decentralisation encompasses the *individualisation* of employment relations.

In Buchanan and Callus’ view, decentralisation can be seen then as a shift from regulation external to the workplace to that internal to the workplace.⁸⁵ While this characterisation is broadly accurate, it does omit the role of a crucial form of external regulation, namely, the common law. The common law through the contract of employment provides the legal framework for individual employment relations. As has been noted above, the character and content of the contract of employment, far from providing a neutral vehicle of the parties’ agreement, buttresses the power of employers.⁸⁶

The second facet of the deregulationist agenda is *decollectivisation* in the sense of reducing the capacity of workers to collectively organise and represent their interests. Decollectivisation can assume various forms. For instance, it can mean the reduction of institutional support for unions. Alternatively, it can mean the imposition of further restrictions on unions and their capacity to engage in collective action through, for example, constraints on industrial action.

A. The deregulationist agenda enacted by the Workplace Relations Act

1. Decentralisation

A key aim of the *Workplace Relations Act* was to decentralise labour regulation.⁸⁷ It did so by simultaneously reducing the role of the federal award system and promoting the use of statutory agreements.

The most significant changes effected by this Act in this respect relate to the AIRC’s award-making powers. For example, the promotion of agreement making especially at the enterprise level gained further priority with the AIRC being required to place heavier weight on this objective when exercising its award-making powers.⁸⁸ More importantly, the Act imposed far-reaching restrictions by generally confining the subject matter of awards to 20 allowable award

⁸¹ For a more detailed examination, see Joo-Cheong Tham, ‘Deregulation of Australian labour law: Some recent trends and tensions’ (2002) 44(11) *Japanese Journal of Labour Studies* 60-78.

⁸² This term is also used in John Buchanan and Ron Callus, ‘Efficiency and Equity at Work: The Need for Labour Market Regulation in Australia’ (1993) 35 *Journal of Industrial Relations* 515, 516.

⁸³ Richard Mitchell and Malcolm Rimmer, ‘Labour Law, Deregulation, and Flexibility in Australian Industrial Relations’ (1990) 12 *Comparative Labor Law Journal* 1, 1 and Buchanan and Callus, above n 80, 515-6.

⁸⁴ Mitchell, above n 1, 127.

⁸⁵ Buchanan and Callus, above n 82, 516.

⁸⁶ See discussion above n 80.

⁸⁷ Section 3(b) of the Act stipulates that one of the purposes of the Act is to ensure that ‘the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level.’

⁸⁸ This is effected through ss 3(b), (c) and 88A(d) of the Act.

matters.⁸⁹ This was a radical departure from the position prior to the passage of the Act when the limitations that applied to the AIRC's award-making powers largely stemmed from constitutional restrictions.

The Act also actively sought to individualise employment relations⁹⁰ through the introduction of AWAs. The most significant feature of AWAs is that once approved, they prevail over awards and State laws and, in certain circumstances, certified agreements.⁹¹ So, for the first time, since the advent of the federal award system, an individual agreement can oust federal awards and certain legislative protection.

The Act also decentralised labour regulation by weakening statutory protection against unfair and unlawful dismissals. Under the previous legislation, the *Industrial Relations Act 1988* (Cth) (*'Industrial Relations Act'*), an employee could access such protection unless excluded by regulation. The *Workplace Relations Act*, on the other hand, introduced another set of disentitling provisions by stipulating that only certain groups had a *prima facie* entitlement to apply for unfair dismissal.⁹² It also added two further circumstances when regulations could exclude employees. Under this Act, regulations could be made excluding employees:

- whose terms of employment contain special arrangements providing particular protection in respect to the termination of employment; and
- in relation to whom the application of the unfair dismissal provisions would cause substantial problems either because of their particular conditions of employment or the size or nature of the undertakings in which they are employed.⁹³

The decentralisation of Australian labour regulation, through a reduction of the role of the federal award system and the weakening of protection against unfair and unlawful dismissals, necessarily means that common law contracts of employment are increasingly important as a source of labour regulation.

Such contracts assume greater significance as the floor of awards becomes more porous. Accordingly, the stripping of awards to 20 allowable award matters invariably means that working conditions are increasingly determined by the contract of employment. Further, the erosion of statutory protection against unfair and unlawful dismissals means that the employer's power to terminate the employment of workers at common law is increasingly untrammelled. This is of serious concern because this common law power has had little regard for the fairness or reasonableness of terminations of employment. Generally, a termination would be lawful at common law if reasonable notice was provided even though the termination could be motivated by capricious reasons.⁹⁴

2. Decollectivisation

The following discussion will consider how the *Workplace Relations Act* has decollectivised Australian labour law by weakening union security measures and increasing restrictions on industrial action.

(a) Union security measures

Union security measures refer to various devices aimed at protecting trade unions. Pre-*Workplace Relations Act*, trade unions were supported in various ways by the federal award system. First, the system itself, through its compulsion, necessitated employer recognition of trade unions. Further, award clauses provided for preference for unionists in relation to hiring

⁸⁹ *Workplace Relations Act* s 89A(2).

⁹⁰ See generally Stephen Deery and Richard Mitchell (eds), *Employment Relations, Individualisation and Union Exclusion: An International Study* (2000).

⁹¹ *Workplace Relations Act* ss 170VQ-R. See generally Ronald C McCallum, 'Australian Workplace Agreements - An Analysis' (1997) 10 *Australian Journal of Labour Law* 50-61 and Andrew Stewart, 'The Legal Framework for Individual Employment Agreements in Australia' in Stephen Deery and Richard Mitchell, *Employment Relations: Individualisation and Union Exclusion: An International Study* (1999) 18-47.

⁹² See text above nn 53-5.

⁹³ *Ibid* s 170CC(1)(d) & (e). See also Chapman, above n 45.

⁹⁴ Creighton and Stewart, above n 9, 297.

and promotion ('preference clauses'). Awards along with legislative provisions⁹⁵ also conferred the right on trade unions to enter and inspect employers' premises and records ('right of entry').⁹⁶

Many of these measures were either removed or severely diluted under the *Workplace Relations Act*. Union security has been most affected by the existence of non-union bargaining streams, namely, 'corporations' agreements and AWAs, and the confining of awards to 20 allowable matters. In a further blow to union security, rights of entry do not appear on the list of allowable matters with the consequence that unions have to rely solely on the statutory rights of entry that are narrower in scope than those previously found in awards.⁹⁷

The Act also introduced a series of provisions relating to freedom of *non-association*. Under the *Industrial Relations Act*, there were provisions protecting union membership. The *Workplace Relations Act*, while preserving these provisions in substance, introduced provisions relating to non-union membership.⁹⁸ Part XA also voids any award or certified agreement which requires or permits conduct which would breach the Part.⁹⁹ This has the effect of voiding preference clauses.

(b) Restrictions on industrial action

As stated in the Introduction, the federal award system has been hostile towards industrial action. According to the historical rationale of this system, its availability ruled out the need for industrial action. As Higgins J put it, 'the new province of law and order' ushered in by the system would replace 'the rude and barbarous process of strike and lockout.'¹⁰⁰ Accordingly, industrial action was deemed illegal in various ways.¹⁰¹

The *Industrial Relations Reform Act 1993* (Cth), enacted by the ALP government, represented a critical change in the law relating to industrial action. This Act which was aimed at accelerating the spread of enterprise bargaining also introduced a limited right to strike into Australian labour law. It did this by conferring immunity from the above sanctions on certain types of industrial action, that is, industrial action engaged in for the purpose of enterprise bargaining. Such action is referred to as 'protected action' under the Act.¹⁰²

The *Workplace Relations Act* preserves the existence of this immunity. It has, however, reduced the scope of its protection in one important respect. Under the *Industrial Relations Act*, employers were prohibited from dismissing or otherwise prejudicing employees on the ground of such employees engaging in industrial action in relation to an industrial dispute which had been notified to the AIRC or found to have exist by the AIRC. The present prohibition, however, only applies in relation to 'protected action'; action which is subject to various statutory requirements.¹⁰³

The *Workplace Relations Act* also ushered in other changes that render industrial action more difficult for workers. For instance, it lays down a prohibition on workers receiving wages during industrial action which travelled beyond the common law prohibition.¹⁰⁴ Further, section

⁹⁵ W.J.Ford, 'Being There: Changing Union Rights of Entry Under Federal Industrial Law' (2000) 13 *Australian Journal of Labour Law* 1, 2-3.

⁹⁶ On union security measures, see generally Phillipa Weeks, *Trade Union Security Law* (1995).

⁹⁷ See Ford, above n 95.

⁹⁸ Naughton, above n 60.

⁹⁹ *Ibid* s 298Y.

¹⁰⁰ H.B.Higgins, 'A New Province for Law and Order' (1915) 29 *Harvard Law Review* 13, 14.

¹⁰¹ For instance, industrial action by workers was invariably a breach of contract entitling their employer to dismiss them. Further, the collective nature of industrial action typically rendered it tortious: see K D Ewing, 'The Right to Strike in Australia' (1989) 2 *Australian Journal of Labour Law* 18. Both the criminal law and the conciliation and arbitration system also provided for additional sanctions, see respectively Creighton, Ford and Mitchell, above n 4, 1146-58 and Breen Creighton, 'Enforcement in the Federal Industrial Relations System: an Australian Paradox' (1991) 4 *Australian Journal of Labour Law* 197.

¹⁰² See Iain Ross, 'Bargaining in the Federal System' in Paul Ronfeldt and Ron McCallum (eds), *Enterprise Bargaining: Trades Unions and the Law* (1995) 36-40.

¹⁰³ *Workplace Relations Act* s 170 MU. See Greg McCarry, 'Industrial Action under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 133, 140.

¹⁰⁴ McCarry, above n 103, 149-52.

127 of the Act conferred a power on the AIRC to issue orders to stop or prohibit industrial action.¹⁰⁵ These orders, often referred to as section 127 orders, while issued by the AIRC, are enforced by the Federal Court principally through injunctions.¹⁰⁶

B. The stalling of the deregulationist agenda post-Workplace Relations Act

Since the passage of the *Workplace Relations Act*, the Coalition government has had little success in further decentralising or decollectivising Australian labour law. As the discussion below will demonstrate, most of its subsequent legislative proposals have faltered in the face of a hostile Senate, the upper house of the federal Parliament, which is controlled by the ALP Opposition and minor parties.

1. Decentralisation

The so-called ‘second wave’ of the Coalition government’s deregulationist agenda was contained in the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 (‘MOJO Bill’).

This Bill proposed relatively minor changes to the role of the AIRC. They encompassed the removal of several allowable award matters like skill-based career paths and tallies.¹⁰⁷ Similarly, it proposed procedural changes to the unfair dismissal regime.¹⁰⁸

On the other hand, the Bill proposed significant changes in relation to AWAs. These included:

- removing the AIRC completely from the process of approving AWAs;
- removing the right of employees to engage in protected industrial action when negotiating AWAs; and
- stipulating that AWAs prevail over statutory enterprise agreements in all circumstances; and
- allowing AWAs to take effect upon signing (prior to approval).¹⁰⁹

The MOJO Bill was, however, rejected by the Senate. In response, the Coalition government has adopted a two-fold strategy. It has jettisoned some of the changes contained in the MOJO Bill. As with the other proposed changes, it has divided them into separate Bills.

This change in approach has to date only yielded very partial success. What arguably is the government’s most significant legislative win is the statutory exclusion of another group of employees from the federal unfair dismissal regime, namely, employees who are serving a ‘qualifying period of employment.’ Such a period is defined to be three months unless otherwise agreed by the employee and employer.¹¹⁰ The government has also succeeded with other minor changes, for instance, the removal of tallies as an allowable award matter.¹¹¹

Many of the government proposals have, in the meanwhile, been circulating around the parliamentary chambers. These include amendments that:

- AWAs take effect upon signing;¹¹²
- employees employed in businesses which engage fewer than 20 employees be excluded from the federal unfair dismissal regime;¹¹³ and
- various matters be excised from the AIRC’s award-making jurisdiction, for example, skill-based career paths and long service leave.¹¹⁴

¹⁰⁵ Ibid s 127(1). See Breen Creighton, ‘Section 127 of the Workplace Relations Act and the Regulation of Industrial Conflict’ in Richard Naughton (ed), *The Workplace Relations Act in Operation: Eight Case Studies* (1998) 49-54.

¹⁰⁶ Ibid ss 127(6) & (7).

¹⁰⁷ MOJO Bill, Schedule 6.

¹⁰⁸ MOJO Bill, Schedule 7.

¹⁰⁹ MOJO Bill, Schedule 9.

¹¹⁰ *Workplace Relations Amendment (Termination of Employment) Act 2001* (Cth).

¹¹¹ *Workplace Relations Amendment (Tallies) Act 2001* (Cth).

¹¹² Workplace Relations Amendment (Simplifying Agreement-making) Bill 2002 (Cth).

¹¹³ Workplace Relations Amendment (Fair Dismissal) Bill 2002 (Cth). See Marilyn Pittard, ‘Unfair Dismissal Laws: The Problems of Application in Small Business’ (2002) 15 *Australian Journal of Labour Law* 154-69. Other changes to the federal unfair dismissal scheme are contained in the Workplace Relations Amendment (Termination of Employment) Bill 2002 [No 2] (Cth)

¹¹⁴ Workplace Relations Amendment (Award Simplification) Bill 2002 (Cth).

2. Decollectivisation

The MOJO Bill proposed further decollectivisation of the Australian labour law in various ways. It proposed increased restrictions on the statutory rights of entry.¹¹⁵ Further, it sought to amplify the scope of the freedom of non-association provisions to prohibit union encouragement clauses, bargaining fees and indirect pressure to join unions.¹¹⁶

The MOJO Bill also proposed additional restrictions on industrial action. It proposed to install secret ballots as a pre-requisite for ‘protected action.’ If passed, the Bill would have made a secret ballot mandatory for ‘protected action’ with the holding of such ballots accompanied by detailed notices stipulating the nature and timing of industrial action. Further, industrial action only became ‘protected’ if a majority of eligible employees voted in the ballot with the majority of votes in favour of the industrial action.¹¹⁷

In comparison, the *Workplace Relations Act* presently requires that such action be duly authorised by the committee of management of the relevant union or by a person conferred such authority by the committee.¹¹⁸ Further, the AIRC may order a secret ballot in relation to impending or probable industrial action if it is satisfied that ascertainment of the attitudes of union members might prevent such industrial action.¹¹⁹ Once such a ballot is ordered, majority approval is required for such action to be ‘protected.’¹²⁰

The second set of proposals restricting industrial action in the MOJO Bill related to section 127. It proposed to reduce the discretion conferred upon the AIRC in relation to section 127 orders by requiring such orders to be issued whenever the AIRC found industrial action which was not ‘protected.’ Moreover, the Bill permitted affected parties to seek enforcement of these orders in State courts.¹²¹

The defeat of the MOJO Bill at the hands of the Senate has led the Coalition government to water down its proposals. For example, while it is persisting with secret ballots as a pre-requisite for ‘protected action,’ it has diluted some of the attendant requirements. For instance, the present proposal only requires 40 per cent of eligible employees to participate in the ballot. Further, ‘protected action’ can be taken within 30 days of the declaration of the ballot result and is not restricted to any specified date.¹²² Similarly, the present set of proposals relating to section 127 is relatively modest. If passed, they would confer on the AIRC the power to issue interim orders as well as require the AIRC hear section 127 applications within 48 hours and.¹²³

IV. CONCLUSION

Australian labour law is founded upon a thin layer of constitutional provisions. Three sources of labour regulation have been enacted upon this thin layer. The federal award system, while no longer as central as it has been in the past, remains a key source of labour regulation. The second source of regulation is that which occurs through various forms of bargaining. There is individual bargaining through common law contracts of employment and AWAs as well bargaining through statutory enterprise agreements. This type of regulation has filled the gaps left by the erosion of the federal award system. Thirdly, there is a sparse set of legislative minimum conditions.

The deregulationist changes ushered in by the *Workplace Relations Act* changed the relationship between these various sources of regulation by elevating regulation through bargaining, sidelining the federal award system as well as weakening legislative protection.

¹¹⁵ MOJO Bill, Schedule 13.

¹¹⁶ Ibid Schedule 14.

¹¹⁷ MOJO Bill Schedule 12.

¹¹⁸ Ibid s 170MR.

¹¹⁹ Ibid s 135(2).

¹²⁰ Ibid s 170MQ(2).

¹²¹ MOJO Bill, Schedule 11.

¹²² Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002 (Cth).

¹²³ Workplace Relations Amendment (Improved Remedies for Unprotected Action) Bill 2002 (Cth).

Since the passage of this Act, however, the mix between these sources of regulation has been relatively stable with the Coalition government's deregulationist agenda stalling.

Reconsidering the Mechanism to Regulate Working Conditions in the Light of Diversified and Individualised Employees and the Declining Labour Unions

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1. General Picture of Laws and Legal Tools Regulating Terms and Conditions of Employment in the UK

1.1. Introduction

The UK has long been characterised as a system based on state abstention or collective laissez-faire. In practice this has meant that the terms and conditions of employment have been regulated by the individual contract of employment, buttressed by collective agreement. But, as collective bargaining has declined, labour legislation has begun to fill the vacuum. These two events have not necessarily been linked. Legislation regulating workers rights dates back to the Factory Acts of the mid nineteenth century but the volume of legislation increased significantly under the Conservative government (1979-1997) which used legislation to erode the powers of trade unions and, more reluctantly, as it implemented EC obligations.

This trajectory has continued under the Labour government as it initiated a major legislative programme to give effect to its own programme laid out in the *Fairness at Work* White Paper.¹ Significantly, New Labour has not reversed much of the Conservative legislation on trade unions but it has dramatically increased the number of individual employment rights (see section two below) and, through a raft of legislation, tried to make the workplace more family friendly. At the same time the need to implement EC Directives continues unabated and this has necessitated the introduction of a large number of secondary measures and some significant reforms to the existing equality legislation.

Given the dramatic changes that have occurred in recent years, the principal pieces of labour legislation were largely consolidated into two principal statutes, the Employment Rights Act 1996 (ERA 1996) which largely concerns individual rights and TULR(C)A 1992 (Trade Union and Labour Relations (Consolidation) Act 1992 (concerning collective matters). Together these two statutes come as close as possible to our Labour Code although this is not a language with which we are familiar. There is, of course, no written constitution in the UK but European Community law and, to a certain extent the European Convention on Human Rights, is beginning to perform something of that function. However, it is the contract of employment which forms the 'cornerstone' of the employment relationship and it is to this subject that we now turn.

1.2. Contracts of Employment

In practical terms, it is the contract of employment which provides the most important source for the terms and conditions of employment. Most contracts (which can be oral or in writing) contain both express terms 'agreed by the parties' and implied terms. Evidence of these express terms is contained in the written statement of terms which must be given to all employees within two months of the start of their contract. The written statement (required by ss.1-12 ERA) does not constitute the contract itself but provides strong evidence of the actual terms. However, the statutory rules are complex.

Implied terms have played an increasingly important role in contracts of employment. In this respect we can see the extent to which the common law on the contract of employment differs radically from ordinary commercial contracts. In respect of commercial contracts, implied

¹ Cm 3968.

terms can be inferred according to the ‘business efficacy’ test laid down in *Moorcock*² and the ‘officious bystander test’ laid down in *Shirlaw*.³ These tests have little relevance in the context of labour law where the courts have become increasingly willing to ‘impose’ duties on both employers and employees. In respect of *employees*, these duties include the duty to obey lawful and reasonable orders, the duty to cooperate with the employer, the duty to exercise reasonable care and skill and the duty of fidelity and loyalty. In respect of *employers* the duties include the general obligation to exercise care of the employee (both in respect of the employee’s health and safety⁴ and economically when giving a reference⁵) and a number of more specific duties, such as the duty to deal promptly with grievances⁶ and the duty of disclosure.⁷

These so-called ‘legal incidents’ of the employment relationship are imposed on employers and employees alike. They operate, in Lord Steyn’s words in *Malik*,⁸ as ‘default rules’ which means that the parties are free to exclude or modify them. However, by far the most important of these terms is the duty, usually implied on the employer ‘not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.’⁹ This important duty, described by Lord Nicholls as a ‘portmanteau, general obligation,’¹⁰ received strong judicial support from the House of Lords in *Malik* where the House decided that Malik was entitled to claim stigma damages from his former employer the bank, BCCI, on the grounds that the bank had breached the duty by running a ‘dishonest or corrupt’ business. However, in a subsequent case, *Johnson v. Unisys*,¹¹ the House of Lords refused to allow the employee to claim stigma damages for the manner of his dismissal reasoning that the term is concerned with ‘preserving the *continuing* relationship which should subsist between employer and employee.’¹² For this reason, Lord Hoffman explained, ‘it does not seem altogether appropriate for use in connection with the way that relationship is terminated.’

These implied terms are of enormous importance and are now well recognised in labour law. However, if they operate merely as default rules then their importance can be undermined by some careful drafting. Yet, an (admittedly small) number of cases appear to countenance the possibility that these implied terms operate in such a way as to *override* express terms. For example, in *Johnstone v. Bloomsbury AHA* [1991] IRLR 118, a case which concerned a junior doctor working on average an 88 hour week (40 hours mandatory and 48 hours discretionary overtime), the Court of Appeal decided 2:1 that an employee should be able to claim damages for the losses he had suffered. Although the reasoning of all three judges differed, for our purposes the most striking judgment is that of Stuart-Smith LJ, who argued that the contract terms did not override the duty of the employer in both contract and tort to take reasonable care to ensure the employee’s health and safety. However, in *Johnson v. Unisys* Lord Hoffman seemed to doubt that these implied terms could prevail over express terms, certainly in the context of dismissal.¹³ So the position is decidedly unclear. For the present, it is possible simply to note that these implied terms are important aspects of the regulation of the employment relationship.

1.3. Collective Bargaining

Trade union membership has declined significantly since its heyday in the 1970s, although

² *The Moorcock* (1889) 14 PD 64.

³ *Shirlaw v. Southern Foundries (1926) Ltd* [1939] 2 KB 206

⁴ *Waltons & Morse v. Dorrington* [1997] IRLR 488.

⁵ *Spring v. Guardian Assurance* [1994] IRLR 516.

⁶ *Goold (Pearmark) Ltd v. McConnell* [1995] IRLR 516.

⁷ *Scally v. Southern Health and Social Services Board* [1991] IRLR 522.

⁸ *Malik v. BCCI* [1997] IRLR 462, para.53.

⁹ *Ibid*, per Lord Nicholls, para. 8.

¹⁰ *Ibid*, para. 13.

¹¹ [2001] IRLR 279.

¹² Per Lord Hoffman, para. 46.

¹³ [2001] IRLR 279, para. 46.

the figures for the last four years have remained fairly constant. Trade union membership now stands at around 7,340,000 (about 29% of all employees). Levels of collective bargaining have declined significantly in the UK and only 22% of private sector employees are now covered by collective agreement (as compared to about 73% of public sector workers).¹⁴ However, this figure too has remained fairly constant over recent years, at about 8.7 million or 35.6% of the workforce. Collective agreements themselves are presumed not to be legally binding (s.179 TULR(C)A)¹⁵ and, unlike Continental systems they do not have *erga omnes* effects. However they can have legal effect through individual contracts of employment provided two conditions are satisfied: first, there needs to be a bridging term (which can be express or implied, including through custom) and second, the terms themselves must be suitable for individuation (that is that they contain matters relating to the individual (eg redundancy selection procedures,¹⁶ disciplinary and grievance procedures¹⁷) as opposed to collective or procedural terms.

Because collective agreements derive their legal force from the contract, this has three significant consequences. First, all employees with a bridging term in their contracts will benefit from the collective agreement, whether trade union members or not. Second, because collective agreements do not operate as a floor of rights in the UK, employers and employees can agree that the terms of the collective agreements do not apply to them. Thirdly, even if the employer breaches the collective agreement, this has no effect on the individual contracts of employment; the individual contracts themselves will need to be amended if the employer wishes to remove all effects of the collective agreement (on the question of contractual variation, see below).¹⁸

Collective agreements are negotiated between recognised trade unions and employers or employers' organisations. In the United Kingdom worker representation has traditionally been channelled through recognised unions (the single-channel approach), with the concept of works councils or their equivalents being largely unfamiliar. This approach to industrial relations, combined with the abstention of the state from involvement in industrial relations, have been distinguishing characteristics of British industrial relations since the nineteenth century.¹⁹

This picture has, however, significantly altered in the recent past, due in part to increased government intervention in industrial relations and in part to external pressure from the European Community. The pattern beginning to emerge is one of a significantly-weakened union structure combined with the development of alternative methods of worker consultation mechanisms influenced by the 'dual channel' approach found on the Continent. The developments at European Union level, while sitting awkwardly with the British model of single channel have, to a large extent, received the support of the trade union movement.

This need for this alternative channel of worker representation was brought into sharp focus by the Commission's challenge to the UK's implementation of two Directives which required information and consultation of 'representatives of the employers provided for by the law and practice of the Member States.'²⁰ The UK implemented this obligation by requiring employers to consult with a recognised trade union.²¹ While in the late 1970s, when the Directive was first

¹⁴ DTI (2002) *Trade Union Membership: an analysis of data from the Autumn 2001 Labour Force Survey*, available at http://www.dti.gov.uk/er/emar/artic_01.pdf.

¹⁵ See also *NCB v. NUM* [1986] IRLR 439 and *Ford Motor Co v. AUEFW* [1969] 2 QB 303.

¹⁶ *BL v. McQuilken* [1987] IRLR 245; *Anderson v. Pringle of Scotland* [1998] IRLR 64.

¹⁷ *Dietman v. Brent LBC* [1988] IRLR 299.

¹⁸ *Robertson v. British Gas* [1983] IRLR 302

¹⁹ Clark and Winchester 'Management and Trade Unions' in *Personnel Management: Comprehensive Guide to theory and Practice in Britain*, K.Sisson (ed), Blackwell, Oxford, p.714. O.Kahn-Freund, 'Legal Framework' in A.Flanders and H.Clegg *The System of Industrial relations in Great Britain*, (Oxford: Blackwell, 1954), 43, cited in B.Simpson *The Determination of Trade Union Representativeness in the United Kingdom*, Paper presented to the ILO, October 1994, 1.

²⁰ Article 2(c) of Directive 77/187/EEC on transfers of undertakings) or 'worker representatives' (Article 1(b) of Directive 75/129 on collective redundancies.

²¹ Section 188 TULR(C)A 1992 provided: 'An employer proposing to dismiss as redundant an employee of a description in respect of which an independent trade union is recognised by him shall consult representatives of the union about the dismissal in accordance with this section.' Regulation 10 of the Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 1981 contained a similar provision.

implemented, this may have been adequate, the decline in trade union recognition over the last twenty years highlighted the inadequate implementation of the Directive in respect of at least half the workforce. Therefore, in *Commission v. UK*²² the Court of Justice upheld the Commission's argument that the UK had failed to implement the Directive properly by not providing a mechanism for the designation of workers' representatives in an undertaking where the employer refused to recognise a trade union.²³

The UK's response can be found in SI 1995/2587²⁴ requiring an employer, from 1 March 1996, to consult with 'appropriate representatives' of any of the employees who are going to be dismissed in the case of collective redundancies and 'affected employees' in the case of transfer of undertakings. These 'appropriate representatives' of any employees are:

- (a) employee representatives elected by them, or
- (b) if the employees are of a description in respect of which an independent trade union is recognised by the employer, representatives of the trade union.²⁵

Although the 1995 'CRATUPE' Regulations gave the employer the choice of which group to consult, amendments introduced by the Labour government require employers to consult with a recognised trade union where one exists.²⁶ Only in the absence of a recognised trade union can an employer consult with elected worker representatives.

The 1995 CRATUPE Regulations marked the first substantial inroad into the single channel.²⁷ They have, however, paved the way for the implementation of other European Directives such as the Working Time Directive 93/104 (as it then was), the Parental Leave Directive 96/34 and the Fixed Term Work Directive 99/70. In respect of the implementation of each Directive, the legislature has made provision for workforce agreements which can flesh out the detail of the rights laid down by the Directive. For example, the Working Time Regulations define a workforce agreement as 'An agreement between an employer and workers employed by him or their representatives in respect of which the conditions set out in Schedule 1 are satisfied.' To be valid, a workforce agreement must:

- be in writing;
- have been circulated in draft to all workers to whom it applies together with guidance to assist their understanding of it;
- be signed, before it comes into effect, either
 - by all the representatives of the members of the workforce or group of workers; or
 - if there are 20 workers or fewer employed by a company, either by all the representatives of the workforce or by a majority of the workforce;
- have effect for no more than five years.

Thus, elected workforce representatives or, in the case of a company employing fewer than 20 workers, the workers themselves can enter into a new type of agreement, a workforce agreement, which can, for example, modify or exclude the application of certain key provisions of the Regulations.

The European Community duty to consult worker representatives also applies in respect of health and safety at work²⁸ and, more recently, in respect of economic issues arising in transnational companies (as a result of the European Works Councils Directive 94/95/EC,²⁹ implemented in the UK through the TICE Regulations) and now in respect of national companies (as a result of Directive 2002/14 on national level information and consultation,³⁰

²² Case C-383/92 [1994] ECR I-2479

²³ See generally P.Davies, 'A Challenge to Single Channel' (1994) 23 ILJ 272.

²⁴ The Collective Redundancies and Transfer of Undertakings (Protection of Employment)(Amendment) Regulations 1995.

²⁵ Regulation 3(1), Regulation 9(4).

²⁶ SI 1999/1925 CRATUPE Regs 1999.

²⁷ Department of Employment, *Consultation about collective redundancies and business transfers: a legislative proposal*, April 1995.

²⁸ See, for example, the Framework Directive 89/391/EEC.

²⁹ OJ 1994 L254/64 considered by C.McGlynn, 'European Works Councils: Towards Industrial Democracy' (1995) 24 ILJ 78.

³⁰ OJ [2002] L80/29.

which are due to be implemented in the UK through the ICE Regulations). These developments are significant for they are intended to foster a spirit of partnership between employers, workers and their representatives, both union and non-union.

1.4. Varying the Terms of the Contract

There are a number of ways in which contractual variation can take place. One possibility is by agreement with the individual employee, usually with the employer offering some consideration in return for the change. Another possibility is for the employer to take unilateral action. This may amount to a repudiatory breach of contract which the employee can accept or reject. If he accepts the breach then he will treat the contract as terminated and sue for unfair and wrongful dismissal. If, on the other hand, he rejects the breach, then he can treat the contract as ongoing and either do nothing (the more usual situation) or sue for damages.

Another alternative is for the employer to agree with the trade union to vary the terms. If this is done via collective agreement and the collective agreement forms part of the individual contract of employment then this will take effect as contractual variation (although there may also have to be some consideration if the variation is to the employees' detriment). Even if the employer does not negotiate a variation in terms with the trade union, the union's participation and agreement may be a factor taken into account when assessing the fairness of the dismissal of any employee who has not agreed to the changes in the contract.³¹

A further possibility is that no variation is necessary either because the contract contains a broad flexibility clause which will achieve the employer's purpose or because the courts are prepared to give a broad reading to the implied duty of cooperation. Therefore, in *Cresswell v. Board of Inland Revenue*³² the Inland Revenue computerised its procedures. This was held to be an updated version of the tax officers' existing jobs which they were supposed to adapt to, subject to the necessary training, and not a unilateral variation of the contract. A final possibility is that certain aspects of the employment relationship are contained in works rules or a company handbook. In this context they are simply a codified form of instructions from the employer which can be altered unilaterally as part of managerial prerogative.³³

The only area in which legislation envisages the possibility of trade unions negotiating a reduction in terms and conditions of employment is in respect of the transfer of an undertaking which involves the survival of an undertaking. This can be found in the revised directive on transfers of undertakings³⁴ which has not yet been implemented in the UK.

2. Significant Changes in the Contents of Labour Laws in Recent Years

2.1. Introduction

The most significant changes that have occurred to labour law in the UK in recent years have been brought about by the (New) Labour government. This was signalled by the *Fairness at Work* White Paper³⁵ which contained a rejection of the approach deemed to epitomise the Conservative government ('low-skill, low-wage, low-quality, low-value economy') and replaced with the aim of achieving 'high' – 'high quality, high performance, high skills, high productivity, high value.'³⁶ The White Paper, which was premised on the aim of achieving a 'flexible and efficient labour market'³⁷ contained three main elements:

- Provisions for the fair treatment of employees;
- New procedures for collective representation at work (see heading three below); and
- Policies that enhance family life while making it easier for people – both men and women – to

³¹ *Catamaran Cruises v. Williams* [1994] IRLR 386.

³² [1984] IRLR 190.

³³ *Secretary of State for Employment v. ASLEF (No.2)* [1972] 2 QB 455.

³⁴ Art. 5(2)(b) of Dir. 2001/23 (OJ [2001] L82/16).

³⁵ Cm 3968.

³⁶ Para. 1.3.

³⁷ Para. 1.8.

go to work with less conflict between their responsibilities at home and at work.

2.2. New Rights for Individuals

As far as new rights for individuals are concerned, some are derived entirely British-grown, others are based on European Community Law. In the first group are firstly, the National Minimum Wage Act 1998 laying down for the first time in the history of British industrial relations a minimum wage for all workers over 18;³⁸ and the Public Interest Disclosure Act 1998 protecting whistleblowers. In the second group are regulations concerning working time, part-time work and fixed term Work.

Significant changes have also been made to existing legislation, notably concerning unfair dismissal. As a result of the *Fairness at Work* White paper, the government:

- Reduced the service requirement prior to claiming unfair dismissal from two years to one. This was justified on the grounds that employees would be less inhibited about changing jobs and thereby losing protection, which should help to promote a more flexible labour market and persuade employers to introduce good employment practices which should ‘encourage a more committed and productive workforce’;³⁹
- Abolished the possibility that those employed on fixed term contracts could waive their rights to claim unfair dismissal;
- Increased significantly the ceiling on the compensatory award from £12,000 to £50,000 (having originally proposed to abolish the statutory cap altogether). All limits were also index-linked.

The government has also been concerned about the volume of cases going to industrial tribunals. As a result, it has placed much emphasis on encouraging dispute resolution in the workplace by introducing – in the Employment Act 2002 – statutory grievance and disciplinary procedures which must be complied with by both employers and employees, as well as encouraging alternative sources of dispute resolution, notably through arbitration under the Employment Rights (Dispute Resolution) Act 1998. It is anticipated that this will have the effect of reducing cases before the employment tribunals by between 34,000 and 37,000.

The other major area in which the government has introduced some significant legislation is in respect of family friendly policies. The approach to family friendly issues is multi-faceted: there is a policy strand (a National Childcare Strategy to encourage businesses to provide access to good quality childcare for their employees); a financial strand (the Working families tax Credit giving financial support to working families) and, most importantly for our purposes, some important legislation. Some of the legislation has been introduced to serve other objectives but is harnessed to support the family friendly strategy (eg the national minimum wage, the Working Time Directive and the Part-time Work Directive) but legislation is specifically intended to address work-life balance issues, notably:

- Improved (and simplified) maternity (and adoption) rights – women are now entitled to 6 months ordinary maternity leave (OML), and a further six months additional (but unpaid) maternity leave (AML);⁴⁰
- Parental leave (a total of thirteen weeks but no more than four weeks p.a during the first five years of the child’s life) and time off for force majeure. Neither of these rights is paid. Both derive from EC Law;⁴¹
- Two weeks paternity leave paid at sick rate levels;⁴²
- The right to request flexible working.⁴³

More generally, and outside the direct rubric of family friendly policies, has been the

³⁸ This is designed to encourage competitiveness ‘by encouraging firms to compete on quality rather than simply on labour costs and price’ (para. 3.2.)

³⁹ Para. 3. 9.

⁴⁰ SI 1999/3312 The Maternity and Parental Leave Regulations 1999.

⁴¹ SI 1999/3312 The Maternity and Parental Leave Regulations 1999.

⁴² SI 2002/2788 The Paternity and Adoption Leave Regulations 2002.

⁴³ Eg SI 2002/3236 The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002.

significant expansion of equality legislation introduced under the impetus of European Community law. In particular, new regulations have been adopted to ensure equal treatment on the grounds of sexual orientation⁴⁴ and religion or belief.⁴⁵ There have also been some significant amendments to the existing legislation on sex, race and disability discrimination.

3. Significant Changes to the Collective Labour Relations Laws and Collective Bargaining Patterns

As we have seen, the other area in which there have been major changes is in respect of collective labour relations. We see this in part in the shift – largely influenced by EC Law – from the single to the dual channel approach to worker consultation. But the *Fairness at Work* envisaged one major policy initiative, which was wholly domestic in origin, but intended to buttress the power of trade unions – the statutory recognition procedure. Under this rather lengthy procedure, which places much emphasis on voluntary agreement, employers are required to recognise a trade union for the purposes of negotiations about pay, hours and holidays, where, in the case of a ballot at a particular bargaining unit, the majority of those voting favoured recognition and that majority represented more than 40% of those entitled to vote.⁴⁶

In other areas the government, consistent with its policy of giving greater rights to individuals, has strengthened collective rights through increased individual rights. It has therefore made provision for those employees who are dismissed for taking part in official industrial action to have a claim for unfair dismissal; it has abolished the so-called *Wilson and Palmer* rule which allowed for some discrimination against those involved in trade union activities, made provision for (but not yet brought into force) rules against blacklisting⁴⁷ and introduced the right for employees to be accompanied by a fellow employee or trade union representative of their choice during grievance and disciplinary procedures.⁴⁸ However, this focus on increased individual protection for collective rights has been the subject of some criticism by the European Court of Human Rights in *Wilson and Palmer*⁴⁹ and is currently being considered by the government in its review of the Employment Relations Act 1999 and in the new Employment Relations Bill.

Yet, these developments came at a price. The *Fairness at Work* White paper emphasised the government's commitment to 'maintaining the key elements of the employment legislation of the 1980s' in particular laws on picketing, on ballots before industrial action and for increasing democratic accountability in trade unions.⁵⁰

4. To What Extent Should Labour Laws Intervene in the Labour Market?

Recent statements from the Labour government demonstrate New Labour's ambiguous attitude concerning the relationship between employment regulation and economic efficiency. For example, the White Paper on *Enterprise Skills and Innovation: Opportunity for all in a world of change*⁵¹ (Cm 5052) published in February 2001 communicated a positive role for employment regulation. On 'rights at work' the White Paper stated:

The UK's regulatory framework must keep up with the evolving workplace. The Government's role is to facilitate adaptation to these new conditions on fair terms. Rights at work are not the same as red tape. Minimum regulatory standards encourage

⁴⁴ SI 2003/1661 The Employment Equality (Sexual Orientation) Regulations 2003.

⁴⁵ SI 2003/1660 The Employment Equality (Religion or Belief) Regulations 2003.

⁴⁶ The procedure can now be found in Schedule A1 TULR(C)A 1992.

⁴⁷ S.3 ERelA 1999.

⁴⁸ S.10 ERelA 1999.

⁴⁹ *Wilson and NUJ v. UK* [2002] IRLR 568 noted by K.Ewing. 'The Implications of *Wilson and Palmer*' (2003) 32 ILJ 1.

⁵⁰ Para. 2.15.

⁵¹ Cm 5052, para. 5.21

partnership in the workplace, promote social inclusion, and give employees confidence. Employers also benefit. Reputable firms are protected from unfair competition. Workers are more motivated if allowed to balance their work and private lives. Staff turnover and absenteeism are reduced.

This view reflects the approach in the *Fairness at Work* White paper that employment rights are seen as inputs into growth rather than drains upon it. The key principle is that ‘fairness at work and competitiveness go hand in hand, and that one must reinforce the other.’⁵² In contrast, the White Paper on *Our Competitive Future – Building the Knowledge Driven Economy*⁵³ published in December 1998 shortly after *Fairness at Work* communicated a very different message about the role of regulation:

The Government is determined to avoid introducing new regulations which will impose unwarranted costs on British business. And we are reviewing the need for those existing regulations which seem incompatible with a flexible, innovative and entrepreneurial economy.

This ambiguity is not unique to the UK and is reflected in a number of documents at EU level too. Yet, despite the protestations, it is clear that there is now a substantial (and at times complex) body of rules regulating both individual and collective employment relations.

⁵² Para. 1.11.

⁵³ Cm 4176, para. 1.14.

The Mechanism for Establishing and Changing Terms and Conditions of Employment

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A. GENERAL CHARACTERISTICS OF THE LABOR LAW IN GERMANY

I. Basic Law Regulating Working Conditions

Working conditions in Germany are regulated on three levels,

- by European law,
- by the Constitution and
- by statutes and judge-made law on the one hand, by collective bargaining agreements, works council agreements and employment contracts on the other hand.

Reference: Textbooks on German labor law by: *Brox/Rüthers*, 15th ed.; *Dütz*, 8th ed.; *Hanau/Adomeit*, 12th ed.; *Hromadka/Maschmann*, volume 1, 2nd ed. 2002, volume 2, 1999; *Junker*, 2nd ed.; *Lieb*, 8th ed.; *Löwisch*, 6th ed.; *Otto*, 3rd ed.; *Preis*, Individualarbeitsrecht, 2nd ed. 2003; Kollektivarbeitsrecht, 2003; *Söllner/Waltermann*, 13th ed. 2003; *Wollenschläger*, 2nd ed. 2003; *Zöllner/Loritz*, 5th ed. 1998.

1. EC Law

Reference: comprehensive: *Hanau/Steinmeyer/Wank*, Handbuch des europäischen Arbeits- und Sozialrechts, 2002; besides: *Fuchs/Marhold*, Europäisches Arbeitsrecht, 2001; *Krimphove*, Europäisches Arbeitsrecht, 2nd ed. 2001; *Schiek*, Europäisches Arbeitsrecht, 1997.

In the beginning of the EC, labor law was of little importance; main items were the economic freedoms. In EC law there is no difference between labor law and social security law as in Germany. There were two starting points for labor law, equal pay for men and women, and health and safety law. The freedom of movement has consequences in labor law and in social security law, but with few changes in German law.

This situation changed by the Maastricht Treaty and by the Nizza Treaty. They gave the EC competence for a lot of materials in labor law. Meanwhile health and safety law of the EC has enormously grown. Besides, quite a number of materials are regulated by EC law.

The way EC law works in Germany is – especially in labor law – by Directives which are then transferred into German law so that their EC origin does no longer show.

This has happened to the following materials:

- Directive 91/533/EWG – Nachweisgesetz
- Directive 2001/23/EG – sec. 613 a Bürgerliches Gesetzbuch
- Directive 80/887/EWG – sec. 183 et seq. Sozialgesetzbuch III
- Directive 98/59/EG – sec. 17 Kündigungsschutzgesetz
- Directive 97/81/EG – Teilzeit- und Befristungsgesetz
- Directive 1999/70/EG – Teilzeit- und Befristungsgesetz
- Directive 91/383/EWG – Arbeitnehmerüberlassungsgesetz
- Directive 93/104/EG – Arbeitszeitgesetz
- Directive 94/53/EG – Jugendarbeitsschutzgesetz
- Directive 96/34/EG – Bundeserziehungsgeldgesetz
- Directive 95/46/EG – Bundesdatenschutzgesetz.

The Directives 2000/43/EG and 2000/78/EG concerning forbidden discrimination must still be transformed into German law.

Besides, EC law works by the “EC corresponding interpretation”. That means that German

law must always be interpreted in accordance with EC law. If there is any doubt if this is the case, an interpretation must be chosen that corresponds with EC law. But this must be within the limits of German interpretation. If it is not possible, German law, that does not correspond with EC law and cannot be interpreted to make it correspond, is not valid.

Example: In the German Arbeitszeitgesetz (Law on Working Time), time of attendance was seen as rest; the ECJ interpreted the Working Time Directive so that time of attendance is working time. The BAG (Federal Labor Court) held that a new interpretation of German law was impossible and that the Arbeitszeitgesetz must be adopted by the legislator to EC law (see BAG 18.2.2003 – 1 ABR 2/02 - comment *Wank*, Recht der Arbeit 2004).

A common interpretation of EC law in the member states is reached by the duty of all higher courts and the option for all courts to ask the ECJ for interpretation, if there are doubts in a current case.

2. The “Grundgesetz” (GG, the German Constitution)

As far as the relationship between the Constitution and “einfaches Recht” (“normal law,” meaning all law under the constitution) is concerned, three aspects may be stated.

a) There are Grundrechte (freedoms) with special relationship to labor law.

aa) Art. 12 GG contains the freedom of work. It is the freedom for self-employed and for employees as well. The state may only interfere into this freedom by following the principle of proportionality.

Example: The law of dismissal must make a compromise between the freedom of the employer and the freedom of the employee, Bundesverfassungsgericht (Federal Constitutional Court) volume 84, page 133, 147 (BVerfGE 84, 133, 147).

bb) Art. 9 para. 3 GG states a freedom to join labor law associations. This means associations of employers and of employees (“Koalitionen,” coalitions). By interpretation of the Bundesverfassungsgericht this freedom contains:

- the freedom of the individual employer and the individual employee to join a labor law association (so different from Japan a union shop agreement is void),
- the freedom of said persons to keep away from such an association,
- the freedom of employers and of employees to found such an association,
- the freedom of these associations to exist and to act,
- a guarantee that the state will create and maintain a functioning system of these associations (including a system of collective bargaining agreements and of labor disputes, BVerfGE 50, 290, 368).

Example: advertising of a trade union during working time (BVerfGE 93, 352).

The state plays two roles: on the one hand this system needs an organizing by the state, by creating the necessary rules. E.g. trade unions are only recognized for the aims of article 9 para. 3 GG if they are powerful enough (BVerfGE 58, 233). On the other hand the state may intervene into the freedom of the coalitions and must therefore be controlled by the courts.

Collective bargaining agreements themselves are bound by the Constitution, especially by the other freedoms of the Constitution. There is a debate whether this takes place in the same way as the state is bound (direct influence) or in a different way (indirect influence of the Constitution). There is a far spread agreement, that the principle of equal treatment is the same for collective bargaining agreements as for the state (see Erfurter Kommentar-*Dieterich*, GG, 4th ed. 2004, Einl. Rdnr. 46 f.).

b) Other articles of the constitution have no special relationship to labor law, but must be regarded in labor law, too. For example, the freedom of the personality of the employee must be respected (art. 1, 2 GG). The freedom of religion (art. 4 GG) requires that the employer tolerates a headscarf (BAG, NZA 2003, 483).

c) The original idea of the freedoms is to give the citizen a way of defense against measures of the state. But from an early stage of interpretation these freedoms have also become ways of

interpreting “einfaches Recht” (basic law). This is done by “constitution corresponding interpretation” (see *Schlaich/Korioth*, Das Bundesverfassungsgericht, 5th ed. 2001, p. 294 et seq.). In a similar way, as national law must be in accordance with EC law, “einfaches Recht” must be in accordance with the Constitution.

If an interpretation nearer to the constitution is possible, it must be chosen. If it is not possible and if basic law does not correspond to the Constitution, it is not valid. But this cannot be stated by any other court than the Constitutional Court (art. 100 GG).

3. Labor law

Labor law is divided into individual labor law, collective labor law and labor struggles; health and safety law is a special part of individual labor law. Most of labor law is meanwhile regulated by statutes. What is almost entirely judge-made law is the law of labor struggles. But as there is a great number of lawsuits in German labor law and as there is a special jurisdiction, there is quite a lot of judgments concerning these statutes, especially in the law of dismissal.

a) Individual labor relations law

aa) In individual labor relations law, there is no codification of the *employment contract*. Some rules are to be found in sec. 611 et seq. BGB (Civil Law), others in sec. 105 et seq. Gewerbeordnung (trade regulations Act). Rules how to conclude a contract are to be found in the BGB, including the questions of break of contract and of limitation. General formulas for labor contracts are ruled by the general rules in sec. 305 et seq. BGB, as referred to in sec. 310 para. 4 BGB. A labor contract need not be concluded by writing; but the most important parts of the contract must be given by the employer in written form (Nachweisgesetz, law on evidence; similar to art. 5 para. 1 of the Japanese LSL enforcement Order).

A control concerning *discrimination* in the moment of hiring at the moment in fact only takes place among men and women, sec. 611 a BGB, which is based on EC law. There will be more items following the new EC Directive 2000/78/EG, so that the results will be different from the Japanese Mitsubishi Jushi case, 27 Minshu 1536.

bb) As *atypical work* are regarded work for a limited period, part-time work (both in the Teilzeit- und Befristungsgesetz (TzBfG, Law on Part-Time Work and Work for a Limited Period) and dispatch work (AÜG, Arbeitnehmerüberlassungsgesetz, law on dispatched work).

Work for a limited period is only allowed in correspondence with a list of good reasons, like for a special task or as a deputy. Besides, a limited contract is possible for two years, including three prolongings, sec. 14 TzBfG. Since January 1st 2004 during the first four years of a newly founded enterprise no reason for a limited period is necessary (sec. 14 para. 2 a TzBfG). No reason is further required for employees older than 58 years, but it is controversially discussed if this is according to EC law.

Part-timers and employees for a limited period must be treated equal to those in fulltime or working for an unlimited period. This means that they get equal pay, following the principle of proportionality. Therefore to employ a part-timer or, like it is possible in Japan, a quasi-part-timer to save costs of wages is of no help for the German employer.

The difference between contract work and dispatch work which is in Japan ruled by the employment security Act, is part of the interpretation of the AÜG.

The principle of equal treatment is now also applicable on employees that are dispatched, sec. 3 para. 1 Arbeitnehmerüberlassungsgesetz. Special collective agreements are, however, allowed, following their own system (see the collective bargaining agreement in Recht der Arbeit 2003, 311).

There is a special law for old-age-part-time (Altersteilzeitgesetz). It allows to work less during the last years of the employment or – which is more often chosen – to work some years in fulltime and to retire earlier.

cc) *Working hours* are ruled according to EC-law by the ArbZG (Arbeitszeitgesetz, Law on Working Time). The general rule is to work no more than eight hours a day and in special cases no more than ten hours. But collective agreements may provide different terms, especially if

they contain attendance.

There is also the Ladenschlussgesetz (Law on Opening Hours), which is still said to be part of labor law and which is regarded by some scholars as against the Constitution as an unnecessary interference with the freedom of the employer.

The Bundesurlaubsgesetz (Law on Paid Leave) grants paid leave for at least 24 working days per year; collective agreements provide even longer periods. Different from Japan paid leave is always taken, if possible. If not (e.g. because of sickness or dismissal), the employee gets money instead.

dd) *Liability* follows the normal rules of civil law, in contract and tort. But there is a reduction for employees, who are fully liable only for acting on purpose or with gross negligence. When they act with normal negligence, the damage is divided between employer and employee. This is judge-made-law; the legislator tried to fix it in sec. 615 sentence 3 BGB.

ee) In cases of *sickness* the employee gets his wages up to six weeks by the employer, sec. 3 EFZG (Entgeltfortzahlungsgesetz, Law on continuation of wage payments) ; after this, it is paid by the social security system (SGB V).

ff) *Risks that make work impossible* which arise from the sphere of the employer are carried by the employer himself, sec. 611, 615 BGB, which means he has to continue paying wages without work being done (by 100 %, not by 60 % according to article 26 of the Japanese LSL).

gg) There are special laws for the protection of *special groups*, like the Mutterschutzgesetz (MuSchG) for protection of pregnant and mothers, the Jugendarbeitsschutzgesetz (JArbSchG) for the protection of youths, Sozialgesetzbuch IX (SGB IX) for the protection of disabled persons.

As far as dismissals are concerned this means: sec. 9 MuSchG leads de facto to the result that it is impossible to dismiss a pregnant employee. Before the dismissal of a disabled person, an authority must give its consent. Members of a works council can only be dismissed by extraordinary dismissal and with the consent of the other members of the works council, sec. 15 KSchG and sec. 103 BetrVG.

hh) There are special laws forbidding *discrimination* because of sex (sec. 611 a, b BGB, sec. 612 para. 3 BGB; because of part-time or because of employment for a limited period (TzBfG); or because of dispatched work (AÜG). More forbidden items will come following Directive 2000/78/EG.

ii) The basis for *health and safety law* is sec. 618 BGB (Bürgerliches Gesetzbuch). But this rule of private law is entirely implemented by the administrative law of health and safety, containing especially the Arbeitsschutzgesetz, the Arbeitsstättengesetz and a lot of others.

jj) In cases of *dismissal* the Kündigungsschutzgesetz (KSchG), applicable to employees at least employed for half a year in an enterprise of at least ten employees (ten since January 1st 2004), requires a special reason for the dismissal and, for a dismissal by economic reasons controlled choice between those that could be dismissed.

Reference: Commentaries by *Ascheid*, Erfurter Kommentar, 4th ed. 2004; *Ascheid/Preis/Schmidt*, 2nd ed. 2004; *Becker u. a.* (KR), 6th ed. 2002; *Hueck/v. Hoyningen-Huene*, 13th ed. 2002.

The Kündigungsschutzgesetz is one of our most important laws. A great number of lawsuits are taken because of dismissals. If the Kündigungsschutzgesetz is applicable, the employer needs a good cause for an *ordinary dismissal*, sec. 1 para. 2 KSchG. It may be in the behavior of the employee or in the aptitude of the employee or in economic reasons.

A dismissal based on the behavior of the employee is possible if the employee acts against the duties of the employment contract.

The dismissal based on the aptitude is possible if the employee does not come up to the required level. But the employer must tolerate that an employee becoming older may not be able to learn new techniques. Another reason refers to sickness. Sickness itself is no reason for a

dismissal, but only the organizational difficulties arising from it. Besides, there must be a negative prognosis for the employee, which is generally only due to a permanent disease.

A dismissal based on economic reasons is only possible, if there is an entrepreneurial decision which will lead to working places becoming unnecessary. The decision itself is controlled by the courts only if it is arbitrary; but the courts control all steps between the decision and the consequences for the single employee. If it is possible to transfer (Japanese “haiten”) the employee on another (free) working place, the employer must do so.

A control of dismissals because of unjust discrimination, like it is widespread in America, is - as far - of little relevance in Germany.

But because a dismissal “because of” a transfer of undertaking is forbidden, sec. 613 a para. 4 BGB, there is a lot of lawsuits to find out if there was a transfer or a continuing of enterprise or simply a new partner to a contract, and if the dismissal was justified by economic reasons. The law of transfer of undertaking refers to all kinds of change, not only to split-offs like in Japan.

(*Reference: Wank, JILL Forum Special Series no. 12, March 2001*)

In *enterprises with less than ten employees* it seems that dismissals are possible at will. For a long time there has been almost no control by the courts. But the Constitutional Court forces the labor courts to control excesses by sec. 242 BGB (“Treu und Glauben”).

An *extraordinary dismissal* without a period of notice is possible if an employee acts strongly against his contractual duties. This instrument is only rarely accepted by the courts.

There has been an intensive discussion about the reform of the law of dismissal recently. Although the law and the courts still regard the reinstatement of the employee in the enterprise as aim of the law, in reality hardly any employee dismissed goes back to the enterprise. Therefore it has been suggested to replace an action for reinstatement by an action for a settlement. The newly established sec. 1 a KSchG points in this direction.

In reality, only few of the dismissed employees (but far more than in Japan) sue their employer. In most cases there is no judgment by the court, but a settlement following the proposal of the court. As there is quarrel about how high the settlement should be, sec. 1 a KSchG provides one half of wages per month for each year of the labor relationship.

kk) The typical normative *retirement age* is 65 years. It is allowed by labor law to terminate the employment contract as far as there is – which is generally true – a pension by the social security system. But meanwhile quite a lot of employees do not reach this age, due to sickness or to a contract of cancellation.

Details of retirement allowances are ruled by the BetrAVG (Gesetz zur Verbesserung der betrieblichen Altersversorgung, law on retirement allowances). Their introduction is voluntary, but once introduced they are ruled by detailed statute law and judge-made law.

ll) To understand the German system of labor law it is necessary to give a look at the *social security system*. Sickness payments for the first six weeks are given by the employer, further payments are given by the social security system. In cases of works accidents the employee can not sue the employer but gets payments by the “Berufsgenossenschaft” (mutual assurance, different from the Japanese workers’ accident compensation insurance law). Retirement payments are given by the social security system (often supplemented by retirement allowances from the enterprise).

b) Collective labor relations law

Collective labor relations law is divided into the three areas of works council law, collective bargaining law and the law of labor struggles. The law of industrial co-determination must also be mentioned.

It is a specialty of German law that the interests of the employees are granted by three different ways, as named above.

aa) The *Betriebsverfassungsgesetz* (BetrVG, Law on works councils) contains a number of rights given to works councils. They are elected by all employees and they represent the whole staff. Although most members of the works council are also members of a trade union, and

although the law allows them to refer to the help of the trade union, this institution is strictly different from trade union representation.

This is a different situation from that in Japan, where the employer can conclude a labor-management agreement with the majority representatives of workers of an establishment. Also in contrast to Japanese law, works council agreements on special subjects named in the BetrVG have a normative effect.

Therefore the subjects ruled by sec. 87 BetrVG and those of Japanese “work rules” are only partly the same, concerning formal conditions of the work and supplementary wages, but different as far as wages in concurrence with collective bargaining agreements are concerned.

The rights of works councils referring to co-determination (enterprise co-determination in contrast to industrial co-determination) comprises personal subjects, social subjects and economic subjects. Co-determination in *personal subjects* means, that before each dismissal the works council must be heard, although its statement is not binding. But if it is not heard, the dismissal is void, sec. 102 BetrVG. The BAG interprets the section so that a works council has only been heard correctly, if it has been given enough information. Although the employer need not give the dismissed employee reasons for the dismissal, this duty is sometimes used by the courts as vehicle for the control of the dismissal itself.

Works councils also can, based on enumerated reasons, prohibit transfers of employees, sec. 99 BetrVG.

Most rights are given in *social subjects*, sec. 87 BetrVG. Works council have a right of co-determination e.g. with short-time work, with the plans for paid leave, for health and safety measures, and especially for the wage system, but only as far as it is not ruled by collective bargaining agreements. Although sec. 77 para. 3 and sec. 87 BetrVG say that works council agreements must not interfere with collective bargaining agreements, especially on wages, in reality there are often two rounds of wage rise, first by collective bargaining agreements, second by works council agreements.

Alterations of works council agreements follow the rules of altering law and are not (or little) controlled by the courts. Therefore the same benefit granted by a works council agreement can more easily be changed than the same benefit granted by an individual labor contract.

Very important is also the co-determination on *economic subjects*, especially on social plans, sec. 112 BetrVG. In cases when e.g. a certain number of employees is dismissed, a social plan must provide settlements. This leads to a strange situation: If a single employee is dismissed, he can only sue for reinstatement, but not for a settlement. But if a certain number of employees is dismissed, they get a settlement, even if it costs the enterprise a lot and even if the idea of the organizational change was to save money.

bb) Collective bargaining is ruled by the *Tarifvertragsgesetz* (TVG, law on collective bargaining agreements). According to the jurisdiction, a trade union is only acknowledged fulfilling this Act, if it has a certain size and power.

Other elements are organization and independence of the employer (see art. 5 of the Japanese trade union law). Collective bargaining agreements between a trade union and either an employers' association or one single employer have a binding effect, sec. 4 TVG. They rule not only working hours and wages, but everything that can be part of an individual labor contract.

cc) *The law of labor struggles* is judge-made-law. The main rules are that there is no judicial control of the demands in such disputes. But, different from Japan, they are ruled by the principle of proportionality. This means that there must be negotiations before a strike is allowed and that e.g. the number of employees locked out must proportionally correspond to the number of those striking.

A right to strike is limited to trade unions. A strike led by a trade union after the collective bargaining agreement has run out is not unlawful. Wildcat strikes, political strikes and sympathy strikes are illegal. Although the number of strikes in Germany is lower than in some other European countries, the strikes that happen are very effective. The trade unions have developed a tactic of short strikes in a rolling system from enterprise to enterprise. Lockouts are very seldom in Germany.

dd) Another German specialty is the *industrial co-determination*. Stock companies in Germany have not one single board, but a board of control and a board of managers. The board of control consists of members sent by the owners, the share-holders, and by members sent by the part of the employees, partly by the employees of this enterprise and partly by trade unions. The competence of this board of control is to choose the managers and to conclude the contracts with the managers as well as to formulate the guidelines of the enterprise and to control management. This dimension of industrial co-determination is unique in Western-Europe.

What is said in favor of this system is that the interests of employees are integrated into the politics of the enterprise which leads to a more peaceful way of solving conflicts. In contrast it is said that this system leads to compromises making enterprises unable for competition; and the employees do not realize if their representatives are part of the management or really representatives of employees' interests.

c) *Labor lawsuits* are very common in Germany, especially concerning dismissals. Most lawsuits are finished by a settlement, based on a proposal of the judge. The employment is finished, but the employee gets a settlement, the height of which refers to the number of years of employment. Even if employers believe that the dismissal was lawful they tend to agree to a settlement, because as long as the lawsuit runs they have to pay wages without getting work, sec. 611, 615 BGB. Because of a (to my opinion) wrong interpretation of the statute by the BAG they even cannot employ their employees just for the time of the lawsuit. So after some months the costs of creditor's delay are higher than a settlement.

II. Legal Tools Regulating Employment

1. Statutes

In a contrast to countries like the US, a lot of rules concerning labor law is to be found in *statutes* (see A. I. 3.); and as lawsuits are common, there is quite a lot of jurisdiction to almost any question in labor law.

2. Collective bargaining agreements

As shown above, the most important instrument to regulate conditions of employment are *collective bargaining agreements*. By law, they are only applicable, if the employee is a member of a trade union and the employer is a member of an employers' association. In reality, most employment contracts refer to collective bargaining agreements, especially if the employer is a member of an employers' association.

One reason is that it is forbidden for an employer to ask at the time of concluding the employment contract if the applicant is a member of a trade union. On the other hand, if an applicant is employed at lower wages than that of a collective bargaining agreement, as soon as he enters the trade union he is granted its wages. Finally employers want to have equal conditions for all employees and they do not want to make trade unions attractive.

3. Works council agreements

Another source of regulations are *works council agreements*. The law on works councils (BetrVG, Betriebsverfassungsgesetz) provides them as the regular instrument of works councils participation if a general rule is required. Those agreements are mandatory, that means that if employer and works council do not reach an agreement, an arbitration procedure can be obtained.

Besides, voluntary agreements are possible, but they are less important.

Works council agreements have the same binding effect as collective bargaining agreements; the difference is that they are binding for all employees of an enterprise.

4. Individual contracts

As shown above, there is little left for *individual contracts*. But different from Japan, in many cases the employer is provided for a special task. That means that the employer cannot make changes referring to this task unilaterally.

Among labor contracts, German law differs between contracts based on a general formula and (real) individual contracts. *Formula contracts* are since the recent reform of the law of obligations ruled by a special part of the BGB (305 et seq.), granting fairness.

Reference: There is a lot of articles; the latest is *Thüsing/Leder*, Betriebs-Berater 2004, 42

Individual employment contracts are only controlled by sec. 138, 242 BGB.

The law of the individual employment contract follows the general rules for obligations in the BGB, with some modifications.

Reference: *Gotthardt*, Arbeitsrecht nach der Schuldrechtsreform, 2nd ed. 2003; *Wank*, Festschrift für Schwerdtner, 2003, p. 247 - 257.

III. Concurrence between the Various Legal Tools

1. Statutes

In labor law, quite a lot of *statutes* are mandatory. But this only works in one way. Collective bargaining agreements, works council agreements and individual contracts which lead to a solution more in favor to the employee, are nearly almost possible. On the other hand, all these tools must not go under the standard given by statute law. This relationship between statutes and private agreements is not called “Günstigkeitsprinzip,” but it follows the same idea.

Modern statutes, however, allow collective bargaining agreements to go under this standard, following the idea that there will be a compensation in another material. In these cases, especially enumerated in the statutes, individual employment contracts referring to the collective bargaining agreement may also follow this exception.

2. Collective bargaining agreements

Although statutes rule quite a lot of materials and of details, there is still enough room for *collective bargaining agreements*. They either rule materials not ruled by statute law or they go into details of rules by statute law or they give better conditions. As most labor contracts refer to collective bargaining agreements, statute law and collective bargaining agreements are the main instruments to rule an employment relationship.

3. Works council agreements

Works council agreements are typically on the materials provided by sec. 87 BetrVG. So the materials of statutes and collective bargaining agreements on the one hand rule what are the contents of the working contract whereas works council agreements rule the working conditions, like working time, in the special enterprise.

4. Concurrence of collective bargaining agreements and works council agreements

There is a problem concerning the concurrence of *collective bargaining agreements* and *works council agreements*. The BetrVG says in sec. 77 para. 3 and sec. 87, that collective bargaining agreements prevail; but there is a dispute about how far this prevailing goes (see B. II.).

5. Individual employment contracts

As far as *individual employment contracts* are concerned, even if the employee is bound by the collective bargaining agreement or by the works council agreement, the individual employment contract is valid if it is more in favor of the employee (“Günstigkeitsprinzip,” see B. II.).

IV. Employees’ Representatives

In Germany the interests of employees are represented by three ways,

- trade unions and collective bargaining agreements,
- works councils and works council agreements and
- enterprise co-determination.

1. Trade unions

Although *trade unions* are also part of the political scene and although they are represented in political commissions, as far as labor law is concerned, they only represent those employees that are members of the trade union. Only these employees are bound by the collective bargaining agreement (and only if the employer is a member of an employers' association). In reality, most individual labor contracts refer to collective bargaining agreements, regardless if the employee is a member of a trade union. If he is not, the collective bargaining agreement is valid by this referring as part of the individual labor contract.

Main subject of collective bargaining agreements are all matters that could be part of an individual employment contract.

In general there are two kinds of collective bargaining agreements, those on wages, running in general only for one year, and those on other working conditions, running in general for several years.

At the moment there are two new tendencies: One is to make collective bargaining agreements more flexible and open for works council agreements, another is to reduce costs of wages.

Labor struggles are only allowed for trade unions and employers' associations.

2. Works councils

Although the Betriebsverfassungsgesetz allows the staff to make elections for *works councils*, if there are at least five employees, in reality it is true that all big enterprises have those works councils, but most of the small enterprises do not have one.

The election refers to the special enterprise; and voters are only the employees of this enterprise. In general the candidates are on a list of the trade union, eventually concurring with a special list in this enterprise.

While collective bargaining agreements may contain all materials, the Betriebsverfassungsgesetz gives works councils only a limited reach of competence, especially

- co-determination on personal subjects,
- co-determination on social subjects and
- co-determination on economic subjects.

Voters for the works councils are all employees of this enterprise, and the works council agreements are valid for all employees. All this has nothing to do with the membership in a trade union.

3. Industrial co-determination

Besides there is an *industrial co-determination* in as far as the boards of all big enterprises are constituted half by representatives of the owners and half by representatives of employees.

We have three different laws of industrial co-determination.

- The first was introduced in the coal and steel industry (Montanmitbestimmungsgesetz, MontanmitbestG). Here the Aufsichtsrat (board of control) exists of the same number of representatives from owners and of representatives from employees (5/5). There is an "eleventh man" to equalize.
- The second system is that for minor enterprises and it is ruled by the *Betriebverfassungsgesetz 1952*. Here 1/3 of the members of the board of control represents the employees.
- Since 1976 for all big enterprises the *Mitbestimmungsgesetz* (MitbestG) is applicable. Here the board of control consists at one half of the representatives of owners and at the other half of the representatives of employees (sent by the employees of the enterprise and by the trade unions). In case of a deadlock the chairman (always by the owners' side) has two votes.

V. Differences between Japan and Germany

1. Trade unions

The rights of a *trade union* are at least the same in Germany, granted by the Constitution and by the Constitutional Court (see A. I. 2.).

The general idea is that labor law grants a basic standard and that collective bargaining agreements go further, leaving enough place for even better conditions in the enterprise. In fact, statute law has meanwhile reached a high standard, and collective bargaining agreements no longer guarantee a minimum standard, but a standard surpassing statute law.

Collective bargaining agreements are binding, but only for members of the trade union.

2. Works councils

There is no equivalent to work rules in Germany. Two situations are possible: Either there is a *works council*. Then almost everything that does not refer to the work itself but to working conditions is ruled not unilaterally by the employer but by works council agreements.

Only if there is no works council, the *employer* can rule these materials himself.

In any case, either with works council or without, you have to divide between

- conditions outside the contents of the *labor contract* and
- orders inside the reach of the labor contract.

E.g. whether an employee has to work 35 hours per week or 40 hours, is ruled by the labor contract. It can only be changed by contract, not unilaterally by the employer. But which tool the employee has to use is due to the orders of the employer. At which time work starts every day is also due to the order, either by works council agreements or, if there is no works council, by the employer.

In an enterprise, employees are not represented by the trade union, but only by the collective bargaining agreement. The rules of works council agreements are binding for all employees in this enterprise, regardless of their membership in a trade union.

3. Instruments for flexibility

In comparison with Japan, German labor law lacks effective *instruments for flexibility* (see D.).

Different from Japan, an employment contract in Germany normally states a special task for which an employee is engaged. A new task or different working conditions cannot be ordered unilaterally by the employer. Either the parties agree to change the contract or the employer is in a bad position. He must apply the “Änderungskündigung” (Japanese “hengo-kaiyaku-kokuchi”), which is, as is generally accepted, an inflexible instrument. In Japan, in contrast, transfers within the enterprise (“haiten”) are more easily possible because the task provided by the contract is broader.

Changes in collective labor law are easier, as they follow the principle of *lex posterior* (the latest rule is valid). But the employer needs the consent of the employees’ representatives.

On the enterprise level the employer may convince the works council that a change of the works council agreement is necessary.

As far as collective bargaining agreements are concerned, the situation may be different for an industry as a whole and in one single enterprise. The problem is, how the conditions in this enterprise can be changed without destroying the collective bargaining agreement in general (see B. II.).

B. SIGNIFICANT CHANGES

I. Various Factors and Attitudes

There has been a debate about deregulation about ten years ago which is still continued. In reality, there has not been deregulation in statute law but rather a continuing increase of *statute* regulations. The demand for more flexibility has also not been fulfilled by statute law.

There has only been more flexibility in *collective bargaining agreements*, allowing the parties on the enterprise level to conclude some modifications.

There has been a continuing increase of flexibility concerning working time. Some years ago every employee had certain working hours, with a fixed time for the beginning and the end of the working day. Meanwhile gliding time is widespread and there are contingents of working hours that are flexibly used.

As far as the problem of harmonizing work with family life is concerned the debate is characterized by state hypocrisy. The state has not yet been able to supply families with enough care-centers for young children and kindergarten or looking after at school, so that mothers either quit their job or change to part-time. At the same time the state claims that employers should do more in favor of equal treatment for men and women!

Other general factors like global competition and structural changes in industry have not led to changes in labor law but have led to a lot of cuts of employees' rights in social security law.

There is a tendency among enterprises to transfer the production to countries where the costs of wages are lower. In eastern Europe, e.g., they are only 1/5 of those in Germany. This means that a continually increasing number of employees are no longer needed in Germany. The result should be to make conditions for employment easier and more flexible by statute law and by collective bargaining agreements. However, politicians and employers' associations and trade unions fail to inform the employees about this inevitable development.

II. The Relationship Between Individual and Collective Regulations

1. Individual contract

In general this relationship has not changed in German labor law. There is a long debate about the role of the *individual contract* in contrast to collective labor law. But it is rather academic. A big number of statutes, collective bargaining agreements, works council agreements and judge-made law has not much left for individual regulations. Besides, those scholars who refer to individual freedom neglect the real powers in an enterprise. Only specialists can pursue their own interest against the employer, whereas most employees have to accept the conditions proposed by the employer.

2. The principle of more favorable conditions (“Günstigkeitsprinzip”)

a) There has been a strong discussion in the interpretation of the “*Günstigkeitsprinzip*” (principle of more favorable conditions for the employee). The origin of the principle is to help the individual who has managed to conclude a favorable contract against collective institutions. There is, as shown above, not much room for it, but this principle is still valid.

b) In recent years the opinion has developed to *interpret this principle in a different way*. There are mainly three items to be considered referring to the “Günstigkeitsprinzip.” This goes together with the political and scientific debate of transferring competence from collective bargaining agreements to the enterprise level.

Reference: *Adomeit*, NJW 1984, 26; *Bonin*, Standortsicherung versus Tarifbindung, 2003; *Buchner*, Der Betrieb 1996, Beilage 12, 1; *Buchner*, Festschrift für Herbert Wiedemann, 2002, 211; *Dieterich*, Der Betrieb 2001, 2398; *Ehmann/Schmidt*, NZA 1995, 193; *Hromadka*, Der Betrieb 2003, 42; *Hromadka*, NJW 2003, 1273; *Löwisch*, Juristenzeitung 1996, 811; *Möschel*, Betriebs-Berater 2003, 1951; *Schliemann*, NZA 2003, 122; *Wolter*, NZA 2003, 1317; *Zachert*, Der Betrieb 2001, 1198

The prevailing interpretation of the principle is that the comparison between the collective regulation and the individual regulation can neither extend to both whole contents nor include only two paragraphs which are compared, but two *coherent materials*, like paid leave (“Sachgruppenvergleich”).

The second item is that the comparison can only be made from an *objective* point of view and not by the individual employee himself.

Finally the idea of the Günstigkeitsprinzip is to protect the *individual* against collective organizations.

Since some years some scholars try to transform the interpretation of the principle. There are two typical situations for this new interpretation:

- Employees want to work longer than provided by a collective bargaining agreement (and to earn more money).
- The employer threatens to close the enterprise. The employees agree with a reduction of wages to secure their employment.

In these cases the new opinion argues:

The height of wages and the security of the job can be compared. - The prevailing opinion says this means to compare apples and pears.

The new opinion says, that it must be left to the arbitration of the individual, which regulation is more favorable. - This sounds like tax law is valid, if a citizen agrees with its validity.

Finally, those cases referred to, mean that the collective organization of the staff votes against the collective organization of trade unions, whereas the “Günstigkeitsprinzip” looks at the individual employee.

Taken all in all, the new interpretation has nothing to do with the original idea of the “Günstigkeitsprinzip”. The changes preferred by this opinion can only be reached by changing statute law and not by a single transformation of the interpretation of the “Günstigkeitsprinzip.”

C. SIGNIFICANT CHANGES IN THE COLLECTIVE LABOR RELATIONS LAWS

I. Derogation from Legal Norms

In Germany the legislator does not trust anyone else to find such a good and fair solution as he has found. Therefore most of labor law statutes are binding for anyone. For example the statute on dismissal does not allow any modification for either collective bargaining agreements, works council agreements or individual contracts.

As shown above, without a statute saying that it is allowed, it is only possible for all said instruments to rule different from statute law, if this is in favor of the employee.

Any regulation not in favor of the employee is in general not allowed. There are a few statutes, with an increasing number, that allow at least collective bargaining agreements to modify the regulation even to the disadvantage of the employees. In these cases, individual contracts referring to the collective bargaining agreement may also derogate legal norms. The idea of the legislator is that trade unions are able to protect the interests of employees and are able to find a compensation in other materials.

Individual labor contracts without reference to a collective bargaining agreement are not allowed to derogate from mandatory legal norms.

II. Alternatives to the Principle of More Favorable Conditions (“Günstigkeitsprinzip”)

1. “Günstigkeitsprinzip”

As said above (see B. II.), in cases of a conflict between saving the employment and reducing wages, some scholars and politicians try to find the solution in a transformation of the “Günstigkeitsprinzip.” The BAG has so far objected to this (BAG AP Nr. 89 zu Art. 9 GG).

The argument behind it is that if you allow this, an employer could easily demonstrate that the situation for the enterprise is dangerous and that cuts of wages are necessary. There would be no legal instrument to control the process. As the problem does not refer to a single employee but to the whole staff, it cannot be solved by a simple modification of the single employment contract, but only by a general process.

2. Modification Clauses

Other ways, which are to be preferred, are to install *modification clauses* in collective bargaining agreements. So far, quite a number of collective bargaining agreements have such clauses, but there is still a lack of those clauses in a lot of collective bargaining agreements.

3. Changes with the consent of the two parties of the collective bargaining agreement

Besides, the law which is already valid allows a deviation from a collective bargaining agreement on an enterprise level with the *consent of the two parties* of the collective bargaining agreement. This is practiced in a lot of cases, although the partners of the collective bargaining agreement do not want to have publicity. In these cases the employer together with the works

council develops a solution to save employments by deduction of wages. If the employer and the works council are able to persuade the partners of the collective bargaining agreements that in the end the solution is more agreeable for employees than to fulfill the collective bargaining agreement, they agree and for a limited time a deviation is possible for this enterprise.

There is a strong political movement to install such a possibility in a statute. It is suggested that there should be a limited period for the parties of the collective bargaining agreement either to consent or to veto the solution found in the enterprise. The parties on the enterprise level should be forced to inform the parties of the collective bargaining agreement about the solution (see *Dieterich/Hanau/Henssler/Oetker/Wank/Wiedemann*, *Recht der Arbeit* (RdA) 2003, 193).

4. An enterprise in danger of becoming bankrupt

When the *enterprise is in danger of becoming bankrupt*, it is a situation which is different from those mentioned before. In this situation it is not only a matter concerning the parties of the employment contract, but also a matter concerning banks, owners and creditors. Therefore a solution can neither be found by a re-interpretation of the “Günstigkeitsprinzip” nor by modification clauses in collective bargaining agreements but by a special solution which is only possible by a new statute. The difference between bankruptcy cases and this situation is that there is a period before an enterprise is bankrupt in which there is the possibility that it will recover. In this case it needs a deduction of claims not only by employees but also by owners, banks and managers. Therefore the procedure must be similar to that of bankruptcy, but it has to be different to give the enterprise the chance to recover. There is a suggestion to install a procedure similar to Chapter 11 in the US Bankruptcy Act (see *Dieterich et al.*, to be printed in RdA 2004).

III. Decentralization of Collective Bargaining

Some politicians, scholars of economy and some scholars of labor law demand that the collective bargaining system should be decentralized. They claim that the system that is valid now does not take the situation on enterprise level at view. The discussion about the new “Günstigkeitsprinzip” (see B. II.) is connected with this argument.

Whereas in Japan there are mostly enterprise unions, in Germany there are industry unions. They include all employees working in that industry, regardless of their special job in the enterprise (like a cook in a steel company).

Those in favor of this argumentation seem not to recognize the diversification in the collective bargaining system that we already have. They seem to have the idea that there is one collective bargaining agreement for the whole of Germany and for every labor contract. In contrast, there are more than 50,000 collective bargaining agreements today valid in Germany. It is true, that although there are different collective bargaining agreements in the different regions of Germany, those of one trade union are very similar. But even if you accept this, there is so much differentiation by collective bargaining agreements differing by branches and by regions that the argument against the system does not convince.

Instead the idea to transfer more power from collective bargaining agreements to the enterprise level would mix two systems. As shown above, the system of collective bargaining agreement is based on the legitimacy of membership whereas the legitimacy of works council agreements is based on the vote of the staff. Besides, collective bargaining agreements may deal with almost all materials, whereas works council agreement may only cover a limited reach of materials. Finally only the partners of collective bargaining agreements are allowed labor disputes and not the partners of works councils. There has not been yet any proposal how these two different systems could be changed in an agreeable way by transferring power from collective bargaining agreements to works council agreements.

D. LABOR LAW INTERVENING IN THE LABOR MARKET

There has been a recent discussion about the relationship between the law of dismissal and unemployment. There are different opinions about this connection, but the prevailing idea is that

if law binds enterprises too much in their choice for hiring and firing employees, they tend to refrain from hiring and use other methods instead. They can extend working hours or go over to contracting out, to employ employees for a limited period or to use dispatched work.

Reference: *Bauer*, NZA 2002, 529; *Buchner*, NZA 2002, 533; *Hromadka*, NZA 2002, 783; *Preis*, RdA 2003, 65; *Rüthers*, NJW 2002, 161; *Wank*, NZA Sonderbeilage 21/2003, 3

Another much discussed item is how enterprises can react to changes in the market by changing the labor conditions. An overview on our system shows that the legal system does not contain agreeable ways for change.

In individual labor law, one way is to make provisions by taking up in the labor contract clauses that allow the employer to make unilateral changes for an adoption to market situations.

If a labor contract does not contain those clauses – and they are only allowed to a certain extend – then there is only the way of “Änderungskündigung” (dismissal combined with an offer for a modified contract, sec. 2 KSchG). Whoever writes about the “Änderungskündigung” must state that, at least as far as mass Änderungskündigungen are concerned this a method which is not appropriate.

Therefore employers in Germany have turned to changes by ways in a collective labor law – especially by contracting out so that the new enterprise is ruled by collective bargaining agreements more in favor for the employer.

Taken all in all, German labor law lacks effective methods of a quick and appropriate way to change working conditions.

The question therefore is less in what manor labor law should intervene in the labor market but that labor law should supply enterprises with effective ways to act as entrepreneurs. That protection of employees by labor law is necessary is not denied in general.

The Framework of French Labour Law and Recent Trends in Regulation

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At the beginning of the twenty-first century, French labour law, as others, faces important challenges. Globalization, new technologies at work, the rise of precarious work, productive decentralization are some of the complex issues it has to deal with. It is in the context of a widespread criticism of the French model of labour law, in large part governed by legislation and the idea of status, that these challenges occur. Too rigid, too complex, French labour law would be in need for reforms. Understanding the overall logic of a system is necessary to understand its evolutions. As a consequence, the paper will describe the overall system of sources, before analysing some of the evolutions that labour law has lived in the recent years, or could live in the coming years, according to the reforms that are at a planning stage.

I. SOURCES¹

The general context of labour law in 2004, with regard to sources of law, is that of a criticism of State regulation of employment relationships. Two figures are the object of criticism.

The first is the judge, who has had in the last twenty years, a fundamental role in the evolution of labour law. He is often criticised for going beyond his role of applying and interpreting the law, and for introducing insecurity in labour law.

The second is the legislator, criticised for excessive interventionism within labour law. The interesting point here is not the criticism in itself, which has existed since the separation of labour law from the civil code, but the alternative proposed to statute law. It is remarkable to note that, on the part of employers, the development of collective bargaining is seen as a priority.

The following developments will consist of a description of the sources of French labour law, as well as their articulation.

A. Description of Sources

The purpose of the paper is not to focus on the international sources, considering they are not specific to French law – the specificity would mainly concern the implementation of European norms in national law –. These are bilateral treaties, conventions of the International Labour Organisation, European Community law, with a special mention to the Charter on fundamental rights recently adopted.

It is suggested to draw a distinction between classical sources and professional sources.

1. Classical internal sources

a) *The Constitution*

The Constitution plays an increasing role in labour, to such an extent that an important subject for French labour law is that of the “constitutionalisation of labour law.” However, this movement has only been possible through an enlargement of the concept of Constitution. It is considered, indeed, that constitutional value should be granted to norms others than the very text of the Constitution:

It has been considered that the Preamble of the French Constitution, which refers to the Declaration of Human Rights of 1789 and the preamble of the Constitution of 1946 (which refers to the “fundamental principles recognized by the laws of the Republic”), has the same value as the Constitution itself. As a consequence, these texts and principles have constitutional

¹ Most cases referred to in the following text can be consulted by connecting to : www.legifrance.com/

value.

Particular attention should be given to the preamble of the Constitution of 1946, which contains social and economic rights (right to work, right to strike, right to collective bargaining...), as opposed to the Declaration of Human rights which contains rather civil and political rights, and is usually considered as a rather “liberal” text. It may be interesting to underline that this declaration is regularly invoked, sometimes successfully, to call into question interventionist legislation. It is the case, in particular, of freedom of enterprise, which is not explicitly referred to in the Declaration, but may be linked to the general principle of freedom stated in article 4 of the declaration.²

Among the constitutional principle, the principle of equality deserves particular attention. It is, indeed, often invoked to contest the validity of a legislative provision, notably when the provision draws distinctions between different categories of workers.

This pretension is rarely successful before the Constitutional Court (*Conseil Constitutionnel*), which states that “the principle of equality does not preclude the fact that the legislator should rule differently different situations, neither that he should derogate to equality for reasons of general interest, in so far as the difference of treatment that results from it is linked with the object of the law.”³ Intelligibility and clarity of the law are also invoked since they have been granted constitutional value by the Constitutional council.⁴

b) Statute law

It is needless to say that Statute law plays an essential part in French labour law. The history of labour law is indeed that of an emancipation with regard to the law of contracts, through the laying down of specific rules by the legislator, notably in the name of workers’ protection. Most statute law is inserted in the labour code. Codification is indeed an essential part of French private law.

c) Case law

The importance of case law in French labour law, notably that of the Court of cassation, is such that it can be ranked among the sources of law – although it is not a formal source of law. The social chamber of the Court of cassation has, indeed, played a decisive role in the evolutions of labour law, notably in individual employment law. For instance, the question of the alteration of working conditions has been nearly exclusively dealt with through case law. The Court of cassation has also played an essential role in the law relative to economic dismissal, notably with regard to the regrading of employees after such a dismissal, but also with regard to the justifications for economic dismissal.

2. Professional sources

Professional sources are mainly customs, work rules and, especially collective agreements.

a) Custom

Two types of customs can be isolated.

The first are professional customs. It is not surprising that this source of law has not encountered considerable evolution.

The second type are the company customs, whose legal recognition originates from case law; they are important in practice, notably with regard to notice in the case of an employment, or awards granted by the employer in addition to wages. The contents of the custom can be of different kinds; it can be the fact of applying voluntarily a collective agreement, of applying a collective agreement that does not normally apply to the company, of granting collective advantages regarding collective representation, of granting individual advantages to all employees of the firm, or at least to all employees of the same category.

² A. Lyon-Caen, *Le droit du travail et la liberté d’entreprendre*, Droit social 2002, p. 258.

³ Conseil Constitutionnel, Déc. 13rd January 2000, 99-423 DC, RJS 2/00, n° 175.

⁴ Conseil Constitutionnel, Déc. n° 98-401, 10th June 1998, Rec. 258 ; Déc. n° 99-421 DC, 16th December, 1999, Rec.136.

For a company custom to be valid, it has to be general (apply to all employees of the company or, at least, to all employees within the same category), invariable, and constant. Its revocation requires the information of the employees along with that of their representatives, and the respect of a reasonable notice.

They have legal value in themselves, independently of the contract. This means that incorporation within the contract is not required for the custom to bind his author, that is to say the employer. How can their legal value be explained? It is sometimes explained through an assimilation with another source of law, that has only been recently recognised (by case law again): the unilateral engagement of the employer. At present, it is difficult to define the latter concept with precision. It is sometimes said, through a comparison with the mechanism of estoppel (which does not exist in itself in French law), that its binding force comes from the expectations created towards the employees.

b) Works rules

The labour code contains provisions regarding the “Règlement intérieur,” which contains company rules relative to discipline, health and safety. It is obligatory in companies employing regularly more than twenty employees.

c) Collective agreements

Collective agreements are the most important of professional sources.

1. Their legal nature

As far as their legal nature is concerned, collective agreements are both contracts (binding for the social partners who have signed them), and normative acts (that contains rules that go beyond the circle of the signers). It is with regard to their normative effect that French collective agreements are commonly associated with statute law.

2. Their scope of application

The applicability of collective agreements depends on the employer having signed it, having adhered to it, being member of the employers’ organization that has signed the agreement, or having adhered to it. If it is applicable, it applies to all contracts of employment concluded with this employer.

Some sector agreements are made applicable to all employers and companies within the sector concerned: this is called “extension.”

3. Their level

Three levels of collective bargaining are considered in French labour law:

1. national
2. sector
3. company (which is subdivided in establishments)

The evolution is that of a weakening of the traditional and typical level of collective bargaining in French law, which is the sector level. Since the 1980’s, company level bargaining has increased, due to an obligatory annual negotiation on wages and working time instituted by the legislator in 1982, but also to a possibility to derogate in a manner that is not necessarily favourable to employees. This evolution has increased employers’ interest for collective bargaining at company level.

National level bargaining has also developed, as an important instrument of social dialogue (see further, the development of social dialogue). It is an important source of proposals for legislative reforms.

4. The actors of collective bargaining

As a rule, only representative trade unions can conclude a collective agreement (There exist two ways to obtain representativity. Some trade unions are per se representative, due to their affiliation to one of the five national trade union organizations that are deemed representative). Those who are not affiliated must prove their representativity, through criteria such as independence or audience at industrial ballots.

Although Trade unions have for long had a monopoly of collective bargaining, an important

exception, in the theory of labour law at least, was introduced by a statute law of the 12th November 1996. It may be underlined that this exception was considered as compatible with the Constitution, due to the absence of constitutional value of trade unions with regard to collective bargaining.⁵

The exception is the following:

In companies that have no trade union representation, and where a sector agreement allows it, a collective agreement can be concluded:

- either by the elected representatives (Comité d'entreprise or délégués du personnel)
- or by one or several employees of the company, that have been given a mandate by one or several representative trade unions.

The objective was to develop collective bargaining in small or medium size companies, that frequently lack trade union representation.

Although essential in theory, this exception was however of a limited scope in practice. The law of 1996 was only “experimental.” It can be observed that a new trend in French labour law is to lay down experimental statute laws, that are bound to be re-examined with regard to the success or failure of their application for a limited number of years. Even though the law of 1996 was not a failure, the success turned out to be limited, considering less than forty agreements were concluded.

The Statute law of 19th January 2000, relative to the reduction of working time to thirty-five hours, introduces a similar legal mechanism. It opens the possibility of giving a mandate to employees, without a sector agreement (which has been strongly criticised), but with a strict legislative framework, and a majority ratification. The project of statute law that is currently before Parliament intends to reactivate the mechanism established in 1996.

B. The Articulation of Sources

The articulation of sources is different from that of civil law, which is based on hierarchy. In labour law, the articulation is not based on the position of the norm within the hierarchy, but on its contents. More precisely, the rule is that the most favourable provision applies.

How to compare a collective agreement and a provision of statute law? The comparison must be carried out advantage by advantage, according to the specific situation of each employee. Yet, some state that this mode of comparison is not appropriate for concession bargaining.

Although the principle is the possibility to derogate in a more favorable way to a source higher on the hierarchy, it does not apply were core rules are at stake. Some rules laid down by statute law are thus absolutely imperative, and cannot be derogated to, even more favourably for the employee. These are notably the rules regarding jurisdiction, criminal sanctions and some rules concerning employee representatives.

II. RECENT EVOLUTIONS IN FRENCH LABOUR LAW

As is the case in other countries, it is common, in France, to distinguish between individual and collective labour law. Only some of the evolutions will be considered in the following developments. Some have already been adopted. Others are at a planning stage, or merely in perspective.

A. Individual Labour Law

The following developments aim at examining some of the important evolutions that French labour law has encountered in the recent years.

1. Statutory intervention

The legislative activity is intense in French labour law. Among many, three statutory interventions will be contemplated.

⁵ Cons. const. D. 96-383 of 6th November 1996, Legifrance.com.

a) *The reduction of working time*

The complexity of the legal regulation of working time does not enable a detailed description. Two main points may be underlined.

The first concerns the contents of the law itself: it organizes a general reduction of working time to 35 hours.

The second point is of particular interest. It concerns the method of elaboration of the law. Its interest regards the relationship between collective bargaining and statute law.

Two statute laws were, indeed, successively adopted. The first, adopted on the 13th June 1998, financially incites companies to negotiate collective agreements on the reduction of working time to 35 hours. These are “anticipation agreements.” The logic that lies behind this first statute law was to enable and encourage companies to negotiate the reduction of working time, rather than having it imposed by statute law. Indeed, unless an agreement was reached, the reduction of working would be an operation of statute law in the year 2000, which has been the case for a large number of companies. The second step was, indeed, the statute law of 13rd January, 2000, that imposes the reduction to 35 hours.

This articulation between collective bargaining and statute law reflects the links that develop between these sources of law, the legislator referring more and more to collective bargaining, whose legitimacy (local - company agreements - or professional - sector agreements -) adds to the legitimacy of statute law. The legislation on working time has been amended in 2003,⁶ with a purpose notably to introduce more flexibility.

b) *The law against sexual and moral harassing*

The introduction of a new section of the labour code on “harassing” deserves attention. Indeed, a statute law of the 17th January 2002, reinforces the provisions on sexual harassing and introduces a protection against moral harassing.

1. *The scope of protection*

Two successive provisions of the labour code protect employees against harassing.

The first is relative to sexual harassing (Article L 122-46 Labour code): “no employee, no candidate for recruitment, or a training period can be sanctioned, dismissed or be the object of a discriminatory measure, should it be directly or indirectly, for having been the victim of, or refused, acts of sexual harassing, whose task is to obtain favours of a sexual nature to his profit or to that of another person.

The second is relative to moral harassing (Article L 122-49 Labour code): “no employee, no candidate for recruitment, or a training period can be sanctioned, dismissed or be the object of a discriminatory measure for having been the victim of or refused repeated acts of moral harassing having as an object or an effect a degradation of the working conditions likely to violate his rights and dignity, to alter his physical and mental health or compromise his professional future.”

The employee who denounces such acts is also protected.

2. *Measures of prevention*

The employer has to take all the necessary provisions in order to prevent acts of sexual or moral harassing (Article L 122-48 Labour code).

3. *Mediation procedure*

A person who has been the victim of moral harassment (but not sexual) can open a mediation (Article L 122-54 Labour code).

4. *Proof*

The proof of sexual and moral harassing is derogatory with regard to the general rules of civil law. It is a recent evolution in French law, under the influence of European Community law with regard to non discrimination. Proof is divided in two stages. The first consists of the proof by the employee of facts that enable to presume sexual or moral harassing. If such facts are

⁶ Loi n° 2003-47 of the 17th January, 2003.

established, it is then to the person accused of harassing to prove that these elements do not constitute harassing, and are justified by objective reasons, that have nothing to do with harassing.

5. Sanctions

Sexual or moral harassing can lead to three kinds of sanctions. The first is the nullity of the decision eventually taken as a consequence of the refusal of the employee to bear sexual or moral harassing (dismissal, sanction). The second sanction is relative to discipline. If the individual who committed the acts of harassing is an employee, he faces disciplinary sanctions. The third type of sanctions are criminal sanctions.

2. The contract of employment and its evolutions

a) The rehabilitation of the contract

An important aspect of French labour law is the rediscovery of contract.

French labour law has developed in reaction against contract law. Yet, contract and contractual analysis tend to be rehabilitated. First, contract is and has always been an instrument of individualisation of the employment relationship. Second, it appears as one of the core mechanisms of employee resistance to change, should it emanate from collective agreements or from unilateral decisions by the employer. The Court of cassation, in the late 20th century, has put emphasis on this aspect, stating notably that a collective agreement can not, per se, modify the contract employment. The most obvious example concerns resistance against unilateral change by the employer.

b) The issue of change

Among the evolutions that the contract of employment, and its regime, have encountered in the recent years, the alteration of terms and conditions of employment deserves particular attention. The rules applicable to change have been elaborated by the Court of cassation.

1. The analysis of the change

For a long time, the changes in the employment relationship were governed by the following rule: *if the modification of the contract was substantial, an agreement between the employer and the employee was required. If it was of minor importance (non substantial), the employee was not able to refuse it: it could be unilateral by the employer.* In other words, the issue of changes in the employment relationship was governed by a distinction according to the importance of the change, according to the circumstances.

The Court of cassation revised its case law in several decisions of the 10th July 1996. Its former rule had been criticised with regard to the principles of contract law. Indeed, the admission of a unilateral modification of the contract, should it be non substantial, was considered as a breach of the principles of contract law. Requiring no agreement of the parties in the case of non substantial modification of the contract was evidently contrary to article 1134 of the Civil code, according to which contracts are binding between the parties. This may explain the new rule. Since 1996, the distinction is between the modification of the contract - which requires the agreement of the parties - and the changes in working conditions decided by the employer in the exercise of his power of direction.

The change is two-fold.

First, the concept of non substantial modification of the contract has been replaced by that of “change in working conditions ...” The purpose of this change was to put an end to the idea of a unilateral modification of the contract, even non substantial. The possibility to change the working conditions is then seen as an exercise of power by the employer. The labour law approach to change in working conditions is thus reconciled with contract law.

Second, the partition between contract and power, that is to say between the changes that require the agreement of the employee, and those that can be unilaterally decided by the employer, departs from that adopted under the former rule.

Instead of analysing the circumstances and qualify the change with regard to the particular circumstances of the employment relationship, the Court of cassation instituted a purely

objective test. Some elements are necessarily part of the contract, and thus their alteration is *per se* a modification of the contract: wages, working time, job function and work place. The other elements are mere working conditions, that can be unilaterally changed by the employer. In this perspective, the partition is purely objective. Was it not too objective? The partition, which had the advantage of being predictable was nevertheless considered as too rigid. It meant that a change of working place within Paris itself required, in theory, the agreement of the employee.

As a consequence, from 1998 onwards, the Court of cassation introduced flexibility within the system, which is today as follows: changes in wages and working time are, whatever the importance of the change, modifications of the contract. Changes in the job function are modifications of the contract, if they alter the contractual definition of the job function. New tasks within the contractual job function are mere changes in working conditions. For instance, changing the task of a secretary from hand writing to computer writing is a mere change in working conditions, and does not require the agreement of the employee.

The change of work place is an issue that has attracted major attention. Considering the requirement of an agreement of employees for all changes of this type, even within the same city, was excessive, the Court of cassation introduced flexibility. If the change lies within a “geographical sphere,” it is qualified as a mere change in the working conditions. If it goes beyond, it is a modification of the contract. The difficulty here is the definition of the “geographic sphere.” Some clarification is expected from the social chamber of the Court of cassation in the coming months.

An element of complexity concerning alterations of the work place is the mobility clause: if the contract contains such a clause – and if its use is not abusive, the change in the location of work is considered as a change of working conditions, unless the use of the mobility clause by the employer is abusive.

2. The Consequences of the refusal

The issue of alteration of working conditions is closely linked to that of dismissal. The refusal of a change in working conditions is in principle a misconduct, that can be a ground for dismissal. On the other hand, the refusal of modification of the contract is not in itself a ground for dismissal. A ground for dismissal is necessary, such as an economic ground.

If the employer decides to dismiss the employee, it will have to establish a ground for dismissal other than the refusal of the contractual modification.

3. Article L 120-2 of the Labour code and the respect for fundamental rights

Article L 120-2 of the labour code is not as recent as the statutory interventions evoked above. Yet, it is only in the last few years that its importance has appeared in case law. This provision, adopted in 1992, has remained quite anonymous for several years before becoming one of the core provisions of the code with regard to the individual relationship. It states that “nobody shall impose restrictions to the rights of the persons, to his or her individual and collective freedom, that are not justified by the nature of the task to accomplish and proportional to the aim pursued.” Article L 120-2 can be summarised as requiring the proportionality and the justification of employer decisions.

This provision has been mobilised to control different types of decisions. It is the case of an employer decision to change the work place of an employee, according to a mobility clause inserted in the contract of employment. Even though the employer is entitled to change the work place of the employee, by virtue of the contract, the use by the employer of a mobility clause can not lead to the imposing of excessive restrictions to the rights of the employee, notably the right to have a normal family life.⁷

Recently, the question of dressing at work was raised before the Court of cassation, and the issue was again that of the proportionality and justification of the decision of the employer to refuse the wearing of short trousers at work.⁸ More generally, the issue of privacy at work, which

⁷ Cass. soc. 12nd January 1999, Legifrance.com.

⁸ Cass. soc. 25th May 2003, Legifrance.com.

has been fundamental in recent labour law,⁹ is deemed to be regulated by virtue of article L 120-2. For example, the control of the bags of the employees, when entering the building of the company, is legal only if it is justified by outstanding circumstances and proportional to the aim pursued in certain circumstances (security control).¹⁰

Inevitably, the selection operated above was arbitrary. Other evolutions could have been studied.

B. Collective Labour Law

Even though the main evolutions concern collective bargaining, employee representation within the company, notably as a way to control economic decisions, has developed.

1. Collective representation and control of power within the company

The ideas of corporate governance have had some impact in French law in the last few years. Although it is mostly an issue for company law (control of directors by shareholders, changes in the structure of company boards...), it has also had some impact in the field of labour law. The impact concerns notably the information and consultation of works councils, who are obligatorily informed and consulted on issues concerning the organisation, management, and general functioning of the company, and notably, the measures that are likely to affect the number or structure of employees. In other words, works councils are part of the governance of the company, even though they have no decision making power.

Their prerogatives are notably the following:

In the shareholders' companies, works council have the same rights of information and communication of documents as shareholders.

A statute law, whose name is significant (statute law on new economic regulations¹¹) (15th May, 2001), has, in this respect, reinforced the role of works councils, notably in the case of a takeover bid; the works council of the company that is threatened by the take over bid is specifically informed and has the right to convoke and hear the initiator of the takeover bid. The sanction is remarkable, in that the initiator of the take over bid is deprived of his rights to vote (art L 432-1 Labour code).

The same statute law has also enacted, in order to improve the implication of the works council within the company, that works council can require from a court the designation of a person mandated to convoke the general meeting of shareholders in the case of urgency. In addition, works council can require the insertion of resolutions in the agenda of the general meeting of shareholders.

It may also be underlined that works councils can designate two of its members to attend the general meetings of shareholders; they may be heard, at their request, in the case of resolutions that require the unanimity.

These elements tend towards an approach of corporate governance that would not be exclusively based on shareholders' interests. It is however with regard to collective bargaining that the recent evolutions are the most striking.

2. The reform of collective bargaining

a) The increasing role of collective bargaining (general statements)

Traditionally, French labour law is based on the intervention of the State, in accordance with French tradition which is not favourable to intermediary bodies. In this respect, the history of the recognition of collective bargaining in France is closely linked to the State. Collective bargaining is usually considered as a delegation by the State to the social partners, to such a point that the idea of collective autonomy is of limited heuristic value in French labour law. A common idea today, embraced notably by the employer organisations and the current Government, is that the State occupies too much place in labour law. The role of Statute law

⁹ For instance, case law on the respect of privacy as to e-mails, Cass soc 2nd October 2001, Legifrance.com.

¹⁰ Cass. soc. 3rd April 2001, Legifrance.com.

¹¹ Nouvelles régulations économiques.

should be limited, and its contents should be modified, notably with a view to simplify it. More space should be given to “social democracy,” a key word in social relations today. The idea is to grant more autonomy to the social partners, notably by delegating them the regulation power. It is sometimes proposed that the hierarchy of sources should be reversed: the legislator would state broad principles, whereas collective agreements would determine the rest. The idea is not new. In 1945, the same principle of social democracy had led the creators of the Social Security to transfer its management and organisation to the social partners. The reasons advanced to delegate power to collective autonomy are notably the globalisation of the economy, the requirements of competitiveness for companies, the growing implication of the civil society in changes and the increasing complexity of the organisation of work. In this respect, some suggest that it should be possible to decide that some European directives can be transposed through collective agreements.

b) The changing function of collective bargaining

One of the central evolutions of collective bargaining is the change in its function. It is not considered anymore exclusively as a way of completing the law with a view to grant better protection to employees. From 1982 onwards, the social partners can derogate from a statute law, even to decrease the rights granted by statute law. It constitutes a major change in labour law, considering statute law is no more a minimum standard common to all employees. The derogation must be expressly stated by the legislator, which is the case for several provisions concerning working time. Derogatory agreements have substantially transformed collective agreement within the company, and indeed, it has favoured its development considering employers were more keen to negotiate.

Alongside “derogatory agreements,” two other kinds of collective bargaining have developed: concession bargaining and, closely linked to the latter, collective bargaining on the issue of employment – notably with regard to economic dismissals. The change of functions of collective bargaining is radical here: it is an instrument of organisation of the company, rather than an instrument of workers’ protection. From an instrument of workers protection, it moves to an instrument of management. As a consequence, collective bargaining becomes associated with the exercise and control of the power of the employer.

Collective agreement on economic dismissals are a very recent example of this (Statute law of 3 January 2003, on collective bargaining relative to economic dismissals¹²). Yet, this statute law is even more interesting with regard to the introduction of an original type of agreement: « method agreements ».

c) Conventional proceduralisation

A rather original type of collective agreement has been introduced. These are called “method agreements.” Their object is not to lay down substantive rules, but procedures of negotiation or dialogue. The idea is not to solve the problems, but to provide the conditions (procedures) to solve them. This is sometimes called conventional proceduralisation,¹³ according to a theory of law that examines a move from substantive to procedural legal regulation.¹⁴

Method agreements have four characteristics, according to the statute law of 2003:

First, they are experimental, in that the legislator has stated that it would legislate again, taking account of the agreements that would have been concluded.

Second, they are « derogatory », in that the collective agreement is not necessarily more protective than statute law. Yet, limits have been stated. For instance, the agreement should not deprive the works council of its right to be informed and consulted.

Third, these agreements must be signed by the majority of trade unions.

Fourth, the « method agreement » must be the object, prior to its conclusion, of a

¹² “relance de la négociation collective en matière de licenciement collectif”

¹³ Cf G. Couturier, *Le choix de la procéduralisation conventionnelle*, Semaine sociale Lamy, 19 janv. 2004, p.8.

¹⁴ DE MUNCK J. et LENOBLE J., *Droit négocié et procéduralisation*, in *Droit négocié, droit imposé ?*, Publications des facultés universitaires Saint-Louis, Bruxelles, 1996, p. 185.

consultation of the works council. It is an interesting example of articulation between elected representatives and trade unions, all the more so as it is a requirement for the validity of the agreement.

d) The project of statute law reforming labour law

An essential statute law on the reform of collective bargaining is currently before Parliament. It could substantially transform the approach to collective agreement in French law. Its main aspects are as follows:

1. The additional character of the sector agreement

There exist traditionally two “obstacles” to the full development of company bargaining. The first is that certain subjects (not numerous) are opened exclusively to sector bargaining, at the exclusion of company bargaining. The second is the traditional mode of articulation of sources according to which company agreements can only contain rules that are more favourable for employees than sector agreements.

The proposal is that the company agreement should have the same regime as the sector agreement with regard to collective bargaining. In this respect, conventional norms at sector level would only apply in the absence of a company agreement.

Furthermore, all the provisions that could exclusively be derogated to by sector agreements, would have to be modified in order to include company and establishment agreements, which demonstrates the central importance attributed to company agreements in the project.

The limitation of the legal efficacy of sector agreements would have to be tempered in three respects. First, the hierarchical value of the agreements already concluded would be maintained. Second, the rule would not apply in some domains (wages, job function, collective rules on social security, ...). Third, the signatories of a sector agreement could decide that their agreement will not be subsidiary.

A second major aspect of the reform is the introduction of the majority rule for the conclusion of collective agreements.

2. The majority rule

The majority rule has been proposed as a response to the rule according to which a single representative trade union can conclude, with the employer, a collective agreement that is binding upon all employees. In French law, considering the collective agreement will apply to all employees, it is understandable that the collective agreement should be signed by trade unions that have gained the majority of votes at the elections.

The statute law on collective bargaining proposes to introduce the “majority rule,” and offers two ways to implement the rule:

The first is a “right of opposition” to the agreement, which already exists as far as “derogatory agreements” are concerned. The agreement is valid, even if it is signed by one representative trade union, but it becomes void if a majority of trade unions make a veto to it. The new statute law would extend the rule to all collective agreements. This can be called a “negative” majority rule.

The second is a true majority rule: the majority would become a requirement for the validity of the agreement. This can be called a positive majority rule.

The rule, as laid down by the legislator, is under severe criticism, considering the modalities proposed rely on the majority of trade unions, which is a purely quantitative approach.

3. The capacity to negotiate

If a sector agreement provides for it, it would be possible for companies having no trade union representatives to have elected representatives negotiate and conclude collective agreements. In the absence of such representatives, employees mandated by trade unions could play the same role. As was stated before, a similar rule was laid down in 1996.

4. Group negotiation

Group negotiation, that has developed in practice, gains recognition with the new statute law. French labour law is certainly, at the beginning of the 21st century, at a core moment of its

development. It is particularly important, at a moment when rules of workers' protection are under considerable pressure, notably with regard to market efficiency, that labour law should be scrutinised, and analysed with regard to its mechanisms, but also to its functions and tasks, that are inevitably plural. Comparative law study, in the context of which this paper has been elaborated, plays an essential part in this reflection.

Recent Changes in the Italian Labour Law

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I. General Picture of Labour Law in Italy

1. The system of sources at national and international level

Labour relations in Italy are regulated by a complex series of normative provisions and autonomous private bargaining, both at a collective and an individual level. With regard to the normative provisions, a distinction must be made between the national and the supranational level. The national sources are the Constitution as the basic law of the State, Acts of Parliament, regional laws, and customary use and practice. With regard to the supranational provisions it is important to distinguish between international and European Union (EU) sources. EU measures can have a direct effect on the Italian system, on the basis of the limitation of sovereignty and the attribution of competences. The international sources, on the other hand, can have juridical effects only if national legislation has been enacted to implement the relevant provisions. This is the case, in particular, of the Recommendations and Conventions of the International Labour Organisation (ILO).

EU law prevails not only over national provisions previously enacted, but also over those enacted at a later date. As a result the **primacy of EU law** is not simply a supplementary matter in judicial decisions, but in the light of the criterion of the attribution of competences among concurrent systems, EU law prevails in all those matters laid down in the European Community treaties. In determining the principles to be applied in a specific case, the national courts are obliged to disregard any national provisions that are in contrast with the norms deriving from EU law.

With regard to matters that are not within its exclusive competence, the European Community intervenes on the basis of the principle of **subsidiarity**, “only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.” (Draft Treaty establishing a European Constitution, Title III, Article 9, http://europa.eu.int/futurum/constitution/part1/title3/index_en.htm).

2. National sources

The Italian legislator has never attempted a codification of labour law provisions, unlike the measures taken with regard to private law, and for certain special branches of law. In fact, Italian labour law is the result of many layers of statutory provisions that cannot be considered the result of a unified and coherent overall design such as a Labour Code.

An attempt to consolidate earlier provisions was made in the Civil Code of 1942, that is still in force. This was carried out under the terms of the earlier monarchical Constitution (known as the Albertine Statute) and the Fascist corporative State. Book V (Libro V) of the Civil Code is expressly dedicated to labour law and regulates:

- professional activity, collective economic agreements and collective labour agreements (Title I);
- subordinate labour in the enterprise (Title II);
- self-employment (Title III);
- subordinate labour in particular relations not concerning an enterprise (Title IV).

However, this system was designed as part of a “corporative” regime, based on the idea of

institutional collaboration between “labour” and “capital” (hence the term corporatism) and on the consequent subordination of all particular interests to the general interest of national production and the State.

In 1944 the corporative system collapsed, and its basic principles were replaced by the system laid down by the republican Constitution of 1 January 1948. First of all, the collaborative view of labour relations was replaced by a perspective on relations between capital and labour that recognised countervailing interests (see for example Article 40 of the Constitution that lays down the right to strike). Second, in providing recognition in the Constitution for trade-union freedom and collective bargaining (Article 39), the juridical and institutional conditions were put in place for collective bargaining instead of state intervention imposing legal prescriptions. In the Constitution the philosophy of participation on the part of the workers is also recognised (Article 46), but this element tended to be of marginal importance in the development in the early years of relations between capital and labour, only to emerge again in recent years in a perspective of financial participation by the workers in the form of company profit-sharing.

With regard to labour relations, the Constitution mainly contains general policy statements and principles. This is the case for example of Article 4, that solemnly declares — though this statement does not give rise to individual rights to be defended in the courts — that “the republic recognises the right of all citizens to work and promotes conditions to fulfill this right.” Articles 35 and 36 are of a similar nature. Article 35 provides a generic statement, that is therefore susceptible to various interpretations on the part of the ordinary legislator, that “the republic protects labour in all its forms,” whereas Article 36 lays down a principle that has only been applied thanks to the action of case law, that “Workers are entitled to remuneration commensurate with the quantity and quality of their work, and in any case sufficient to ensure to them and their families a free and honourable existence.” Article 39 also contains a policy statement in providing for the registration of trade unions, for the purposes of giving collective labour agreements an *erga omnes* effect for all the workers in the sector covered by the agreement (“Registered trade unions... may jointly enter into collective labour agreements which are mandatory for all who belong to the respective industry of these agreements.”)

3. The five phases in the development of Italian labour law provisions

Although it is not the result of an organic and unitary design, the special Italian labour law legislation subsequent to the Constitution may be summarised in five distinct historical phases (though for certain matters there is a degree of overlapping):

- post-Constitutional labour law. The post-Constitutional phase of labour law was characterised by the following measures: efforts by the courts to adapt the provisions of the Civil Code and the Penal Code to the new juridical and institutional structure; decisive legislative intervention aimed mainly at establishing public control over the labour market (Act no. 264, 29 April 1949 regulating recruitment procedures) and the provision of minimum standards of obligatory protection of employment based on a model of open-ended stable lifelong employment contracts. As a result there was a drastic reduction in the decentralisation of production in all forms (Act no. 1369, 23 October 1960, repealed by the Biagi Law, Legislative Decree 276/2003), heavy restrictions on the use of temporary labour (Act no. 230, 18 April 1962, repealed by Legislative Decree 368, 6 September 2001) and a gradual reduction of the freedom to dismiss employees (Act no. 604, 15 July 1966);
- promotional labour law. This second phase was characterised by legislation aimed at promoting the trade-union presence in the company. This legislation aimed at channeling the employer’s powers into clearly defined procedures, culminating in Act no. 300, 20 May 1970, known as the *Statuto dei lavoratori* or Workers’ Statute. This *Statuto* was of considerable importance in implementing the principles and policy statements laid down in the Constitution. Alongside certain provisions relating to changes in the job description and duties of the worker, the exercise of managerial and disciplinary powers, reinstatement in employment in the case of unfair dismissal, and the matching of the supply and demand for labour, the *Statuto* represents the first significant attempt to implement by means of private-law labour relations the main constitutional safeguards with particular reference to:

- a) the recognition and the guarantee of inviolable human rights, be it as an individual or in social groups expressing their personality (Article 2, Constitution); b) the freedom to set up trade unions and take part in union activity (Article 39, Constitution); c) the need for private economic initiative to be directed towards social ends, and to be carried out in a way that does not harm public security, liberty, or human dignity (Article 41, Constitution);
- labour law of economic crisis and emergency. The third phase started at the end of the 1970s and the beginning of the 1980s, and was characterised by the introduction of emergency measures aimed at limiting the effects of the serious economic recession affecting the Western economies at the time. This phase, marked by the transition from individual guarantees to collective safeguards, saw the first signs of erosion of the obligatory protection measures in labour law, both with the introduction of new working patterns (part-time working, work training contracts) and with the introduction of measures aimed at governing company restructuring (solidarity contracts and new regulations for the Wage Guarantee Fund or *Cassa Integrazione Guadagni*);
 - labour law aimed at flexibility. This phase of labour law designed to deal with the economic crisis paved the way in the 1990s for a new conception of labour law which, alongside the objective of safeguarding individual workers in existing jobs, focused on the more general objective of defending employment and supporting the productive system. Labour law aimed at flexibility was therefore adopted, which, alongside certain exceptions to the general system of labour protection (for example Article 23, Act no. 56, 28 February 1987 on fixed-term working), aimed to redesign the system of protection and completely reorganize the means for matching the supply and demand for labour in order to provide greater scope for autonomous private bargaining, both collective and individual. Act no. 223, 23 July 1991, not only reformed the regulations governing collective redundancies, but also made provision for direct hiring for most kinds of workers, replacing the rigid numerical criterion laid down by Act no. 264, 29 April 1949. Subsequently Act no. 608, 28 November 1996, totally reformed the procedures for promoting access to employment, extending the method of direct hiring to all workers. Legislative Decree no. 469, 23 December 1997, implementing delegated law no. 59, 15 March 1997 (known as the Bassanini Act) abolished the principle of the public monopoly on employment services, recognising private employment agencies as legitimate undertakings. In the same period, Act no. 196, 24 June 1997, extended the range and increased the flexibility of the use of types of salaried employment providing an alternative to open-ended employment contracts, introducing incentive mechanisms for the employment of young people and for bringing black-market labour into the formal sector. Finally, the Biagi Law (Legislative Decree no. 276/2003) introduced further reforms aimed at enhancing the flexibility of the labour market;
 - the implementation of EU measures in the field of labour law. Alongside and supporting the process of making the labour market more flexible, a process of modernization of the rules governing labour relations has begun (represented in Italy by the introduction of private-sector management techniques in public services, Legislative Decree no. 29, 3 February 1993) arising from membership of the European Union. After the initial measures consisting of “hard laws” (such as those of the 1970s relating to collective redundancies, the transfer of undertakings and insolvency of employers), the European Union has more recently experimented with “soft laws,” consisting of guidelines and objectives, with a view to coordinating employment policy on a European scale, that has had, and continues to have, a considerable impact on the Italian system.

4. Collective bargaining

It must be underlined that the rules governing labour relations are the fruit of complex interaction between statutory provisions, case law decisions, administrative procedures and agreements between the social partners (collective bargaining).

In this connection a matter of particular interest is that of the “binding” nature of provisions in relation to all workers, both members and non-members of the unions negotiating collective

agreements (the principle known as *erga omnes*). With reference to this particular practice, the Constitution makes provision for trade-union registration, that for political, trade-union and technical reasons has not yet been implemented, in order to provide for the negotiation of “collective labour agreements that are mandatory for all who belong to the respective industry of these agreements” (Article 39, Constitution). In the absence of ordinary legislation to implement this principle, specific regulations for collective labour agreements are lacking and as a result, since the provisions of the Civil Code relating to corporative collective agreements are not applicable, such agreements have been included in the area of private law, as atypical contracts. As such, like all contracts (Article 1372 (1), Civil Code) they are binding exclusively on the contracting parties (or rather, on the members of the associations signing the contracts). It is in this sense that it is possible to speak of common law collective agreements. As the result of private autonomous negotiations pursuant to Article 1322 (2), Civil Code, such agreements are regulated exclusively by the general provisions of the Civil Code governing contracts and obligations. However, on the basis of numerous case law rulings, common law collective contracts have a general effect *de facto*, and are not limited to the members of the associations.

5. Levels of collective bargaining

At present the structure and levels of collective bargaining are laid down in the Protocol on Labour Costs of 23 July 1993, signed by the Italian Government and the social parties. In brief, this agreement provides for two levels of bargaining: the first level is national sectoral collective bargaining, supplemented, where the social partners consider it appropriate, by second-level collective bargaining on a territorial scale, or more often, at company level. The national collective labour agreement is valid for four years in relation to the regulation of the terms and conditions of employment (the normative part) and for two years in relation to remuneration (the economic part). The second-level collective labour agreement is valid for four years and may only deal with points other than those dealing with remuneration covered by the national sectoral collective labour agreement (1993 Protocol, Clause 2).

6. Relations between the law and private autonomy

Relations in labour law between private autonomy (individual or collective) and the law are governed by the principle of the prevalence of the law broadly speaking over private autonomy. This is because it is believed that the law broadly speaking has the task of protecting the fundamental rights of workers, such as freedom, dignity and safety, in a mandatory manner. As a result, every regulation produced by private autonomy, whether individual or collective bargaining, that reduces the level of protection laid down by the law is null and void. In this sense it is said that individual or collective bargaining cannot introduce changes to labour regulations that are less favourable to the worker.

Complementary to this principle, it is always possible for lower level sources (private autonomy) to provide for terms and conditions that are more favourable to the worker, providing exceptions to a higher source (law in the broad sense). Bearing in mind the practically unlimited range of possibilities for improving working conditions compared to those laid down by the law, private autonomy is therefore competent to introduce changes provided they are advantageous to the worker.

It must be noted that the mandatory nature of the first of the principles outlined above — that conditions cannot be renegotiated if they are less advantageous to the worker — has been cast into doubt by the loss of centrality of statutory provisions and the expansion at the same time of processes of self-regulation by the social partners. Moreover, it should be noted that more and more frequently it is the legislator that delegates to collective autonomy the possibility of providing exceptions — even if less favourable to the worker — to regulations deriving from legislative sources, either for the purposes of saving a company in danger of closing down or for combating unemployment, since in these cases there is often a need to introduce flexible regulations reflecting local conditions and/or conditions prevailing in an individual company. Therefore the principle that exceptional provisions may not be introduced if they are unfavourable to the worker still exists as a legal norm, but in many specific cases it is set aside

due to the need to safeguard employment levels.

7. Relations between collective agreements of various levels and kinds

First of all it should be noted that at least in the private sector there is no general provision governing relations between collective bargaining sources.

The rules for resolving cases of conflict are therefore usually provided by legal opinion or case law. For many years case law treated the problem of the relations between collective agreements on the basis of the principle that conditions could not be negotiated that were less favourable to the worker. When cases arose in which there was a conflict between two levels of collective bargaining, the agreement that provided the most favourable conditions for the worker was upheld.

Today, however, applying a principle that is more widely supported both by legal opinion and case law, any problems arising from a conflict between collective agreements at different levels are resolved on the basis of a chronology, so that the more recent agreement prevails.

However, in many cases, in order to head off any possible contrast between the provisions of collective agreements, the social partners make provision for the relations between the different levels of agreement, specifying specific areas of competence for each bargaining level.

With regard to relations between collective and individual bargaining, though they remain substantially unchanged, they have been reconsidered by the legislator. Individual autonomy seems to have been given greater recognition by the legislator with the reform of 2003. In particular, on numerous occasions, the legislator delegates the negotiation of certain matters (for example, certain aspects of part-time contracts) to individual autonomy when such matters are not dealt with by collective agreements. However, it must be underlined that the main aim of this new approach by the legislator is to prevent the trade union from exerting power in such a way as to prevent individual arrangements, rather than to grant individual autonomy greater scope than collective bargaining.

8. Employees' representatives

The right of employees to form associations for the defense and promotion of their rights and occupational interests is recognised in Article 39 (1) of the Constitution, according to which “the organisation of trade unions is free”. It is therefore the individual worker who enjoys the freedom to organise and to take part in trade-union activity.

Considered as the freedom of self-organisation — even more than the freedom of action and protection of individual or collective interests — the recognition of the right of trade-union freedom makes it possible to understand the variety of forms and structures of the organised group, together with the principle of **trade-union pluralism**, typical of the Italian experience characterised by the presence of the three main trade-union confederations: CGIL (*confederazione generale italiana dei lavoratori*), CISL (*confederazione italiana sindacato dei lavoratori*) and UIL (*unione italiana dei lavoratori*).

The organisational structure of the trade union may also be developed in a “horizontal” way, on the basis of territorial needs, divided into 1) the local level (*Camera territoriale del lavoro* for CGIL and UIL or *Unione territoriale del lavoro* for CISL); 2) regional (*Camera territoriale del lavoro* for CGIL and UIL or *Unione territoriale del lavoro* UIL) and 3) national (political trade unionism). This level includes all the trade unions of the productive categories present in a given area. A further dimension is the vertical one, depending on the category or sector of the workers or the productive activity of the enterprise employing the worker enrolled in the trade union (sectoral trade unionism): this is the case of confederations, sectoral federations, regional sectoral structures and territorial sectoral structures.

This organisation along vertical and horizontal lines is also to be found in the employers' associations, which may also be divided on territorial lines or by sector of production. However, an important difference must be noted in this connection: whereas trade unions belong automatically to both levels, horizontal and vertical, the entrepreneurial associations may belong to the territorial level without necessarily belonging to the sectoral level and vice versa.

With specific reference to the protection of the rights of the worker at company level,

workers have the express right in every establishment to set up company-level trade-union representatives or *rappresentanze sindacali aziendali* (RSA) within the framework of the trade unions that are signatories to the collective agreements in force in the establishment. These company-level trade-union representatives and officers have the right to carry out trade-union business in support of trade-union activity by the workers in the company.

It should also be noted that there is no specific model for company-level trade-union representatives, but their role is based on industrial relations practice. At present (as discussed below in III), the company-level trade-union representatives (RSA) coincide with unitary trade-union representatives (*rappresentanze sindacali unitarie*) (RSU).

Unlike company-level trade union representatives, the unitary trade-union representatives provide representation for all the workers in an establishment, and not just those who are union members.

II. Changes in the Contents of Labour Laws

In recent years economic conditions have undergone changes and as a result work organisation has also been transformed. The Italian legislator, in order to adapt to developments in the economic context and to govern the changes that are taking place, has recently introduced reforms affecting most areas of labour law. In particular, the Biagi Reform of 2003, based on the guidelines in the European Employment Strategy, laid down the following objectives: the creation of a transparent and efficient labour market capable of increasing employment opportunities and offering equal access to regular quality employment; the implementation of a coordinated strategy aimed at combating the structural weaknesses of the Italian economy: unemployment among young people, long-term unemployment, the concentration of unemployment in the South of Italy (the Mezzogiorno), the low rate of participation by women and older persons in the labour market.

Particular attention is paid to the reform of apprenticeship contracts, and work experience contracts are regulated as a means to improving access and re-entry to the labour market. Further measures include the monitoring of the conditions of every person of working age in order to prevent social exclusion, and to provide input into pro-active policy making; the setting up of an efficient system of employment services, both public and private, authorised and accredited, forming a network to accompany and facilitate contact between those in search of employment and those in search of workers; the introduction of regulated forms of flexibility, negotiated with the trade unions, in such a way as to strike a balance between the needs of the enterprise to compete on international markets and the essential forms of protection and promotion of the workers. Other significant measures include the introduction of staff leasing, and the provision of new types of contract aimed at adapting labour organisation to changes in the economy and extending participation in the labour market to groups at risk of social exclusion. Provision is also made for the introduction of “on call” working, a type of contract on the basis of which the employee is available to work as and when the employer requires; the introduction of job sharing, allowing two employees to take over the responsibilities of a single worker and share the salary and benefits on the basis of their individual contributions. Part-time working regulations were reformed, and employment policies for an efficient and modern labour market are being promoted especially for the South of Italy and for the categories of workers who today encounter most difficulty in finding regular quality employment. Moreover, a more significant role is given to bodies providing labour protection and representation, with particular regard to bilateral or joint bodies, as part of the management of active employment policies.

III. Changes in Labour Relations Laws

The most significant measure in industrial relations in Italy is the agreement of 1993 that introduced innovations regarding collective bargaining but also regarding company-level trade-union representation by setting up unitary trade-union representative bodies (RSU). These bodies provide representation in the enterprise, are elected by the workers and closely linked to the trade unions. Therefore, even today, it is not possible to speak of a system of dual

representation in Italy, that is to say a system that is both associative and institutional.

Subsequently, in 1995, a referendum repealed the regulations for the selection of representative bodies on the basis of the most representative trade unions. The immediate consequence of this reform is that today unitary trade-union representative bodies may be set up by the signatories of the collective agreement in force in the establishment.

The representation under examination has been the subject of debate for a long time. Moreover, in spite of the fact that a number of bills have been presented to Parliament dealing with this matter, the overall system of representation has not been reformed by the legislator and the application of the principle laid down in Article 39 of the Constitution (trade-union registration for the purposes of *erga omnes* application of collective labour agreements) seems to have been set aside.

However, with regard to collective agreements, the measures introduced by the 1993 tripartite agreement were negotiated with a view to bringing pay settlements into line with a rigorous incomes policy in order to combat inflation and contain the cost of living in a strongly competitive international environment.

The incomes policy pursued by the Government and the social partners at that time led to the redefinition of collective bargaining procedures. In the 1993 Protocol, two levels of collective bargaining were laid down, with a division of competences: the national level of sectoral bargaining, intended to set minimum wage levels on a sector-by-sector basis, is accompanied by a second level of bargaining, either at company or territorial level, aimed at introducing a measure of flexibility in terms of pay linked to company profits and increases in productivity.

As noted above, national collective agreements are valid for four years with regard to normative provisions and two years with regard to remuneration. Pay increases provided by the collective agreement are linked to the planned level of inflation that is adopted as a joint objective. For the purposes of establishing the entity of such pay increases, the social partners take account of the incomes and employment policies negotiated with the Government, with the objective of safeguarding the purchasing power of the workers, and the general tendency of the economy and the labour market, the competitive position and the overall performance of the sector. During biennial negotiations for the renewal of minimum wage levels, further points to be taken into consideration include the comparison between the planned rate of inflation and the actual rate of inflation over the previous two years, to be assessed also in the light of any changes in the balance of payments of international trade, as well as trends in overall pay rates.

Company-level bargaining on the other hand deals with matters that are different from and not a repetition of those dealt with by national bargaining for the sector. Locally negotiated pay increases are closely linked to the performance achieved in relation to the plans negotiated by the social partners, for the purposes of increasing productivity, quality and other elements of competitiveness for the company, including productivity margins, as well as company profits.

Company-level and territorial bargaining follows a four-year cycle and is carried out on the basis of the parameters laid down by the national collective agreement for the sector in the spirit of best negotiating practice, with particular regard to small enterprises. The national collective agreement for the sector also lays down the timeframe, on the basis of the principle of the autonomy of negotiating cycles, and the matters to be dealt with.

However, the effectiveness of this system of collective bargaining has been found to be limited. Whereas the national collective agreement for the sector has made it possible to effectively defend the purchasing power of wages and salaries, the second level of collective bargaining has been found to be ineffective. Empirical research into the practical impact of the 1993 Protocol based on the interaction between the two negotiating levels has shown that the big companies act in a way that does not take due account of the framework laid down by the national collective agreement. Moreover, decentralised bargaining (whether company-level or territorial) that was intended to introduce greater differentiation into pay rates, introducing greater flexibility into the system, has been found to be insufficient and unsatisfactory both in quantitative and qualitative terms.

Second-level agreements have been characterised to a considerable extent by measures of a traditional kind, not linked to objective parameters of productivity, profitability or quality for

various reasons: the lack of transparency in previous rounds of negotiation, a lack of awareness of the true potential of decentralised bargaining on the part of those taking part, a reluctance to widen the range of matters to be dealt with (such as work organisation), the lack of adequate structures, including organisational structures (with particular reference to territorial negotiation).

This scenario has been accompanied by an increasingly marked decentralisation of collective bargaining. The reasons for this trend may be summarised in the following three points:

- 1) a significant loss of importance for the national collective agreement due to the presence in Italy of a marked imbalance between the various geographical areas that raises questions about the desirability of a two-level bargaining system;
- 2) the need to deal at company level with questions relating to company restructuring and the adaptations required by the introduction of the single currency, representing a significant factor in the decentralisation of collective bargaining. The containment of inflation safeguarded by membership of the euro has resulted in national incomes policies being superseded;
- 3) a crisis of trade-union representation at national level, with the trade unions appearing to be less representative of workers than in the past.

IV. Labour Laws and the Labour Market

Labour law is utilised also in the regulation of the labour market. Employment policies in Italy have traditionally been characterised by strong safeguards for the worker in the “labour relation” while paying less attention to the protection of the worker on the “labour market.” A peculiar characteristic of the Italian tradition is the view of labour law, and of the policies underlying it, simply in terms of protection of one party, with a view to emancipating the worker, characterised as subordinate in both social and economic terms, the “weaker party” in the labour relation. In addition to these policies, others of a more pro-active kind have been introduced, in connection with Italy’s membership of the European Union. The coordination of employment policies among the EU Member States is based on four pillars: employability, entrepreneurship, adaptability and equal opportunities, that taken together form the European Employment Strategy.

Traditionally Italy has had a system of income support for unemployed workers far less developed than that of other European countries: since priority was given to defending existing employment, it was considered desirable to provide incentives for the worker to seek new forms of employment. Another area that has traditionally received insufficient attention is the enhancing of the employability of those seeking work (particularly disadvantaged groups and those in long-term unemployment), as expressly required by the European guidelines.

For these reasons in recent years active labour policies have been introduced aimed at changing the direction of legislative intervention, that has so far been concentrated on the static protection of those who are already in employment, paying less attention to the promotion of employment in general.

The most recent and most significant intervention in this direction was taken with the Biagi Law in 2003, that redesigned existing employment contracts (part-time work, apprenticeships, coordinated and continuous collaboration) and introduced new forms of employment (on-call working, job sharing, accessory working, work experience programmes, staff leasing on an open-ended basis).

In relation to the objective of employability, a wide range of instruments is being experimented with to facilitate the transition from school/higher education to the labour market: from access to employment contract to new forms of apprenticeship, from employment exchanges to new forms of work experience and career guidance.

Radical changes have also been introduced with regard to employment services. The public monopoly on services for matching the supply and demand for labour has been abolished, providing significant openings for private employment agencies to operate on the market.

With regard to the regulation and organisation of the labour market, an attempt has been

made to update public policies. On the one hand, the work of the private agencies in matching the supply and demand for labour is carefully monitored by the public authorities. On the other hand, the reform of the labour market includes an attempt to improve the services provided by the public authorities by decentralising them to the Regions and the local authorities, with a reorganisation of state and local competences, the simplification of administrative procedures for matching the supply and demand for labour, the strengthening of links between public and private operators and, finally the plan for setting up a computer network covering all employment services, with the creation of a continually updated national employment exchange, in order to link up the entire country to a network permitting the rapid circulation of information about vacancies and the availability of suitable workers.

A characteristic of this process of reform is the progressive decentralisation of labour policies that is intended to lead in the short term to labour programmes being run at a local level, diversified in such a way as to reflect the particular characteristics of the various labour markets.

The promotion of equal opportunities for men and women is an important policy objective, with incentives provided on a pro-active basis. With regard to the promotion of equal opportunities, Italy's response to the policy guidelines of the EU has been reasonably quick, in certain cases providing for affirmative action on the lines of measures adopted in the United States.

Mechanisms for Establishing and Changing Terms and Conditions of Employment in Sweden

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1. Introduction

The subject of this paper is the mechanisms for establishing and changing terms and conditions of employment in Sweden. It relates both to fundamental aspects of the Swedish labour law and industrial relations model, and to the current 'transformation' of working life, including trends towards an increasing individualisation and decentralisation and a new emphasis on fundamental social rights and non-discrimination. The outline of the paper is as follows. Section 2 presents the 'Swedish Model' of industrial relations. Section 3 deals with the basic mechanisms for establishing and changing terms and conditions of employment in Sweden. Section 4 gives an account of recent reforms of Swedish labour law, and discusses the resultant challenges to the 'Swedish Model' of industrial relations. Lastly, in section 5, I make some final remarks.

2. The 'Swedish Model' of industrial relations

The 'Swedish Model' of industrial relations is characterised by a high degree of self-regulation, state non-intervention and autonomy of the social partners. The two central labour-market organisations, the Swedish Confederation of Trade Unions (LO) and the Confederation of Swedish Enterprise (Svenskt Näringsliv), formerly the Swedish Employers Federation (SAF), were founded in the end of the 19th century, and the cornerstone of today's collective labour law emerged through the interactions of the social partners. The relationship between the social partners was characterised by co-operation, concert and social partnership. At a couple of crucial moments during the 20th century the social partners concluded master agreements, for example, the 'December Compromise' in 1906, which established the employees' freedom of association, and the employer prerogatives (section 3), and the Saltsjöbaden agreement in 1938. The 'Swedish Model' of industrial relations, thus represents a successful balance of power between work and capital. Furthermore, the 'Swedish Model' portrays distinct elements of corporatism, with the social partners co-operating with the state and sharing social responsibility. The Swedish labour market is strictly organised. 80-85 percent of all employees are members of a trade union, and the organisation rate on the employer side is, in principle, equally high. During the 1980s and 90s the unionisation rate in Sweden has, in contrast to the situation in many other European countries, remained relatively stable and high. The Swedish trade union movement is centralised and composed of nation-wide industrial unions. It is not ideologically, religiously or politically divided.¹

Collective bargaining and collective agreements have played a vital role in the self-regulation of the Swedish labour market, and traditionally constituted the most important legal source in the area of labour law. Collective bargaining has been very centralised in Sweden, and the collective bargaining coverage almost complete. Another distinguishing feature of the 'Swedish Model' of industrial relations is well-established and strong mechanisms for information, consultation and co-determination. In Sweden the workers' influence is channelled solely through trade unions, a so-called *single-channel model*, with trade unions participating both in collective bargaining and industrial action, and in local consultation and co-determination activities concerning management decisions affecting individual employees or the business in general.²

The 'Swedish Model' of industrial relations has in a comparative context been described as

¹ Cf. Bruun *et al.* 1992, Kjellberg 1998, Kjellberg 2003, Numhauser-Henning 2001a and Nielsen 1996.

² Cf. Kjellberg 1998, Fahlbeck 2002 and Biagi 2001.

*a social-collectivist model, a consensual industrial relations system and an institutionalist model.*³ The development since the beginning of the 1970s has brought about important changes in the above-mentioned respects, changes that fundamentally challenge the ‘Swedish Model’ of industrial relations in its traditional sense. I will return to and discuss these changes in their relevant contexts in sections 3 and 4 below.

3. Basic mechanisms for establishing and changing terms and conditions of employment

Since 1995 Sweden has been a member of the European Union, and EC law has therefore the highest rank of all legal sources in the area of labour law. Important areas of EC labour law, having prompted changes in Swedish labour law legislation during the last ten years (section 4), are, for example, equal treatment and non-discrimination, employment protection with regard to collective dismissals and transfers of undertakings and some provisions regarding information and consultation.

In today’s intensive debate about the future of labour law, fundamental social rights combined with non-discrimination legislation and a reformed social-security system are often apostrophised as a feasible way ahead.⁴ The constitutional aspects of Swedish labour law are in many ways undeveloped (in contrast to, for example, German labour law); consequently, the current debate concerning fundamental social rights in working life comes across as largely new. It is true that the Swedish Constitution includes a ‘catalogue’ of fundamental rights and freedoms (cf. chapter 2 of the 1974 Instrument of Government); but it has never really taken effect. In part this is due to the fact that the Constitution, in principle, does not grant any legally enforceable rights to anyone. The provisions of the Constitution are not applicable to employment relationships in the private sector of the labour market, and their significance in legal relationships between individuals is marginal. However, the incorporation of the European Convention on Human Rights into Swedish law in 1995 has increased the attention paid to fundamental rights. Consequently, important cases concerning the negative freedom of association and workers’ privacy respectively have been brought before the Labour Court in recent years.⁵

Against this background, legal developments within the EU, where fundamental social rights are in clear focus, naturally play a vital role. Respect for fundamental rights and freedoms became part of EC law early on. The concept of fundamental rights that has been applied by the European Court of Justice has derived its content from constitutional traditions common to the Member States and from international conventions and instruments on human rights, especially from the European Convention on Human Rights. The proclamation of the EU Charter of Fundamental Rights in 2000 setting out rights (though not legally binding) such as the freedom of association, the right to collective bargaining, the right to work, the right to personal integrity, the right to fair working conditions, the right to continuous education and vocational training etc., has further highlighted the importance of fundamental social rights.⁶

The 1970s witnessed a ‘boom’ in legislative activity, and ever since labour law legislation is very frequent in the Swedish context. This poses a challenge to the traditional ‘Swedish Model’ of industrial relations with an emphasis on self-regulation, state non-intervention and autonomy of the social partners. In principle, the function of labour law legislation in Sweden is to set mandatory minimum standards for terms and conditions of employment. However, one of the most distinctive (and in a comparative perspective perhaps also surprising) features of Swedish labour law legislation is its largely ‘semi-compelling’ character. Principally, labour law legislation, for example, the employment protection regulation, assigns individual employees

³ Cf. van Peijpe 1998, Bamber and Lansbury 1998 and van den Berg, Furåker and Johansson 1997.

⁴ Cf. for example, from the Swedish perspective, the series in the journal *Arbetsmarknad & Arbetsliv*, with contributions by Bruun 1995, Hydén 1996 and Numhauser-Henning 1997.

⁵ Cf. Öman 2003, Bruun 1999 and Herzfeld Olsson 2003. Cf. for example also Labour Court judgements AD 1998 No. 17 and AD 1998 No. 97.

⁶ Cf. Bruun 1999 and Herzfeld Olsson 2003.

strong, mandatory and legally enforceable rights. However, even important individual rights (e.g. seniority rules) can be deviated from (disadvantaging the employee) by means of a collective agreement entered into by the employer and the trade union. This ‘semi-compelling’ character can only be understood against the background of the ‘Swedish Model’ and its expressly collective character and great autonomy of the social partners.⁷

The two real centrepieces of Swedish labour law legislation are the 1976 Co-determination Act and the 1982 Employment Protection Act. The 1976 Co-determination Act regulates the central aspects of collective labour law, *inter alia* freedom of association, the collective agreement, right to information, consultation and co-determination and industrial action.⁸ All trade unions (with at least one member at the workplace) enjoy a statutory right of general negotiation with the employer. Trade unions that have concluded a collective agreement with the employer (or the federation of employers) on wages and general conditions of employment enjoy more far-reaching rights of ‘primary’ negotiation and co-determination, for example, when it comes to management decisions concerning important alterations in the working conditions of employees or in the employer’s activities and business. Such *established trade unions* organise the majority of Swedish employees, and giving these trade unions legal privileges constitutes a distinctive feature of Swedish labour law.⁹

The 1982 Employment Protection Act covers central aspects concerning the entering into, the content and the termination of employment contracts. In comparison, the Swedish employment protection stands out as being relatively strong. During the 20th century, we have seen a shift from the unilateral right of the employer to dismiss employees (cf. the employment at will doctrine) via the limited, collectively bargained employment protection to the strong and general statutory employment protection that is in force today in the 1982 Employment Protection Act. The prominent feature of Swedish employment protection is the fact that the employer must have *just cause* (or *objective grounds*) for dismissal. Coupled with this just cause requirement are rules obliging the employer, *inter alia*, to negotiate with trade unions, to give notice, to provide the employee with alternative work, to apply the statutory seniority rules, and, if the necessary conditions are met, to re-employ dismissed employees. In addition, the Act contains detailed rules concerning fixed-term work and its permissibility (section 4). In the absence of a general Labour Law Code important areas of individual labour law are regulated either by general civil law (such as the 1915 Contracts Act) or by principles derived from the case law of the Labour Court.^{10 11} Legislative changes immediately and automatically affect individual employment relationships.

Collective agreements constitute, together with legislation, the most important legal source of Swedish labour law. The greater part of an employee’s terms and conditions of employment (especially wages) is regulated by collective agreements. A collective agreement is statutorily defined as ‘an agreement in writing between an organisation of employers or an employer and an organisation of employees about conditions of employment or otherwise about the relationship between employers and employees’, cf. section 23 of the 1976 Co-determination Act. Within its area of application a collective agreement is legally binding not only for the contracting parties to the agreement, but also for their members, cf. section 26 of the Co-determination Act. A collective agreement has both a mandatory and ‘normative’ effect, for which reason its rules automatically become part of the contract of employment of an individual employee being legally bound by the collective agreement, cf. section 27 of the 1976 Co-determination Act. Unless otherwise provided for by the collective agreement, employers and employees being bound by the agreement, may not deviate from it by way of an individual

⁷ Cf. Numhauser-Henning 2001a and Bruun 1992 (section 4).

⁸ Important supplementary rules in the area of collective labour law are found in the 1974 Act on Trade Union Representatives, the 1987 Act on Board Representation for Employees in Private Employment and the 1996 Act on European Works Councils.

⁹ Cf. Fahlbeck 2002, Edström 2002 and Bergqvist, Lunning and Toijer 1997.

¹⁰ Cf. Lunning and Toijer 2002 and Rönmmar 2001a.

¹¹ Other important areas of labour law legislation are non-discrimination and equal treatment, working environment, working time, vacation and time off, cf. Numhauser-Henning 2000, pp. 364 ff.

employment contract. Such a contract can be declared null and void, and breaches against the collective agreement are sanctioned by the payment of financial and punitive damages, cf. sections 54-55 of the 1976 Co-determination Act. In most cases collective agreements set minimum standards only, allowing employers, trade unions and employees to agree on better terms and conditions of employment by way of a local collective agreement concluded at workplace level or an individual employment contract. Swedish labour law does not provide for an extension *de jure* of collective agreements. However, in practice, the coverage of collective bargaining is almost complete and a *de facto erga omnes* effect is achieved.¹² Important reasons for this are the high unionisation/organisation rates on both sides of the labour market and the far-reaching legally binding effects of the collective agreement. Furthermore, unorganised employers often conclude local collective agreements, undertaking to apply the terms and conditions of the leading national sectoral collective agreement (a so-called *hängavtal*). Even if no such local collective agreement is concluded the terms and conditions of the leading national sectoral collective agreement may be applicable as constituting established custom and practice. In addition, in practice employers bound by a collective agreement apply its terms and conditions also to unorganised employees.¹³ With the collective agreement follows a peace obligation, constituting an important point of departure for the regulation of industrial action. Due to the 'normative' and mandatory effect of the collective agreement any changes as to its terms and conditions immediately and automatically affect the contract of employment and the individual employment relationship.¹⁴

Collective bargaining in Sweden has traditionally been centralised. Collective agreements are entered into at different levels. Nation-wide collective agreements are concluded at sectoral level, and supplemented by local collective agreements concluded at workplace level. Some master agreements, mainly concerning co-operation and co-determination, are concluded at national top level. National sectoral collective agreements are often concluded for a definite term of two or three years. The yearly wage increases are set at national and sectoral level, and implemented at local workplace level, though clearly within the binding framework set at national level. Since the 1980s there has been a clear tendency towards decentralisation and individualisation, resulting in important changes as regards the collective bargaining structure and industrial relations (section 4).¹⁵

The scope for regulating terms and conditions of employment by way of individual employment contracts has traditionally, and as a result of the 'normative', mandatory and far-reaching effects of the collective agreement, been limited. The conclusion of an individual employment contract has mainly marked the start of the employment relationship, and has otherwise remained silent on the issue of material terms and conditions of employment. Individual employment contracts can be entered into freely, and without any formal requirements. Employment contracts concluded orally or through the actions of the parties are therefore as valid as written employment contracts.¹⁶ The recent trends towards individualisation, decentralisation and flexibilisation have, however, brought about changes in this respect (section 4).¹⁷

An employer and an employee are (provided that mandatory provisions in legislation and collective agreements so permit) free to renegotiate and vary the terms and conditions of the

¹² According to a survey from 2001 the collective bargaining coverage in Sweden is as high as 90-95 percent; cf. Kjellberg 2003, p. 350.

¹³ In relation to the trade union having concluded the collective agreement the employer, as a result of a general principle of collective labour law, is obliged to apply the terms and conditions of the collective agreement uniformly to all employees, regardless of trade union membership.

¹⁴ Cf. Bergqvist, Lunning and Toijer 1997, pp. 310 ff., Malmberg 1997, pp. 144 ff., Fahlbeck 2002 and Numhauser-Henning 2000.

¹⁵ Cf. Kjellberg 1998, Fahlbeck 2002 and Numhauser-Henning 2001a.

¹⁶ As a result of the so-called 'Cinderella Directive' (91/533/EEC) an employer is, however, obliged to notify the employee of the essential aspects of the contract or employment relationship, cf. section 6a of the 1982 Employment Protection Act.

¹⁷ Cf. Malmberg 1997 and Fahlbeck 1995.

individual employment contract. In accordance with general civil law principles the employer cannot against the will of the employee unilaterally vary the terms and conditions of the individual employment contract. If the employer and the employee cannot reach an agreement the employer has to dismiss the employee and offer him or her re-employment on changed terms and conditions of employment (e.g. lower wages or fringe benefits). Such a dismissal must be made in accordance with the statutory employment protection. The employer must be able to show just cause for dismissal, and rules obliging the employer to offer the employee alternative work, negotiate with the trade union and apply seniority rules etc. must be adhered to. According to Swedish labour law the Labour Court may not legally scrutinise the material content of the offered new terms and conditions of employment and their reasonableness. If the employer's reason for dismissal is redundancy, in the Swedish context referred to as *shortage of work*, the possibilities for variation of the individual employment contract in the above-mentioned way are considerable. The concept of redundancy is defined as all reasons not related to the employee personally, and encompasses reasons of an economic, organisational or other business-related character. By virtue of the employer prerogatives the employer has a right to determine which line of business to pursue (and how), and what number of employees to employ. The employer has been given a unilateral right to decide when and if there is a redundancy situation. The Labour Court has in numerous legal cases made clear that it is not prepared to question or try the employer's business and economic considerations. Therefore redundancy *per se* always amounts to a just case. Provided that the employer correctly applies the seniority rules and does not act in a discriminatory fashion, he or she will always be able to vary the individual employment contract by reason of redundancy by dismissing the employee and offering re-employment on changed terms and conditions of employment. (The rules on notice periods apply, however.)¹⁸

When it comes to the employee's obligation to work, variation of contract in the above-mentioned way is seldom required. The employer prerogatives and the right to direct and allocate work (see below) give the employer the right to, within the contractually agreed limits of the employee's obligation to work, decide what tasks the employee is to perform and when, where and how. The obligation to work is normally regulated by the applicable collective agreement. According to the general principle (the so-called '29-29-principle', cf. Labour Court judgement AD 1929 No. 29) an employee is obliged to perform all tasks that are covered by the applicable collective agreement. Since most collective agreements are of the industry-wide type, and cover all work tasks at the workplace concerned, the employee's obligation to work is extensive.¹⁹

The contents of an employee's terms and conditions of employment can also be determined by reference to established custom and practice in a specific branch of business or (even) a specific company.

The employer prerogatives can be said to form one of the bases of Swedish labour law. As early as 1906 (in the 'December Compromise'), employers were granted the rights to hire and fire at will and to direct and allocate work in return for respecting the employees' freedom of association.²⁰ Today the employer prerogatives constitute both a general principle of law and a tacit clause in all collective agreements. During the juridification process of the 20th century the employer prerogatives were gradually dismantled, both by way of collective agreements and through legislation. Thus the employer's right to fire at will has been abolished, and the right to hire at will has been subjected to several restrictions. By virtue of the employer prerogatives an employer, however, still enjoys the right to direct and allocate work. In principle, this right is free and unilateral and encompasses elements such as work organisation, production and working methods, work duties, working time, training and education and the granting (and

¹⁸ Cf. Malmberg 1997, pp. 322 ff. and Lunning and Toijer 2002, pp. 378 ff. See, for example, also Labour Court judgements AD 1993 No. 61 and AD 1993 No. 101.

¹⁹ Cf. Malmberg 1997, pp. 259 ff. and Rönmar 2001b.

²⁰ Similar agreements regarding respect for the employer prerogatives and the freedom of association were entered into in other Nordic countries in the early 20th century; cf. Nielsen 1996, p. 18.

withdrawal of) of fringe benefits. Besides giving individual employees orders and instructions regarding the performance of work (and thereby in practice, at least partially, determining the content of the employee's obligation to work), the employer can also issue works rules regulating general aspects of the workplace. Traditionally, employers' decisions in this area have been almost protected against legal scrutiny and employee demands for justice and fairness. Today, however, this picture is somewhat modified. The employer's right to direct and allocate work has been subject to limitations such as non-discrimination rules, rules regarding the trade union's right to negotiation and co-determination and general principles of law derived from the case law of the Labour Court (cf. the concept good labour-market practice and the 'sauna-bath principle', obliging employers to justify particularly far-reaching transfers or changes in work duties by stating objective grounds). However, it is important to note that as a main rule the employer still enjoys a free and unilateral right to direct and allocate work. The above-mentioned limitations are isolated and partial, and they do not alter this fundamental starting-point.²¹

4. Recent reforms of Swedish labour law and challenges to the 'Swedish Model' of industrial relations

The reforms of Swedish labour law in recent years can be described both in terms of deregulation and (re-)regulation. Since 1995 EC labour law has served as a general driving force for (re-)regulation. Many of the recent legislative reforms of Swedish labour law therefore stem from the obligation to implement EC law directives.²²

During the 1990s the 1982 Employment Protection Act has been the subject of several reforms, however, leaving the fundamental structures of the employment protection (including the just cause requirement for dismissal and the supplementing obligations of the employer to as far as possible avoid dismissal and at least mitigate its negative consequences for individual employees).²³ The regulation of fixed-term work has been of particular interest to the legislator. Employment contracts for an indefinite period are considered the rule, since they afford the strongest protection, e.g. employment protection. Fixed-term contracts must be specifically agreed upon, and in order for such contracts to be legal the precise rules of the 1982 Employment Protection Act must be adhered to.²⁴ The act contains a 'catalogue' of situations in which the use of fixed-term contracts is permissible, cf. sections 5-6. Fixed-term contracts may be used, for example regarding temporary substitute employment and probationary employment. The general trend ever since the middle of the 1970s has gone towards increased opportunities for employers to use fixed-term employment. Since 1996 a fixed-term contract ('agreed fixed-term employment', cf. section 5a) may be used with regard to one and the same employee for a period of twelve months during any three-year period – and without the employer having to give any motive.^{25 26} In 2002 the National Institute for Working Life in a report, commissioned by the government, proposed a new regulatory framework for fixed-term employment. According to the proposal the 'catalogue' of fixed-term contracts in the 1982 Employment Protection Act should be abolished and instead all fixed-term contracts, concluded for periods up until 18 months, be permitted. The employment protection of fixed-term workers should be strengthened, *inter alia* by extending the right to re-employment, and employers using fixed-

²¹ Cf. Schmidt *et al.* 1994, pp. 224 ff., Rönmar 2001b and Labour Court judgement AD 1978 No. 89.

²² Cf. Eklund 1998, Numhauser-Henning 1997 and Nyström 2000.

²³ (Re-)regulation has sometimes taken the form of an explicit 'restoration' of the legal situation prior to a deregulatory reform, as when the social democratic government in 1994 'restored' the employment protection regulation after a period of conservative government.

²⁴ These provisions are, however, 'semi-compelling', and collective agreements regulating fixed-term employment in specific ways, thereby deviating from the statutory rules, are frequent, cf. section 2 of the 1982 Employment Protection Act.

²⁵ However, this trend has not been entirely unequivocal. Since 2000 an employee that has been employed by one employer as a temporary substitute for a total of three years during the last five years is regarded as having a contract of indefinite duration, cf. section 5 subsection 2 of the 1982 Employment Protection Act.

²⁶ Cf. Lunning and Toijer 2002, pp. 134 ff., Numhauser-Henning 1997 and Eklund 1998.

term contracts for periods longer than 18 months be made to pay an economic fee (in the long run making long-term fixed-term employment unprofitable, thereby promoting the use of permanent employment in these situations). Whether or not this proposal will result in a new legislation remains to be seen.²⁷

The reforms concerning fixed-term employment were supplemented by a lifting of the ban on temporary agency work and private employment agencies in the beginning of the 1990s. There has also been intensive debate on working time flexibility, and some collective agreements in this direction have been signed.²⁸

The 'semi-compelling' character of the 1982 Employment Protection Act has also been strengthened. In 1996 the opportunities for the social partners, by way of collective agreements, to deviate from the Act, for example, regarding the regulation of fixed-term work and the seniority rules, was extended. Nowadays, such a deviating collective agreement can be entered into even at the local workplace level, cf. section 2 subsection 3. The seniority rules applied in cases of dismissal for reasons of redundancy, have been intensively debated during the 1990s, cf. section 22 of the 1982 Employment Protection Act. Priority is based upon length of service, and according to the principle 'last in-first out', the employees with the shortest length of service are to be dismissed. In 2000 the right for employers in small enterprises with fewer than ten employees to exempt two persons of particular significance for business activities from the priority given in accordance with the seniority rules was introduced.^{29 30}

The legislator's explicit motive for implementing the above-mentioned reforms in the 1990s was a desire both to make it easier for small enterprises and to increase total employment (*inter alia* by 'relaxing' the rules regarding fixed-term employment). However, important pressures towards reform were also changing labour market conditions, resulting from trends towards flexibilisation and individualisation and the Knowledge Society. The progressing flexibilisation of working life involves an increase in adaptability and allocative flexibility, and a shift from traditional to atypical employment. Globalisation of economy and commerce, new technology, increasing international competition and the emergence of the Knowledge Society constitute background reasons for this development. Labour market flexibility is often discussed in Atkinson's terms of the 'flexible firm' and numerical, functional and financial flexibility. Numerical flexibility relates both to the form and duration of the employment contract and to working-time arrangements, and serves the purpose of achieving greater flexibility in the number of workers employed. In focus are, for example, fixed-term and part-time work. Functional flexibility is a matter of versatility within permanent relationships, and it primarily affects the so-called core group of workers. The aim of functional flexibility is to vary the content of work in relation to the changing demands of production. Financial flexibility, finally, is concerned with making wages more adaptable to circumstances such as the profits of the business or the employee's knowledge and efficiency. The above-mentioned reforms of the 1982 Employment Protection Act and other aspects of individual labour law, on the whole aiming at the partial deregulation of the employment protection and the promotion of fixed-term, part-time and temporary agency work can be described as an increase in numerical flexibility and atypical employment.³¹

The Knowledge Society (sometimes also called the Information Society, Network Society, Post-Industrial Society or Post-Fordist Society) is another important factor reshaping the labour market and labour law in Sweden. In the Knowledge Society, the most important factor of production is knowledge, or perhaps more accurately the knowledge of individual employees. This strong emphasis on knowledge makes employees the vital productive resource; and as a

²⁷ Cf. Ds 2002:56.

²⁸ Cf. Eklund 1998.

²⁹ A corresponding exemption rules, though not limited to small enterprises, was in force for one year in the middle of the 1990s.

³⁰ Cf. Numhauser-Henning 1997 and Eklund 1998.

³¹ Cf. Atkinson 1984, Atkinson and Meager 1986, Numhauser-Henning 1993, Numhauser-Henning 1997 and Eklund 1998.

result, employers become dependent on having, and keeping, skilled employees. Hence, in the Knowledge Society the traditional power relationship between employer and employee changes (and shifts to the advantage of the employees). Employees in the Knowledge Society, Knowledge Workers, are supposed to be knowledgeable, skilful, professional, responsible and committed. In the wake of the Knowledge Society we therefore can see a delegation of power and a dismantling of hierarchies.³²

The currently most dynamic area of individual labour law, having been the object of massive reform since 1999, is the area of non-discrimination. In Sweden we have witnessed the creation of several new non-discrimination acts; and on the EC level (not least after Amsterdam), a number of new and important legal initiatives have been taken. The Swedish legal protection against discrimination in working life was greatly strengthened, and widened, by the creation of three new non-discrimination acts which came into force in May 1999. The 1999 Act against Ethnic Discrimination replaced an earlier 'toothless' Act, while the 1999 Act on the Prohibition of Discrimination in Working Life against Persons with Disabilities and the 1999 Act on Prohibition of Discrimination in Working Life Based on Sexual Orientation introduced entirely new non-discrimination rules. Laws prohibiting discrimination on the grounds of gender have existed since 1979. The most recent one, the 1991 Equal Opportunities Act, has been the subject of recent reform in order to strengthen its rules and achieve better accordance with EC law. The non-discrimination acts contain prohibitions against direct and indirect discrimination and prohibit discriminatory decisions and behaviour on the part of the employer regarding recruitment, training and promotion, terms and conditions of employment, direction and allocation of work, termination of employment etc. Furthermore, the 1991 Equal Opportunities Act and the 1999 Act against Ethnic Discrimination contain rules on so-called active measures. In addition, the 2003 Act on Prohibition of Discrimination has been adopted, a general civil law prohibiting discrimination on grounds of ethnic origin, religion or belief, sexual orientation and disability outside the scope of labour law, but in areas such as labour-market policy, housing, social assistance and social security.^{33 34}

An important background to this expansion of non-discrimination law is the above-mentioned process towards the flexibilisation of working life and the relaxing of standardised conditions of employment. The increased diversification that these developments entail creates a greater need for protection against discrimination. Furthermore, EC law and its clear emphasis on discrimination issues has also served as an important source of inspiration for recent developments in Swedish labour law. The principles of equal treatment and non-discrimination are recognised as vital general principles of EC law. The principle of non-discrimination on the basis of nationality is essential to the European Community and its single market, and the EC regulation in the area of gender discrimination is both comprehensive and able to build on tradition.³⁵ Through the Amsterdam Treaty, the gender-equality aspect was highlighted even more by the introduction of a *mainstreaming strategy* concerning equality between women and men (cf. Articles 2 and 3 EC). Furthermore, an important new basis for legal action in the area of non-discrimination was established by the creation of the new Article 13 of the EC Treaty after Amsterdam, expanding the Council's powers to take appropriate action in order to combat discrimination. Consequently, two new directives, one establishing a general framework for equal treatment in employment and occupation and the other implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, have been adopted.³⁶

³² Cf. Rönmar 2001a, Numhauser-Henning 1997 and Bruun 1995.

³³ Cf. also the adoption of the 2001 Act on Equal Treatment of Students in Higher Education, which prohibits discrimination on grounds of gender, ethnic origin, religion or belief, sexual orientation or disability.

³⁴ Cf. Numhauser-Henning 2001b.

³⁵ Cf. Articles 12 and 39 EC, Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community and Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

³⁶ Cf. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

Besides this, the principle of equal treatment in EC law has ‘spread’ to new protected groups, and today it also covers atypical workers (fixed-term and part-time workers). With the support of the European social partners, the social dialogue and the legislative procedure in Articles 138 and 139 EC, the Council has adopted two directives implementing the so-called framework agreements on part-time and fixed-term work.³⁷ Besides the general argument of social legitimacy, underpinning all non-discrimination legislation, the background to this legal development is also to be found in the flexibilisation of working life and the resultant increase in atypical employment. The ‘spread’ of the principle of equal treatment has a twofold aim: partly to increase the protection of atypical workers, partly to promote the flexibilisation of working life (cf. the concept of *flexicurity*). In future, these equal-treatment considerations may come to encompass self-employed workers as well.³⁸

At present, there is also a lively national and international debate about the increasing individualisation of working life and labour law. The debate is related both to the general highlighting of the individual employee and his or her conditions, and to the increased importance of regulation in the individual employment contract. The individualisation of working life runs parallel to a process of individualisation which is taking place at a more general cultural and societal level.³⁹ The emphasis on individual rights and individual labour law in EC law is often referred to as an important background for the ongoing individualisation process. EC law has brought about what, in principle, amounts to a ‘paradigmatic shift’ in Nordic labour law. Thus, EC law has shifted the emphasis from collective to individual labour law, changed the traditional doctrine of the sources of law, introduced new legal remedies for individuals and altered the role of the courts.⁴⁰

An increased regulation in the individual employment contract has an ‘explosive effect’ in relation to Swedish labour law and the ‘Swedish Model’ of industrial relations. We have seen that terms and conditions of employment traditionally have almost exclusively been regulated by collective agreements, and the individual employment contract has been of little or no importance. Today, however, the employees’ working conditions are to a larger extent than before regulated in individual employment contracts. As a result the collective agreement, the real centrepiece of Swedish labour law, is losing ground.⁴¹ This individualisation is also one expression of the ongoing flexibilisation of working life. We are thus witnessing a move from standardisation towards individualised and flexible working conditions.

Next to the employer prerogatives (conferring unilateral decision-making powers on the employer), the individual employment contract constitutes one of the most flexible regulating mechanisms. Regulation at this level involves extensive decentralisation of the bargaining structure; it makes it possible to adapt working conditions to the specific needs of the particular company and the individual employment relationship. At the same time, it is both costly and administratively cumbersome to agree on working conditions with every single employee, compared to the ‘mass-regulation’ resulting from collective bargaining and collective agreements. The notion that the entering into of an individual employment contract has been preceded by a genuine negotiation between the employer and the employee often turns out to be a chimera. When contracts are concluded at this individual level, the employer often has a very strong bargaining position, owing *inter alia* to his economic advantage and the traditional unequal nature of the employment relationship. The employer thus possesses great opportunities

³⁷ Cf. Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC and Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. These directives have been implemented into Swedish law through the adoption of the 2002 Act on Prohibition of Discrimination of Part-time and Fixed-time Workers. Several attempts to achieve a corresponding regulation of temporary agency work have also been made at EC level. Hitherto, however, they have all failed.

³⁸ Cf. Numhauser-Henning 2001b and Rönmar 2004.

³⁹ Cf. Beck 1994 and Simitis 1994.

⁴⁰ Cf. for example Malmberg 1997, Hydén 1996 and Nielsen 1996.

⁴¹ Cf. Fahlbeck 1995 and Malmberg 1997.

to formulate the conditions of employment more or less unilaterally.⁴²

Another important expression of the ongoing individualisation process is the decentralisation of industrial relations in general, and wage negotiations in particular, that has taken place in recent years, partly as a result of a deliberate strategy of the Confederation of Swedish Enterprise (and its predecessor the Swedish Employers Federation). Collective agreements are concluded at national sectoral level, not as before at the national level between the two top labour-market organisations the Swedish Confederation of Trade Unions (LO) and the Confederation of Swedish Enterprise (Svenskt Näringsliv), but also to a large extent at the local level. The prior three-tier system has thus been replaced by a two-tier system. As was mentioned above, the 'semi-compelling' character of the 1982 Employment Protection Act reflects this reality, and these days it is possible to deviate from some of its rules in local collective agreements, too. Furthermore, individual wage-setting is very frequently used.⁴³ There are also signs indicating a 'corrosion' both of the Swedish tradition of co-operation and social partnership and of corporatism, such as the Confederation of Swedish Enterprise's withdrawal from numerous tripartite government bodies and the social partners' recurrent reluctance and failure to reach agreement concerning labour law reforms during the 1990s.⁴⁴

Following the emergence of the Knowledge Society new 'individualised' forms of the right to direct and allocate work may evolve, for example, duties for the employer to account for and negotiate his decisions in relation to individual employees (cf. the report of the National Institute for Working Life, which proposes the introduction of a legal obligation for employers' to inform and consult individual employees in matters regarding important decisions in the area of the direction and allocation of work). Such duties constitute yet another step towards decentralisation, and challenge the traditional role of Swedish trade unions representing employees at workplace level and participating in negotiation and co-determination.⁴⁵

Individualisation, in the form of decentralised industrial relations and increased regulation in individual employment contracts, weakens the collective labour-market structures, thereby challenging the 'Swedish Model' of industrial relations. The ongoing individualisation trend manifests itself in a variety of ways. Consequently, it embodies many, partly conflicting, implications for the future of labour law in Sweden. The increasing individualisation can be seen as an expression of a strengthened position for the individual employee and his or her rights (in relation to the state as well as the employer), in other words of *empowerment*. Simultaneously, though, individualised and decentralised industrial relations, together with the increasing importance of the individual employment contract, risk undermining the strength and influence of trade unions. A weakening of the collective structures makes it more difficult for employees to constitute a collective voice, something which will counteract a democratisation and may lead to the *disempowerment* of large groups of employees.⁴⁶

EC law also poses challenges to the 'Swedish Model' of industrial relations. It is true that EC provisions in the area of collective labour law, such as provisions regarding information and consultation in the directives concerning collective dismissals, transfers of undertakings, European works councils and the establishment of a general framework for informing and consulting employees, have been relatively easily implemented into the 1976 Co-determination Act and integrated with the Swedish tradition of information, consultation and co-determination. However, the focus in EC law on individual employees and individual rights contradicts the collective preference of the 'Swedish Model' of industrial relations and the central role being played by the collective agreement. The fact that implementation of EC directives cannot be made exclusively by means of collective agreements, is a source of irritation for both the

⁴² Cf. Rönmmar 2001b.

⁴³ The rules regarding mediation in case of industrial action were reformed, and strengthened, in 2000, *inter alia* aiming at promoting wage negotiations and wage increases in balance with national economy, cf. sections 46-53 MBL.

⁴⁴ Cf. Kjellberg 1998, Numhauser-Henning 2001a and Nyström 2000.

⁴⁵ Cf. Ds 2002:56.

⁴⁶ Cf. Rönmmar 2001b.

Swedish legislator and the social partners. The *de facto* almost complete collective bargaining coverage in Sweden does not in a sufficient way legally guarantee the enforcement of individual rights, and supplementary legislation is therefore required for the implementation of EC directives.^{47 48}

5. Final remarks

We have seen that legal developments in the area of non-discrimination, the emergence of the Knowledge Society, the strengthening of fundamental social rights and the increasing individualisation of working life are some important trends that are currently ‘reshaping’ Swedish labour law and industrial relations.⁴⁹ Swedish labour law has in recent years been the object both of deregulation and (re-)regulation. To a large extent the reforms of the 1982 Employment Protection Act can be described in terms of an increase in atypical employment and numerical flexibility. The trends towards individualisation and decentralisation have resulted in a strengthening of the individual employment contract (and a corresponding weakening of the collective agreement). The ‘Swedish Model’ of industrial relations in its traditional sense is clearly, and in different ways, ‘put under pressure’. The interplay between the Swedish and the European/EC dimension of industrial relations, respectively (taking into account *inter alia* the European social partners and the social dialogue, the EU Employment Strategy and the European Monetary Union) in the years to come will prove crucial for future mechanisms for establishing and changing terms and conditions of employment in Sweden.

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⁴⁷ Cf. Nielsen 2002, pp. 49 ff., Nielsen 1996 and Numhauser-Henning 2001a.

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⁴⁹ I have argued elsewhere that these labour-market trends to a large extent harmonise with a development towards *empowerment* of employees, a general requirement for objective grounds in the area of the direction and allocation of work and new and strengthened individual rights for employees, cf. Rönmar 2001b.

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PART II

The Scope of Labor Law and the Notion of Employees

Labor Law Coverage and the Concept of ‘Worker’

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1. Introduction

In almost all industrialized countries, labor laws were originally intended to protect workers in the manufacturing sector. Therefore, the prototypical person covered under labor protective laws has been a blue-collar employee. However, the transformation of the industrial structure, which has placed more importance on the service sector, combined with the growing number of white-collar employees, have made obsolete the centrality of blue-collar employees in labor protective regulations. As a result, how labor law coverage is determined and how the concept of employee is defined have become highly controversial issues.

This is also a problematic issue in Japan. First, concerning the definition of “employee,” or, as stipulated in Japanese law, “worker,” it should be noted that in contrast to most other countries Japanese labor law contains statutory provisions. Both individual labor relations law and collective labor relations law — the main substance of Japanese labor law — contain their own definition of “worker,” and their coverage is limited only to the “worker.”

In the area of individual labor relations law, Article 9 of the Labour Standards Law, the basic law in this area, prescribes that “worker” shall mean one who is employed at an enterprise or place of business and who receives wages therefrom, without regard to the type of occupation. The concept of “worker” as embodied in the LSL has been understood to be the same as that in other labor protective laws, such as the Minimum Wages Law, the Industrial Safety and Health Law, etc.

In the area of collective labor relations law, Article 3 of the Trade Union Law defines a “worker” as “one who lives by his/her wage, salary or other remuneration assimilable thereto regardless of the kind of occupation.”

The purpose of the TUL is different from that of the LSL, and consequently the concept of “worker” in both laws is not the same. For example, since the purpose of the TUL is to guarantee to workers the right to organize trade unions, to bargain with their employers and to resort to industrial actions as a measure to protect their professional interest, the scope of the TUL can and should be demarcated widely, e.g. to cover the unemployed, professional baseball players, etc. But the LSL regulates the terms and conditions contained in work contracts, so that the concept of “worker” in the LSL concerns only those individuals who have already established employment relations.

2. Defining the Meaning of ‘Worker’

A particularly controversial issue is whether or not an individual is a worker covered under the LSL. Once someone is deemed to be a “worker,” that individual has legal protection, while, on the other hand, if a decision is rendered that the individual does not qualify as a “worker,” then he/she has no rights.

To date the courts have resolved many disputes regarding various types of workers; e.g. directors who perform the same work assigned to employees, drivers who use their own trucks to transport goods a customer has consigned through a transport agency, independent contractors such as carpenters, entertainers, canvassers, workers who perform a highly specialized job like a systems engineer, teleworkers, etc. As indicated above, the terms used in Article 9 of the LSL are ambiguous, making no distinction between the concept of who is and who is not a “worker.” To date, the courts have ruled on a case-by-case basis, and consequently

judgments depend on the merits of individual cases.

However, judges tend to rely on certain characteristics when determining whether someone qualifies as a “worker.”

- (1) Can the individual refuse, in practice, to accept the work
- (2) Whether and to what extent the individual can decide when and where to work
- (3) To what extent does the employer supervise and control the work
- (4) Can the individual outsource the service to others
- (5) Are the work rules regarding discipline applicable to the individual
- (6) Which party — worker or employer — must bear expenses for materials or devices used to complete the job
- (7) Does the individual receive remuneration for the accomplishment of the service, or only for the results
- (8) Is income tax deducted from the salary

While the factors that are taken into account have become clear, it is by no means certain which factors take precedence, even if scholars who have analyzed case law note that factors (2) and (3) have been given more relevance.

According to prevailing academic opinion, the main characteristic of a worker covered under the LSL is the existence of a subordinate relationship with an employer. The concept of “subordination” or “dependence” is also very familiar in European Continental countries, where, as in Japan, it has been repeatedly stated that labor laws were created to protect the “subordinate” worker. Therefore, in labor protective regulations, the protection for independent work does not exist.

But even this is ambiguous. Obviously, normal employees — blue-collar or white-collar — who perform their service in a factory or office, are protected as a “worker” under labor legislation. But working styles have become greatly diversified, and accordingly so has the accompanying level of subordination. For instance, employees in a sales section are usually engaged in activity outside the office to deal with customers, rendering their work less susceptible to supervision. Moreover, employees in research departments section have usually wide discretion to undertake research, and their wages are closely related to their results and achievements. It is difficult to view these employees as being in a subordinate position vis-à-vis their employers.

In short as working styles become more diversified, the more difficult it becomes to determine whether a relationship of subordination exists between the worker and the firm which utilizes his/her labor power.

It may be true that the case-by-case approach adopted by the courts makes it possible to attain a more appropriate resolution of the litigation in question. But it is extremely difficult for both the parties to predict whether or not an individual who performs the service is deemed to be a worker under the labor laws. Hence, it may be the lack of legal stability and transparency that can cause problems. For example, an independent contractor may decide to suddenly take action against a firm with which it has a relationship, asserting that it is an employee and can claim overtime payments recognized under the LSL (Article 37). On the other hand, a worker with weaker bargaining power who is forced to adopt the form of a self-employed entity in order for the other party to evade the increased costs incurred by coverage under labor protective regulations may want the legal protection offered for those placed in a subordinate position in the process of the performance his/her job. Of course, case law stipulates that the characteristics of a “worker” should be based upon real circumstances, regardless of the name the parties give to their contract. In this sense, from the theoretical viewpoint, a so-called “fake” worker is not allowed to exist, so that any individual can enjoy the status of worker as long as he/she meets the conditions mentioned above. But, as it is impossible in advance to determine the outcome of legal action, most people do not go this route because of the possibility they may lose.

3. How to Solve This Dilemma

To come up with a suitable definition of “worker,” it is necessary to clarify the criteria of a

“worker.” As long as the fact-dependent approach is maintained, the predictability should be sacrificed. One possible measure to avoid such problems is to adopt another approach, which permits the parties to determine definitely whether or not the contract is a contract of employment covered under the labor protective laws. If the parties concerned do not stipulate that their contract is a contract of employment but instead a contract for service/independent contract, this contract would definitely be viewed as a contract for service/independent contract. A judge could not *ex post* modify the arrangement laid out by the parties. In this way, the legal instability caused by the overall judgement of various criteria of a “worker” would be removed.

But there is a risk; the party with stronger bargaining power may compel the other to accept a contract for service/independent contract, solely to evade labor protective regulations. Therefore this approach cannot be approved easily without sound proof guarantees that the worker truly and freely entered into it.

In this regard, attention should be paid to one Supreme Court decision. Article 24 of the LSL provides that wages must be paid in full except in statutory limited cases. Case law has even stated that an employer is prohibited from offsetting the worker’s wage claim against the amount of damages caused by a worker’s act¹. However, recently the Supreme Court ruled that, as opposed to a unilateral offset by an employer, an offset the worker freely agreed does not violate the full-payment principle if there exists a reasonable ground.² The provisions of the LSL are, in principle, mandatory, but this decision detracted from the mandatory nature of the LSL by stating that voluntary agreement by the worker takes precedent. The extent to which this ruling can be extended to cases other than those involving full payment of wages is still being debated.

In this respect, it is also important to take into consideration the information gap between the worker and the employer when acknowledging a worker’s agreement. In the area of civil laws, to resolve various problems caused by the differences in bargaining power or the information gap between enterprises and consumers, a law related to consumer contracts was enacted in 2000. Although the application of this law expressly excludes a contract of employment, the problems it addresses have much in common with those found in a contract of employment in that, as the weaker party of the contract concluded with an enterprise, a worker can be compared to a consumer. That’s why the provisions included in this law regarding information should be, by analogy, transferred to labor law. For example, an agreement worker gives to a deterioration in working conditions should be null and void if the enterprise provides him/her with the relevant information in advance.

In some countries, the integration of a worker into the business or the organization has been regarded as the principal factor in determining if one is an employee. Also in Japan, some academics have argue similar opinions. But it seems to me that such an approach has not succeeded in resolving the transparency or predictability problem.

Italy is probably unique in that it has tried to grapple squarely this problem. Recently, to reduce the number of conflicts in this matter, a new law introduced a “certification” procedure used to classify a “worker,” (for more details, see the Italian National Report).

4. Is It Possible to Extend Labor Protective Regulations to Non-workers?

As a “gray zone” between “subordinate” workers and independent ones comes into existence, a new problem is emerging. Some of the self-employed such as independent contractors are economically dependent, but are excluded from labor law protection. For example, a teleworker’s remuneration is usually low and he/she deals with a particular company. However it is unlikely that a teleworker qualifies as a “worker” under the LSL. There are a number of reasons for this. Teleworkers usually work at home; even if there is an economic compulsion, they can accept or refuse freely to conclude or continue a contract; they have discretion over how, when, and where the work is carried out; they purchase equipment such as

¹ The *Kansai Seiki* case, Supreme Court (Nov.2, 1956)10 *Minshu* 1413; the *Nihon Kangyo Keizaikai* case, Supreme Court (May. 31, 1961) 15 *Minshu* 1482.

² The *Nisshin Seiko* case, Supreme Court (Nov. 16, 1990) 44 *Minshu* 1085.

computers at their own expense.

However, it would not be appropriate to exclude teleworkers completely from legal protection on the grounds that they fail to qualify as a “worker” under the LSL. The justification for labor protective regulations is grounded in the substantial inequality of the contractual parties, employer and employee. Therefore, it is indefensible that legal protection is denied to teleworkers who are in a position similar to normal wage-workers in that a contract is concluded between people whose bargaining powers are notably different.

From this perspective, some legal scholars say that “economic” subordination or dependence should be taken into account when classifying a person as a “worker.” It may be true that the economic situation of a worker is a more appropriate indicia for assessing whether or not one needs labor protection. But how “economic” subordination is determined still remains unclear.

According to recent research I conducted, many franchisees proved to be in the midst of a harsh economic climate and working conditions were severe, even if, legally speaking, they are considered to be company owners. The owners of franchisees usually are proprietors or leaseholders of their shops and pay a license fee to their franchisers. The franchiser provides the franchisee with know-how and other information and at the same time controls the franchisee’s business. Of course, the franchise owners are not employees, on the contrary they employ people. However, they run a high risk, while on the whole receiving low remuneration. Such a “high risk and low return” situation may in fact need more protection than the “low risk and low return” situation typical of normal employees. But through my research I discovered that many franchise owners prefer working without restrictions than working under paternalistic protection. Therefore, legal intervention in this case may be unnecessary, even if the working conditions are very harsh and economic situation miserable. This is an example that the needs of workers are various and complex, and the expansion of the total labor protective laws towards economic dependent and legally independent workers is not always welcomed by such workers.

Nevertheless, the coverage of labor laws needs to be expanded, even if the scope and the provisions depend on the individual and the type of worker.

The question of how to remove the inequalities offered by legal protection between a “worker” and a “non-worker” is attracting the attention of labor law scholars. In Japan, until a few years ago, this subject had been largely neglected because it was thought that a contract concluded by a non-worker should be subject to civil or commercial laws.

Now however, it is obvious that a significant number of independent contractors perform services in economically dependent conditions. Since they are non-workers, they are excluded from legal protection embodied in the LSL and other labor related laws. Certainly, even under current laws, a “non-worker” is not always excluded from legal protection. For example, the Workmen’s Accident Compensation Insurance Law recognizes certain categories of the self-employed as being able to receive compensation (Article 27 *et seq.*). Moreover, although homeworkers were not considered “workers” under the LSL, in 1970 the Industrial Homework Law was enacted, extending some degree of legal protection to homeworkers. Now the methodology of legal regulations — by which legal protection is in principle reserved for someone defined as a “worker” and is extended in an exceptional way to those in a situation similar to a “worker,” such as a homemaker — should be called into question.

Today a few labor law scholars assert that some provisions within existing labor legislation can and should be applied to self-employed workers. A comparative study shows that some anti-discrimination laws concerning race and sex, occupational safety and health, and protection of fundamental human rights etc. should be enacted for any type of worker, dependent or independent.

Moreover we may need to examine the possibility of expanding labor protective regulations to unpaid workers. Of course, as the definition of worker includes “wages,” unpaid workers cannot be considered a worker under either the LSL or TUL. However, some provisions included in labor protective laws are intended to protect the worker against the risk caused by performing the service in a subordinate situation. Theoretically speaking, these provisions can be extended to unpaid workers, if such workers are engaged in their activity under some control of the person for whom they perform the service. In this case, the fact that unpaid workers do

not receive a wage does not matter. As far as unpaid workers are engaged in socially useful activities, it is fair that the state afford legal protection to such workers in some relevant matters.

In the future, we should theoretically analyze which sections of the existing labor laws concern “employee” status or personal or legal “subordination,” which sections can be subject to the derogation from the mandatory legal provisions through agreement between individual employees and what the requirements for the derogation are, whether some sections are related to economic dependence or economic realities and can be expanded to legally independent but economic dependent workers; and whether there is a common principle which can be expanded to every socially useful activity, including unpaid work.

The Definition of “Employee” in American Labor and Employment Law

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I. Introduction

Although there are certainly many specific legislative exceptions, the general practice in the United States is to define who is a covered “employee” for a labor or employment law statute or doctrine, according to the purposes for which the statute or doctrine were adopted. For example, under the common law doctrine of respondeat superior, an “employee” is one who a person has the right to “direct and control” in the performance of some compensated duties, and accordingly, it is appropriate to hold the “employer” liable for the torts of the employee he “controls.”¹ Similarly, the default definition of employee in most federal protection legislation, for example the Fair Labor Standards Act,² is the “economic realities test” in which the court looks to see if a person is in such a relation to another under the economic realities of the situation that it effectuates the purposes of the act to find that person is an “employee” under the act.³ Under most state Workers’ Compensation statutes, the definition of “employee” is specifically provided in the statute, but broadly interpreted to “effectuate the remedial purposes of the act.”⁴

This practice of adapting the definition of “employee” to meet the purpose of each individual act is in some ways optimal, since it allows courts to most fully follow the purposes of Congress or state legislatures in enacting the legislation in question. However, the practice can also create problems of notice and uniformity where the purpose of the statute is not clear to the parties or where people who are employees for one statute are surprised to find they are not employees for the purposes of another statute.⁵

There is at least one major exception to this basic principle that American law defines employees according to the purposes of the act. Congress has expressly confined the definition of “employee” under the National Labor Relations Act to the tort definition of “employee.”⁶ Furthermore, Congress also added an exception for “supervisory employees” while the Supreme Court has added exceptions for “managerial” and “confidential” employees.⁷ Although it fulfills congressional intent for the courts to follow this constrained definition in determining the coverage of the National Labor Relations Act, this definition and its exceptions create a tension between the purposes of the Act in promoting equity in bargaining power and industrial peace and the scope of the Act by excluding vulnerable employees who would undoubtedly benefit from it.

¹ See *infra* Part IIA.

² 29 U.S.C. §§ 201-219 (1994).

³ See *infra* Part IIB.

⁴ See *infra* Part IIC.

⁵ See *infra* Part IID.

⁶ See *infra* text at notes 52-54.

⁷ See *infra* Part IIIC.

II. Defining “Employee” to Effectuate the Purposes of an Act

A. Tort Law—The “Direct and Control” Test

According to the common law doctrine of respondeat superior, an employer is responsible for an employee’s torts committed within the scope of employment.⁸ Liability is based on the equitable principle that “just as the employer is entitled to reap the benefits of the employee’s conduct, so too must the employer bear the responsibilities of that conduct.”⁹ The principal means of determining who is an employee for the purposes of respondeat superior liability is by applying the “direct and control” test.¹⁰

The “direct and control” test concerns the capacity of the contractor to regulate the means and manner of job performance.¹¹ If the contractor of work merely specifies the final product, while the contractee controls the time, place and means of his or her work, and provides his or her own tools and materials, it is likely the contractee will be found to be an independent contractor.¹² Correspondingly, if the contractor specifies how the work is to be done, “directing and controlling” the contractee, and providing tools and materials, then the contractee is likely to be found to be an “employee” for the purposes of the doctrine of respondeat superior and the contractor or “employer” will be held liable for any negligence on the employee’s part in performing his or her duties. The Supreme Court summarized the “direct and control” test as follows: “the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done.”¹³ This principle is well established in American law.¹⁴

The purpose of defining “employee” by applying the “direct and control” test under tort law is to ensure that the proper party pays for the wrongs. This test meets that purpose since it determines whether the employer has the right to control how the employee performs his work and the precautions that are undertaken in the course of that work.¹⁵ By imposing liability on the employer, it is more likely that the employer will take a proactive stance to prevent accidents by exercising considerable control over employees in order to avoid such liability.¹⁶ In other words, efficiency, as well as the basic concepts of fairness and equity, dictates that the employer should accept the burdens that accompany the benefits of its respective operation.¹⁷

⁸ ALVIN L. GOLDMAN, *LABOR AND EMPLOYMENT LAW IN THE UNITED STATES* 133 (1996).

⁹ *Id.* It is also relevant to note that if the employee is acting solely for his own behalf, and in a manner which is not reasonably foreseeable, the employer will likely be able to escape liability. *Id.* at 134.

¹⁰ Most common law definitions of respondeat superior derive from §2 of the Restatement (Second) of Agency. That section uses the terms “master,” “servant,” and “independent contractor.” A master is defined as “a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.” *RESTATEMENT (SECOND) OF AGENCY* §2 (1) (1958). The term “master” is often used interchangeably with “employer.” The Restatement defines “servant” as “an agent employed by the master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right of control by the master.” *Id.* at §2(2). “Servant” is also used interchangeably with “employee.” An independent contractor is defined in the Restatement as “a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s control with respect to his physical conduct in the performance of the undertaking.” *Id.* at §2(3).

¹¹ *See* MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* 548 (1999).

¹² And thus, the employer will not be responsible for the injuries caused by the independent contractor.

¹³ *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 523 (1889)

¹⁴ *See, e.g. National Convenience Stores, Inc. v. Fantauzzi*, 584 P.2d 689, 691 (Nev. 1978) (stating “Nevada’s policy rationale for the doctrine of respondeat superior is grounded on the theory of control ...”).

¹⁵ *See* Kyoungseon Kim, *A Study of the Definition of “Employee” under the Federal Employment and Labor Statutes* at 11-12 (document on file with author).

¹⁶ *See generally* Clarence Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339 (1935). The argument proceeds that this is most economically efficient means to prevent harmful activities. *See also* Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984).

¹⁷ *See generally* DAN B. DOBBS, *THE LAW OF TORTS*, VOL. 2, 909 (2001).

B. *The Fair Labor Standards Act--The "Economic Realities" Test*

According to the Fair Labor Standards Act,¹⁸ an employee is defined as "any individual who is employed by an employer."¹⁹ The Act further states that "employ includes to suffer or permit to work."²⁰ In interpreting this vague definition, the Supreme Court has applied the "economic realities test."²¹ The economic realities test focuses on the "whole activity" surrounding the employment relationship in determining whether the workers are employees for the purposes of the Act.²² Neither the common law definitions of employee and independent contractor nor any agreement between the parties are controlling in determining the nature of the relationship.²³ Instead, the economic realities test considers whether the individuals at issue are economically dependent on the business for which they labor.²⁴ This inquiry is highly fact-dependent and requires an analysis of the entire employment relationship.²⁵

In *Rutherford Food Corp. v. McComb*, the Supreme Court interpreted the definition of employee to be quite broad under the Act, stating that "this Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category."²⁶ The definition of employee under the Act deserves such broad construction because "the Act concerns itself with the correction of economic evils through remedies that were unknown at common law."²⁷ The Court determined in *Rutherford* that, according to the economic realities of the situation, the workers at issue were employees under the FLSA. The Court based this decision on the facts that: (1) the company's equipment and facilities were used by the workers; (2) the workers had no business organization that could or did shift from one facility to another; (3) the workers were under close supervision by the managing official of the plant; and (4) the profits to workers depended upon their work.²⁸ Therefore, the workers in question were economically dependent on the business for which they worked, and thus employees under the act.

The Fair Labor Standards Act is social legislation intended to cover a wide spectrum of workers.²⁹ In *Mednick v. Albert Enterprises, Inc.*,³⁰ the Fifth Circuit stated that the meaning of such words as "employee," "independent contractor," and "employer," are "to be determined in light of the purposes of the legislation in which they are used."³¹ The court further stated that "[t]he ultimate criteria are to be found in the purposes of the act."³² The purpose of the FLSA, according to the court, is "to protect those whose livelihood is dependent upon finding employment in the business of others."³³

While the purpose of the FLSA was to cover a broad range of workers, in practice, such has

¹⁸ 29 U.S.C. §§ 201-219 (1994). The Fair Labor Standards Act contains four major requirements: a minimum wage, an overtime standard, restrictions on child labor, and equal pay. See ROTHSTEIN, ET AL., *supra* note 17 at 263.

¹⁹ 29 U.S.C. § 203 (e).

²⁰ 29 U.S.C. § 203(g).

²¹ See, e.g., *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28 (1961).

²² See, e.g., *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

²³ See ROTHSTEIN, ET AL., *supra* note 11, at 265.

²⁴ *Id.* at 265-66. In determining who constitutes an "employee" under the test, courts have used a number of factors such as: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments in equipment and material; (3) the worker's opportunity for profit and loss through the managerial skill; (4) the skill and initiative required for the work; (5) the permanence of the relationship; and (6) the extent to which the service rendered is an integral part of the alleged employer's business. *Id.* at 266.

²⁵ *Id.*

²⁶ 311 U.S. at 728-29.

²⁷ *Id.* at 727.

²⁸ *Id.* at 730.

²⁹ See 81 CONG. REC. 7,657 (1937) (Statement of Sen. Black) (stating the definition of employee under the FLSA is regarded as having "the broadest definition that has ever been included in any one act").

³⁰ 508 F.2d 297 (5th Cir. 1975).

³¹ *Id.* at 299.

³² *Id.* at 300.

³³ *Id.*

not always been the case.³⁴ For example, in *Donovan v. Brandel*,³⁵ the Sixth Circuit held that migrant farm workers who labored as “pickle-pickers” were not employees and thus, not entitled to the protections of the Act.³⁶ The court had several reasons for denying the migrant workers protection. Most notably, the court relied on the facts that there the workers had a temporary relationship with the farm,³⁷ pickle picking requires a degree of skill,³⁸ the farmer lacked control over the workers,³⁹ and the pickle-pickers were not an integral part of the farmer’s operation.⁴⁰

As a matter of policy, it seems fundamentally unfair to exclude workers such as the “pickle-pickers” who may be working long hours for a relatively low wage. This would seem to be the exact problem that the FLSA was enacted to correct. In addition, the court’s interpretation of the “economic realities” test as used in *Brandel* would exclude vulnerable classes of workers, like migrant farm workers, who most need the protection of the Act. For example, if picking pickles is a “skill” as the court held, it is hard to imagine an occupation which would not require “skill.”⁴¹ Despite the problems with the economic realities test, however, even its critics conceded that it meets the purposes of the FLSA better than the common law direct and control test.⁴²

C. *Workers’ Compensation Laws*

The definition of a covered “employee” in most Workers’ Compensation statutes is based on common law master-servant concepts.⁴³ However, these definitions have a significantly different meaning in the context of workers’ compensation. The terms contained in the various statutes are consistently read broadly so as to encompass a wide range of workers who may otherwise have been excluded under traditional common law definitions. As famous commentator Arthur Larsen notes:

[A] recognition of the difference between compensation law and vicarious liability in the purpose and function of the employment concept has been reflected both in statutory extensions of the term “employee” beyond the common law concept and in a gradual broadening of the interpretation of the term to bring within compensation coverage borderline classes for whom compensation is appropriate and practical.”⁴⁴

The trend of interpreting workers’ compensation statutes broadly is quite well established across the various states.⁴⁵ Since the purpose of Workers’ Compensation statutes is to provide benefit and protection to the injured worker it is logical that such a statute would favor coverage

³⁴ According to one commentator, the reason for these failures is due to the fact that the economic realities test focuses on economic dependence, which is an inherently subjective concept. See Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When it Sees One and How it Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 302-304 (2001).

³⁵ 736 F.2d 1114 (6th Cir. 1984).

³⁶ *Id.*

³⁷ Although between 40-50% of the workers returned annually. *Id.* at 1117.

³⁸ *Id.* at 1117-18.

³⁹ *Id.* at 1119.

⁴⁰ *Id.*

⁴¹ The exercise of skill and initiative is one of the factors courts have used to exclude workers from the protection of the FLSA under the “economic realities test. See ROTHSTEIN, ET AL., *supra* note 11, at 266.

⁴² See Lewis L. Maltby & David C. Yamada, *Beyond “Economic Realities”: The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 260 (1997).

⁴³ See ROTHSTEIN, ET AL., *supra* note 11, at 548. Courts frequently consider the factors set forth in §220 of the *Restatement (Second) of Agency* to determine the nature of the employment relationship. *Id.*

⁴⁴ ARTHUR LARSEN, *WORKERS’ COMPENSATION LAW: CASES, MATERIALS, AND TEXT* 269 (1984).

⁴⁵ See, e.g. *Stainless Specialty Mfg. Co. v. Indus. Com’n*, 144 Ariz. 12, 15 (1985) (holding workers’ compensation law is to be construed liberally in order to effectuate its remedial purpose); *v. Workers’ Compensation Review Bd.*, 5 Cal.Rptr. 3d 485 (2003) (stating “Courts are required to view the Workers’ Compensation Act from the standpoint of the injured worker with the objective of securing for him or her the maximum benefits which can lawfully be given.”); *Driscoll v. General Nutrition Corp.*, 252 Conn. 215, 220-21 (2000) (stating “[i]n [reservations] arising under workers’ compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purposes of the act”); *Griffin Pipes Products, Co. v. Griffin*, 663 N.W. 2d 862 (Iowa 2003) (stating “The primary purpose of the workers’ compensation statute is to benefit the worker, and thus, the court interprets those statutes liberally in favor of the worker.”); *Robertson Gallo v. Department of Labor & Industries*, 81 P.3d 869 (Wash. App. Div. 3, 2003) (stating “Where reasonable minds can differ over what provisions in the Workers’ Compensation Act mean, in keeping with the legislation’s fundamental purpose, the benefit of the doubt belongs to the injured worker.”).

rather than exclusion.

D. *Problems with Notice and Uniformity*

The lack of uniformity in the definition of “employee” has both positives and negatives. While defining “employee” according to the purposes of the statute can most fully effectuate the intent of state legislatures and Congress, it can also cause problems for the average American worker and employer by making it difficult to determine when, and by which, labor and employment law doctrines and statutes a person is covered. The problems are of course magnified when the legislature fails to clearly express the purposes of the statute that will guide the determination of who is an employee. Lack of uniformity and clarity raise legitimate notice objections in that potential employers and employees do not always know which doctrines or statutes apply to which potential employees, and also raise litigation costs as the parties endeavor to sort out these controversies.

III. The Definition of “Employee” Under the National Labor Relations Act

The general principle that who is an “employee” is defined according to the purposes of the examined act has been violated in the case of the National Labor Relations Act (NLRA), the primary act governing the conduct of union organizing and collective bargaining in the United States. Although the Supreme Court initially followed this general principle by adopting the “economic realities test” in the case of *NLRB v. Hearst Publications, Inc.*,⁴⁶ Congress later amended the NLRA to specifically exempt “independent contractors,” according to the common law tort definition, and “supervisors” from the definition of employee in the act. These exemptions have proven problematic for American labor law.

A. *The Hearst case*

In *NLRB v. Hearst Publications, Inc.*,⁴⁷ the Supreme Court held that “newsboys”⁴⁸ qualified as a group which deserved protection under the NLRA. The Court stated that the test for an “employee” was not confined “exclusively to ‘employees’ within the traditional common law distinctions separating them from ‘independent contractors.’”⁴⁹ Instead, courts should determine whether the group at issue is subject, “as a matter of economic fact, to the evils the [NLRA] was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in a special situation.”⁵⁰ The Court further stated that the term “employee” was to be defined broadly under the National Labor Relations Act when “the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute’s objectives and bring the relation within its protections. . . .”⁵¹ Thus the economic realities test began its short sojourn as the working definition of who constituted an “employee” under the NLRA.

B. *The Exclusion of Independent Contractors—Congressional Response to Hearst*

Three years later, Congress responded to the Hearst decision by amending the NLRA to specifically exclude independent contractors and supervisors from the Act’s coverage.⁵² Congress stated “[t]o correct what the [National Labor Relations Board] has done, and what the

⁴⁶ 322 U.S. 111 (1944)

⁴⁷ *Id.*

⁴⁸ More specifically, the Court held that full-time “newsboys” who sold papers at established spots qualified as a group which the NLRA was enacted to protect. *Id.* at 130.

⁴⁹ *Id.* at 126.

⁵⁰ *Id.* at 127.

⁵¹ 322 U.S. at 128.

⁵² See 29 U.S.C. §§ 151-69 (1947). The amended act was called the Taft-Hartley Act. See generally SAMUEL STREICHER & MICHAEL C. HARPER, LABOR LAW: CASES, MATERIALS, AND PROBLEMS 134 (1996).

Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contractors" from the definition of "employee".⁵³ The Board thus began applying the "right to control" test to determine employee status.⁵⁴

In *NLRB v. United Insurance Co.*,⁵⁵ the Court's holding reflected the Congressional amendments. The Court held that whether a worker is an independent contractor or an employee under the National Labor Relations Act should be determined according to "pertinent common-law agency principles."⁵⁶

C. *The Managerial and Supervisory Exceptions*

In order to facilitate the interests of employers in obtaining the undivided loyalty of supervisors, supervisors were excluded from the protection of the Act.⁵⁷ Supervisors are defined by the Act as follows:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.⁵⁸

The Court elaborated on this test in *NLRB v. Health Care & Retirement Corporation of America*⁵⁹ stating:

[T]he resolution of three questions; and each must be answered in the affirmative if an employee is to be deemed a supervisor. First, does the employee have authority to engage in 1 of 12 listed activities. Second, does the exercise of that authority require the "use of independent judgment"? Third, does the employee hold the authority "in the interest of the employer?"⁶⁰

The distinction between supervisors and lead employees often comes down to a matter of degree. This issue is frequently decided according to fact specific case by case approach.⁶¹ The modern trend in these cases has been towards a greater willingness to find that the employees in question are supervisors and away from analysis in terms of the Act's policies.⁶²

Although not specifically listed in the statute, managerial and confidential employees are also excluded from the coverage of the Act.⁶³ Managerial employees are defined as "those who 'formulate and effectuate management policies by expressing and making operative the

⁵³ House of Representatives Report No. 245, 80th Cong., 1st Sess., on H.R. 3020, at 18 (1947).

⁵⁴ See DOUGLAS E. RAY, ET AL., UNDERSTANDING LABOR LAW 21 (1999).

⁵⁵ 390 U.S. 254 (1968).

⁵⁶ *Id.* at 258. The Court further listed the following as decisive factors in the determination: (1) the worker performs operations that are an essential part of the company's normal operations; (2) training by company personnel; (3) the worker has considerable assistance and guidance from the company during the performance of his/her duties; (4) the workers are accountable to the company for collected funds and must report them; (5) benefit from the company's vacation, pension, and group insurance plans; (6) a permanent working arrangement with the company. *Id.* at 259. The Court also stated that no one factor is determinative. *Id.* at 258. *Accord Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (holding retired employees are no longer workers for hire); *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995) (holding Congress intended to define employee according to conventional common-law agency doctrine).

⁵⁷ See 1 NLRB, Legislative History of the Labor Management Relations Act at 305 (1947). Other policies influential in the administration of the NLRA include: (1) free choice needs protection against employer manipulation that could follow from permitting representatives of management to participate in the election process; (2) certain employees need not be protected by the Act because they already enjoy protection by virtue of their employment status; and (3) permitting a union voice with respect to any management and the union would improperly confuse the distinction between management and the union and therefore prevent workers properly on the management side of the line from performing their tasks adequately. JULIUS G. GETMAN, ET AL., LABOR MANAGEMENT RELATIONS AND THE LAW 24 (1999).

⁵⁸ 29 U.S.C.A. § 152 (11)

⁵⁹ 511 U.S. 571 (1994). This case is also known as the LPN case.

⁶⁰ *Id.* at 573-74.

⁶¹ See GETMAN ET AL., *supra* note 57, at 24.

⁶² *Id.*

⁶³ See RAY ET AL., *supra* note 54, at 23.

decisions of their employer.”⁶⁴ Confidential employees are defined as “persons who exercise managerial functions in the field of labor relations.”⁶⁵

D. *The Problems of Exclusions*

The definition of “employee” under the National Labor Relations Act has been a significant source of conflict and debate in recent years.⁶⁶ The willingness of the courts to exclude an increasing number of workers as “independent contractors,” “supervisors” or “managerial” employees has denied many workers who could have benefited from the provisions of the NLRA the protections of the Act. For example, American employers have been known to restructure their technical legal relationship with employees in order to escape coverage under the NLRA. For example, a trucking firm that employs drivers might “sell” the trucks to their drivers, with a lien on the truck and payments and a service agreement subtracted from future carrying fees, in an effort to make the drivers “independent contractors” under the NLRA, and so exempt from the act.

With respect to the managerial exception, in *NLRB v. Yeshiva University*,⁶⁷ the Supreme Court held that full-time faculty members at a large private university were “managerial” employees due to the faculty’s role in various areas such as faculty appointments, the setting of curriculum, and graduation requirements.⁶⁸ The Court dismissed the National Labor Relations Board’s argument that faculty members were not aligned with management because they were exercising independent judgment rather than “conform[ing] to management policies.”⁶⁹ The Court stated that “the faculty’s professional interests—as applied to governance at a university like Yeshiva—cannot be separated from those of the institution.... The “business” of a university is education.”⁷⁰

In *NLRB v. Health Care & Retirement Corp.*,⁷¹ the Court similarly held that licensed practical nurses (LPN’s), who directed less skilled employees in the performance of their duties were also supervisors under the NLRA.⁷² The Court reasoned that nurses’ professional interests in caring for patients were not distinct from the nursing home which employed them.⁷³ The direction of subordinate nurses by the LPN’s was held to be “in the interest of the employer” and the LPN’s were denied the protections of the Act.⁷⁴

Both the *Yeshiva* and LPN case have been a significant source of criticism by academic commentators.⁷⁵ The potential impact of the *Yeshiva* and LPN case may be to effectively deny

⁶⁴ *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267,288 (1974).

⁶⁵ *See NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170 (1981).

⁶⁶ Some commentators blame this conflict on the increasing level of skill, education, and experience in the American work force. *See Harry G. Hutchinson, Toward a Robust Conception of “Independent Judgment”: Back to the Future?*, 36 U.S.F. L. REV. 335, 335 (2002).

⁶⁷ 444 U.S. 672 (1980).

⁶⁸ *Id.*

⁶⁹ *Id.* at 688.

⁷⁰ *Id.*

⁷¹ 511 U.S. 571 (1994)

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 580.

⁷⁵ *See, e.g.,* Teresa R. Laidlacker, *The Classification of the Charge Nurse as a Supervisor Under the National Labor Relations Act*, 69 U. CIN. L. REV. 1315 (2001) (arguing the unionization of nurses would be beneficial to the future of the American health care system); Jennifer Myers, *A Critical Look at the Circuit Court Split After NLRB v. Hilliard Development Corporation*, 3 U. PA. J. LAB. & EMP. L. 671, 701-02 (2001) (stating the negative effects on the labor movement of classifying nurses as supervisors under the NLRA). *But see* R. Jason Straight, Note, *Who’s the Boss? Charge Nurses and “Independent Judgment” After National Labor Relations Board v. Health Care and Retirement Corporation of America*, 83 MINN. L. REV. 1927 (1999) (arguing that the Supreme Court’s interpretation of nurses as supervisors is consistent with the goals of the NLRA).

NLRA coverage for many professionals.⁷⁶ This trend towards increasing exclusions seems contradictory with the stated purpose of the NLRA which is to “encourage[] the practice and procedure of collective bargaining ... by protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”⁷⁷ The exclusion of workers from NLRA denies them protection for their basic rights of organization and, in doing so, precludes them from forming an effective union to bargain with their respective employers.

IV. Conclusion

In most aspects of American labor and employment law, the word “employee” is defined according to the purposes of the statute. This process enables the courts to most fully effectuate the purposes of the legislature. However, when the legislature fails to give the statute an explicit purpose, problems can arise. In addition, the varying definitions of “employee” can cause significant problems for workers attempting to discern if they qualify for coverage.

While most definitions of “employee” are intended to comport with the legislative purpose of the statute, the National Labor Relations Act stands in opposition. While the purpose of the NLRA is to promote equity in bargaining power and industrial peace, the modern trend has been to exclude an increasing amount of workers who would benefit from the protection of the Act. This has resulted in the formation of a significant number of workers unable to organize under the Act’s protections.

⁷⁶ Justice Ginsburg stated this point in her dissent in the LPN case:

If any person who may use independent judgment to assign tasks to others or direct their work as a supervisor, then few professionals employed by organizations subject to the Act will receive its protections. The Board’s endeavor to reconcile the inclusion of professionals with the exclusion of supervisors, in my view, is not just “rational and consistent with the Act,” ... it is required by the Act. 511 U.S. at 598-99.

It is also important to note “professional employees” have been deemed to fall within the protection of the Act. See Jeffrey M. Smith, *The Prospects of Continued Protection of Professionals Under the NLRA: Reaction to the Kentucky River Decision and the Expanding Notion of the Supervisor*, 2003 U. ILL. L. REV. 571, 571 (2003). The Act defines “professional employees” as follows:

One whose work is “predominantly intellectual and varied in character,” involves “the consistent exercise of discretion and judgment in its performance,” produces a result that “cannot be standardized in relation to a given period of time,” and requires knowledge “in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital.” Frederick J. Woodson, *NLRB v. Retirement & Health Care Corp. of America: Signaling a Need for Revision of the NLRA*, 13 J. L. & COM. 301, 306 (1995) (citing 29 U.S.C. §152 (12)(a)(1989)).

⁷⁷ 29 U.S.C.A. § 151 (1988).

The Scope of Australian Labour Law and the Regulatory Challenges Posed by Self and Casual Employment

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I. Introduction

Australian labour law¹ draws a key distinction between workers who work under contracts of service/employment, employees and those who perform work under contracts for services, independent contractors. This distinction emerges from the fact that the bulk of labour legislation is devoted towards the former. So much so that it has been said the contract of employment forms the ‘cornerstone’² of the Australian labour law system. Inroads have, however, been made into the dominance of the contract of employment by generic labour legislation, that is, labour legislation that apply equally to employees to independent contractors.

The first two parts of this paper will respectively survey Australian labour legislation which is confined to employees (‘employment-based labour legislation’) and generic labour legislation. This is followed by a brief discussion of the prevailing approach for determining whether a worker is an employee. The last two parts are devoted to considering the regulatory challenges posed by two key forms of non-standard work in Australia, self-employment and casual employment.

II. Employment-Based Labour Legislation

The centrality of the contract of employment stems mainly from the fact that such a contract triggers the system.³ This is apparent from the scope of federal awards and statutory agreements.⁴ Federal awards are limited to preventing and settling an ‘industrial dispute.’⁵ Such disputes, in turn, are restricted to interstate industrial disputes ‘about matters pertaining to the relationship between employers and employees.’⁶ The principal industrial statute, the *Workplace Relations Act 1996* (Cth) (‘*Workplace Relations Act*’), essentially ascribes the common law meaning of ‘employee’ to its statutory equivalent. Accordingly, the content of federal awards is primarily confined to workers considered employees at common law.⁷

The same applies to ‘industrial dispute’ enterprise agreements.⁸ Similarly, statutory individual agreements under the *Workplace Relations Act*, Australian Workplace Agreements, may only be made between an employer and employee. Further, such agreements may only deal with matters relating to their employment relationship.⁹ A slightly more liberal situation applies to ‘corporations’ enterprise agreements: these agreements may only be made between an employer directly with its employees or organisation/s of employees but the subject-matter of

¹ For reasons of space, this article will focus on labour regulation at the federal level and those of Australia’s two most populous states, New South Wales and Victoria.

² Breen Creighton and Richard Mitchell, ‘The Contract of Employment in Australian Labour Law’ in Lammy Betten (ed), *The Employment Contract in Transforming Labour Relations* (1995) 129, 136.

³ Breen Creighton, ‘Reforming the Contract of Employment’ in Andrew Frazer, Ron McCallum and Paul Ronfeldt (eds), *Individual Contracts and Workplace Relations* (1998) 77, 81.

⁴ For a more detailed discussion of federal awards and statutory agreements, see Joo-Cheong Tham, *The Framework of Australian Labour Law and Recent Trends in Regulation*, paper presented to the Japan Institute for Labour Policy and Training’s International Seminar on Comparative Labour Law, 9-10 March 2004, 3-7.

⁵ See *Workplace Relations Act* ss 88B-89A. Section 89A does further restrict that Australian Industrial Relations Commission’s (‘AIRC’) power to make awards but specifying the ‘allowable award matters’.

⁶ *Workplace Relations Act* s 4.

⁷ *R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138.

⁸ *Workplace Relations Act* s 170LO.

⁹ *Ibid* s 170VF(1).

the agreements is not restricted to matters pertaining to their employment relationship.¹⁰

Key statutory entitlements are also restricted to employees. A worker needs to be an employee before s/he can access the federal unfair dismissal scheme.¹¹ In the main, only such workers benefit from the obligation of employers to contribute nine per cent of the employee's¹² wages to a superannuation fund.¹³ This obligation has, however, been extended to embrace workers who work under contracts that are wholly or principally for the labour of the worker.¹⁴

Standard leave entitlements are typically conferred only on employees. For instance, the statutory minimums relating to annual and sick leave in New South Wales¹⁵ and Victoria¹⁶ are cast in such terms. The same applies to the unpaid parental leave entitlements under the *Workplace Relations Act*.¹⁷

Finally, the centrality of the common law notion of 'employee' is also reflected in some workers' compensation schemes. The federal scheme which only covers workers engaged by the Commonwealth government restricts entitlement to workers' compensation to 'employees'; a term which tacitly imports the common law meaning of 'employee.'¹⁸

III. Generic Labour Legislation

In Australia, there are key pieces of labour legislation which are generic in the sense of applying equally to both employees and independent contractors.

Both groups of workers receive statutory protection against discrimination at the workplace under anti-discrimination statutes. For instance, there are statutory prohibitions against discrimination against employees and independent contractors on the ground of their sex in the offering of work and the terms and conditions upon which such work is offered.¹⁹ The freedom of association provisions in the *Workplace Relations Act* are of comparable scope with hirers of labour, for example, prevented from altering the position of an employee or independent contractor to his or her prejudice on the ground of the worker's union membership.²⁰

Similarly, the duties imposed by occupational health and statute statutes on the hirers of labour largely do not depend on whether the worker hired is an employee or independent

¹⁰ Ibid ss 170LK. The restrictions that federal awards, 'industrial dispute' certified agreements and AWAs be confined to matters dealing with the employment relationship do not mean that there cannot be clause dealing with independent contractors. For example, if the use of independent contracts is pertinent to the employment relationship, it is seriously arguable that it is a matter dealing with the employment relationship, see Breen Creighton and Andrew Stewart, *Labour Law: An Introduction* (2000) 80-1. For more detail, see Tham, above n 4.

¹¹ *Workplace Relations Act* s 170CB. It should be noted that term 'employee' in the *Industrial Relations Act 1988* (Cth), the previous principal industrial statute, has been given a construction that goes beyond the common law meaning of 'employee': *Konrad v Victoria Police* (1999) 165 ALR 23. This broader construction, however, has not been applied to the corresponding term in the WR Act, see *Williams v Commonwealth of Australia* (2000) 48 AILR ¶14-353.

¹² *Superannuation Guarantee (Administration) Act 1992* (Cth) s 12(1) defines the term, 'employee' as having an ordinary meaning.

¹³ Ibid s 12(3). This obligation primarily stems from the *Superannuation Guarantee (Administration) Act 1992* (Cth) but is also supplemented by award provisions that deal with matters not covered by the legislation, for instance, the superannuation fund to which the employer is to contribute (see, for example, Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1995 [AW783479] cl 25). Federal awards also require employers to make superannuation contributions. These contributions reduce the amount the employer is required to contribute under the *Superannuation Guarantee (Administration) Act 1992* (Cth): *ibid* s 23.

¹⁴ Ibid s 12(3).

¹⁵ *Annual Holidays Act 1944* (NSW) s 3. It should be noted that the operative term in the preceding statute is 'worker'; a phrase that is slightly wider than the common law concept of employee. In New South Wales, a defacto minimum entitlement to sick leave is prescribed via the requirement that all State awards must provide for at least one week's of sick leave per year: *Industrial Relations Act 1996* (NSW).

¹⁶ *Workplace Relations Act* Schedule 1A cl 1.

¹⁷ *Workplace Relations Act* Schedule 14.

¹⁸ *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 5.

¹⁹ *Sex Discrimination Act 1984* (Cth) ss 14(1) and 16; *Anti-Discrimination Act 1977* (NSW) s 8 and *Equal Opportunity Act 1995* (Vic) ss 13-4.

²⁰ *Workplace Relations Act* s 298K.

contractor. This is so for two reasons. In some jurisdictions, the statutory term, ‘employee,’ has been defined so as to include independent contractors. For example, under both the federal and Victorian statutes, the employer’s general duty to provide, as far as practicable, a safe working environment to its ‘employees’ includes a duty to independent contractors engaged by the employer.²¹ Furthermore, occupational health and safety statutes typically require an employer to take all reasonably practicable steps to ensure that all persons are not exposed to risks to their health and safety due to the conduct of the employer’s undertaking.²² This duty would oblige an employer to take the requisite steps with respect to affected independent contractors.²³

The prior status of a person as an employee or independent contractor is also irrelevant to the question whether s/he can claim unemployment income support under Australia’s tax-payer funded social security system. Eligibility for such support will primarily depend on a person demonstrating that s/he meets the means test and is actively seeking work.²⁴

Moreover, the distinction between employees and independent contractors is largely immaterial from the perspective of Australia’s income tax system. Until recently, there was a concern that individuals were increasingly supplying labour services as self-employed contractors in order to minimise their tax liability.²⁵ This has now been remedied by legislation with this avenue for tax minimisation/avoidance largely closed off with the passage of the *Alienation of Personal Services Income Act 2000* (Cth). Among others, this Act requires workers who derive more than 80% from a particular client to be taxed on the same basis as employees.

Lastly, there are workers’ compensation schemes which are quasi-generic in the sense that they cover a significant proportion of independent contractors. Under the New South Wales’ scheme, a worker who enters into a contract with another party to perform work exceeding \$10 in value:

- which is not work incidental to a trade or business regularly carried out by the worker; and
 - does not either sublet the contract or employ any other worker;
- is deemed to be an ‘employee’ of the other party.²⁶ The Victorian scheme contains a similar provision²⁷ but goes further in extending its reach to many other independent contractors.²⁸

IV. The Approach for Determining Whether A Worker is An ‘Employee’

The prevailing approach for determining whether a worker is an ‘employee’ considers a range of factors with the key factor being the degree of control the alleged employer has over the worker’s activities. Other factors include:

- whether the worker supplies her or his own tools and equipment;
- whether the worker bears any financial risk in performing the work;
- whether the worker is free to perform work for other persons;
- whether the worker is free to delegate the performance of work to others;
- whether the worker is paid wages; and

²¹ *Occupational Health and Safety (Commonwealth Employees) Act 1991* (Cth) s 16(4) and *Occupational Health and Safety Act 1985* (Vic) s 21(3).

²² *Occupational Health and Safety (Commonwealth Employees) Act 1991* (Cth) s 17; *Occupational Health and Safety Act (NSW) s 16* and *Occupational Health and Safety Act 1985* (Vic) s 22.

²³ For a detailed discussion of these issues, see Richard Johnstone, ‘Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking’ (1999) 12 *Australian Journal of Labour Law* 73-112.

²⁴ A cluster of work-seeking requirements is contained in the ‘activity test’: *Social Security Act 1991* (Cth) ss 541 and 601.

²⁵ There were two well-recognised avenues for minimising the tax liability in such circumstances. First, services could be rendered through an interposed entity. This then allows the splitting of income for tax purposes. Second, workers in such situations tended to claim a greater range of income tax deductions: Review of Business Taxation, *A Tax System Redesigned: More certain, equitable and durable: Overview, Recommendations and Estimated Impacts* (1999) 286-94. For discussion of the position prior to the 2000 legislative reforms, see John Buchanan and Cameron Allan, ‘The Growth of Contractors in the Construction Industry: Implications for Tax Reform’ in John Buchanan (ed), *Taxation and the Labour Market* (1999).

²⁶ *Workplace Injury Management and Workers Compensation Act 1998* (NSW) Schedule 1, cl 2(2).

²⁷ The \$10 threshold does not, however, apply: *Accident Compensation Act 1985* (Vic) s 8.

²⁸ *Ibid* s 9.

- the degree to which the worker is integrated into the alleged employer's business.²⁹

An affirmative answer to all but the last two factors will point to the worker being an independent contractor. On the other hand, if a worker is paid wages and highly integrated into the alleged employer's business, s/he is more likely to be considered an employee.

There are two noteworthy points regarding this above approach. First, the economic reality of the relationship between the supplier and hirer of labour does not figure. For example, the fact that the supplier of labour is economically dependent on the hirer of labour is not expressly a factor pointing towards a contract of employment.³⁰ Secondly, the courts have tended to adopt a formalistic approach in determining whether a particular factor exists. This approach has meant, for instance, that the contractual terms have dictated the answer as to whether the worker is free to work for others or free to delegate the performance of work to others. Courts have clung to this formalistic approach despite situations where the formal freedom conferred by the contract has been insubstantial.³¹

V. The Challenge of Self-Employment

A recent study has estimated that, in 1998, self-employed contractors, that is, workers who supply labour services through their own business while not engaging any employees, constituted 10.1% of all employed persons in Australia; an increase from an estimated 7.3% in 1978.³²

A key challenge posed by this growth is the proportion of self-employed contractors who are 'dependent' contractors. These are contractors who share the attribute of employees in being economically dependent on a single hirer of labour but do not have the legal status of an 'employee.' The above study found that, in 1998, between 2.6% to 4.2% of the employed workforce were 'dependent' contractors.³³

The phenomenon of 'dependent' contractors is undoubtedly fuelled by well-recognised ways to evade the characterisation of a dependent work relationship as one of employment. The interposition of a legal entity between the worker and the hirer of labour is one such method. For example, a worker who supplies labour to another through a company will not have an employment relationship with the hirer of labour. Neither will the company since it is assumed that employees can only be natural persons.³⁴ This is even when the company's sole purpose is to function as a vehicle for the supply of the worker's labour.

Alternatively, the contours of the work relationship could be shaped in a way that it does not satisfy the various indicia of employment. For instance, a party with stronger bargaining power could engage a worker with the contract requiring the worker to supply his or her own equipment and formally leaving the worker free to delegate the performance of work. A worker that is economically dependent on the hirer of labour will not, however, avail her or himself of this formal freedom to delegate because of the need for income. In such circumstances, the hirer of labour is able to secure the supply of labour through a dependent work relationship while avoiding the characterisation of such a relationship as one of employment. Given that the contract of employment is the regulatory pivot of the Australian labour law system, such avoidance enables the evasion of labour legislation and the attendant imposts.³⁵

The challenge posed by dependent contractors has been primarily met in two ways. First, courts and tribunals have been conferred remedial powers to rectify unfair contracts.³⁶ Second,

²⁹ *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 and *Hollis v Vabu Pty Ltd* (2001) 75 ALJR 1356.

³⁰ A lonely exception is Gray J's approach in *Re Porter* (1989) 34 IR 179, 184-5.

³¹ See discussion below n 35.

³² Matthew Waite and Lou Will, *Self-Employed Contractors in Australia: Incidence and Characteristics* (2001) 23, 32.

³³ *Ibid* 35-6.

³⁴ See *Australian Mutual Provident Society Ltd v Chaplin* (1978) 18 ALR 385, 389-90.

³⁵ See Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15(3) *Australian Journal of Labour Law* 235.

³⁶ WR Act s 127A and Part 9 of the *Industrial Relations Act 1996* (NSW).

certain statutes contain provisions deeming certain groups of independent contractors to be employees.³⁷ These responses have been criticised as inadequate on the ground that they fail to reform the general test for determining whether a worker is an employee.³⁸

VI. The Challenge of Casual Employment

In Australia, a casual employee is statistically defined an employee without entitlement to paid annual or sick leave. This definition largely conforms to the award system under which workers considered casual employees are denied such leave entitlements while being paid a hourly premium called the casual loading.³⁹ Of note is the fact that casual employees in Australia are not necessarily engaged on short-term contracts.⁴⁰

In the past three decades, there has been phenomenal growth in casual employment as defined above.⁴¹ The employment share of such workers grew from 13.3 per cent of all employees in 1982 to 20.0 per cent in 1989.⁴² This sharp growth has persisted over the last decade with casual employees constituting 27.3 per cent of all employees in 2000.⁴³ Such growth, in the context of lower employment growth, has also seen the increase in casual employment assume greater importance in terms of new jobs created. In the 1990s, for instance, the growth in casual employment accounted for slightly over 70% of net employment growth.⁴⁴ Moreover, while casual employment in Australia remains highly feminised, it is now permeating most sections of the workforce.⁴⁵

A key challenge that casual employment poses for Australian labour law is that it is, in many instances, a degraded form of work. This is largely due to the fact that casual employees are not properly compensated for the benefits and security that they are denied. This inadequate compensation or 'an officially sanctioned gap in protection'⁴⁶ arises, in part, because of inadequacy of the casual loading.

The casual loading is inadequate for various reasons. It is sometimes not even paid either because the casual employee is not covered by an award or because the relevant award is not properly enforced. Even when paid, the loading falls short of proper compensation as it is primarily aimed at compensating for foregone award benefits.⁴⁷ Its compensatory reach does not extend to statutory entitlements denied to certain casual employees, for example, statutory protection against unfair dismissal.

This gap in protection means that casual employment allows work to be performed at a lower cost to the employer than if it were performed by a non-casual employee. The regulatory risks are two-fold: degraded work for casual employees and the ability to evade standard protection by employing labour through a particular mode of employment.

Three responses to the challenge posed by casual employment have been identified in the

³⁷ See generally Alan Clayton and Richard Mitchell, *Study on Employment Situations and Worker Protection in Australia: A Report to the International Labour Office* (1999) 52-8.

³⁸ See Stewart, above n 33, 268-70.

³⁹ ABS, *Labour Statistics: Concepts, Sources and Methods* (2001) para 4.38

⁴⁰ See Joo-Cheong Tham, 'Employment Security of Casual Employees: A Legal Perspective' in Michael Barry and Peter Brosnan (eds), *New Economies: New Industrial Relations: Proceedings of the 18th AIRAANZ Conference: Volume 1: Refereed Papers* (2004) 516-24.

⁴¹ It should be noted that casual employees in Australia are not necessarily subject to employment insecurity.

⁴² Peter Dawkins and Keith Norris, 'Casual Employment in Australia' (1990) 16 *Australian Bulletin of Labour* 156, 164. Workers classified by the ABS as casual employees will henceforth be referred to as ABS casual employees. For the ABS definition of casual employment, see discussion above nn 139-40.

⁴³ Alison Preston, 'The changing Australian labour market: Developments during the last decade' (2001) 27 *Australian Bulletin of Labour* 153, 160.

⁴⁴ Iain Campbell and John Burgess, 'Casual Employment in Australia and Temporary Employment in Europe: Developing a Cross-National Comparison' (2001) 15 *Work, Employment & Society* 171, 175.

⁴⁵ See Iain Campbell, 'The Spreading Net: Age and Gender in the Process of Casualisation in Australia' (2000) 45 *Journal of Australian Political Economy* 68.

⁴⁶ Iain Campbell, 'The Growth of Casual Employment in Australia: Towards an Explanation' in Julian Teicher (ed), *Non-Standard Employment in Australia and New Zealand* (1996) 43, 49.

⁴⁷ *Re Metal, Engineering and Associated Industries Award, 1998 - Part 1* (2002) 110 IR 247.

literature:

- *limiting* casual employment;
- *compensating* casual employees for the disamenities of such employment, for example, through the casual loading; and
- *attaching conditions* to casual employment so as to narrow the gap between such employment and non-casual employment.⁴⁸

All three approaches have been adopted by unions. While the pursuit of the first approach is now circumscribed because the AIRC is prevented from awarding clauses which limit the proportion or number of employees in a particular type of employment,⁴⁹ unions have sought to limit casual employment through conversion clauses. The Australian Manufacturing Workers' Union for instance, was successful in limiting casual employment by means of a clause entitling casual employees who have had six months of regular employment with an employer to request a conversion to 'permanent' status. This entitlement, however, is heavily qualified as it is subject to the employer's right to refuse on reasonable grounds. In the same case, the union also successfully pursued a compensatory approach in achieving an increase of the casual loading from 20% to 25%.⁵⁰ Lastly, the approach of attaching conditions is evident in the Australian Council of Trade Unions' present application to the AIRC which seeks, among others, the extension of severance pay benefits to casual employees who have had more than 12 months' continuous service with an employer.⁵¹

VII. Conclusion

It should be apparent from the previous discussion that the scope of Australian labour law significantly depends on the demarcation between workers who are employees and those who are independent contractors. At the same time, key pieces of labour legislation have ignored this distinction by embracing both groups of workers.

The centrality of the contract of employment has meant that the dependent self-employed poses a serious challenge to adequacy of Australian labour law. Another key challenge arises not from this centrality but from the fact that Australian labour law sanctions an under-compensated form of non-standard work, casual employment.

⁴⁸ Barbara Pocock, John Buchanan and Iain Campbell, ' "New" Industrial Relations: Meeting the Challenge of Casual Work in Australia' in Michael Barry and Peter Brosnan (eds), *New Economies: New Industrial Relations: Proceedings of the 18th AIRAANZ Conference: Volume 2: Un-refereed Abstracts & Papers* (2004) 208, 213-4.

⁴⁹ *Workplace Relations Act* s 89A(4).

⁵⁰ *Re Metal, Engineering and Associated Industries Award, 1998 - Part 1* (2002) 110 IR 247.

⁵¹ See <http://www.e-airc.gov.au/redundancycase/>

For a discussion of the compensatory and conditions-attachment approaches in the context of two specific cases, see Gillian Whitehouse and Tricia Rooney, 'Employment Entitlements and Casual Status: Lessons from Two Queensland Cases' (2003) 29(1) *Australian Bulletin of Labour* 62.

The Personal Scope of the Employment Relationship

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1. Introduction

The personal scope of the employment relationship is crucial in English law and today is it a more live question than ever before. There are three distinct statuses:

- Employee
- Worker; and
- Self-employed.

The first two are defined by statute. S.230(1) ERA 1996 explains that an ‘employee’ is:

An individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment.

‘Contract of employment’ is defined by s.230(2) ERA as ‘a contract of service or apprenticeship, whether express or implied, and, (if it is express) whether oral or in writing. In s.230(3) workers are defined. The term includes employees (ie those working under a contract of employment) but also applies to ‘an individual who has entered into or works under (or where the employment has ceased, worked under)

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract who status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

While employees are defined by reference to the fact that they are employed under a contract of service, the self-employed have a contract *for* services.

For the purposes of employment protection, employees enjoy the greatest level of protection, self-employed the least; while, for the purposes of tax law, the opposite is the case – the self-employed enjoy the most favourable tax regimes, employees the least. However, this representation is over-simplistic and has changed in recent years. In particular, new tax rules have made it more difficult to enjoy self-employed tax status, while workers have enjoyed an increasing number of rights. This is partly to do with a policy choice by the Labour government and partly as a result of EC law. The key issue, then, is how to distinguish between these different statuses. This is not an easy task, as Mummery LJ noted in *Franks v. Reuters*:¹

Drawing a line between those who are employees (and so have statutory employment rights) and those who are not entitled to statutory employment protection has become more, rather than less difficult as work relations in and away from the workplace have become more complex and diverse.

2. Employees

2.1. Defining Employees

In *Express and Echo*² the Court of Appeal (Peter Gibson LJ) said that it was necessary to ask four questions to determine whether an individual was an employee:

1. Is there a contract?³
2. What are its terms?

¹ [2003] IRLR 423, para. 18.

² [1999] IRLR 367.

³ Here the standard requirements apply: there must be an intention to be legally bound, an agreement reached by the process of offer and acceptance, and some form of value (‘consideration’), given by the employer to the worker in return for a service. On the importance of this, see *Hewlett Packard v. O’Murphy* [2002] IRLR 4.

3. Are there any terms inconsistent with it being a contract of employment?
4. Is it a contract of services or for services?

Questions three and four are the most pertinent to our enquiry. Question three raises the issue of delegation. If, as on the facts of *Express and Echo*, an individual can delegate to a third party the performance of the services then the contract will not be a contract of employment.⁴

Question four goes to the heart of the enquiry as to whether the contract is one of employment. Over the years, a number of tests have been developed by the courts to determine the answer to this question, tests which had already ‘collapsed into a maze of casuistry’ by 1951.⁵ One test concerns control – that the servant agrees that in the performance of that service he will be subject to the other’s control in a sufficient degree to make that other master.⁶ While this formulation sounds rather anachronistic and so has been subject to certain modifications (reflecting the changing nature of control from ‘how to’ to ‘what to’⁷) the use of the control test has by no means died out. As recently as 1995 the Court of Appeal suggested in *Lane v. Shire Roofing*⁸ that the test to determine whether an individual was an employee was ‘who lays down what is to be done, the way in which it is to be done, the means by which it is to be done and the time when it is done?’.

In other cases the courts have looked at the level of integration of the individual into the employer’s business. For example, in *Stevenson, Jordan & Harrison Ltd v. Macdonald & Evans*⁹ Denning LJ said that under a contract of service ‘a man is employed as part of the business and his work is done as an integral part of the business; whereas under a contract for services his work, although done for the business, is not integrated into it, but is only an accessory to it.’ The integration test places less emphasis on the personal ‘subordination’ of the employee and more upon the way in which the work is organised. However, the test may be of less use in situations where the boundaries of the organisation are diffuse or unclear, as in the case of sub-contract or agency labour.¹⁰

The courts have also examined the economic reality of the situation,¹¹ looking to see whether the provisions are consistent with it being a contract of service (eg does the employer have the power to select and dismiss, is the worker paid a wage or a lump sum, does s/he have to render exclusive service, or to work on the employer’s premises; does the employer own the tools and the materials; does the employer bear the primary chance of profit or risk of loss; is the work an integral part of the business).¹² This approach shows the extent to which the courts will not just look at one single factor but instead take a multiple or ‘pragmatic’ approach, weighing up all the factors for and against a contract of employment and determining on which side the scales will settle.¹³ This prompted some to suggest that the ‘elephant test’ applied to determining the question whether the contract was one of employment¹⁴ – that judges knew a

⁴ Although cf *MacFarlane v. Glasgow City Council* [2001] IRLR 7 where more limited powers of delegation did not prevent the contract from being one of employment.

⁵ O.Kahn-Freund, ‘Servants and Independent Contractors’ (1951) 14 MLR 504 considered in B.Hepple, ‘Restructuring Employment Rights’ (1986) 15 ILJ 69 who noted the artificiality of the control test once the managerial and technical functions are split.

⁶ *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 2 QB 497, MacKenna J at p.515; *Nethermere (St.Neots) Ltd v. Gardiner* [1984] ICR 612, Stephenson LJ, p.623.

⁷ See Viscount Simmonds in *Mersey Docks & Harbour Board v. Coggins & Griffiths Ltd* [1947] AC 1, 12.

⁸ [1995] IRLR 493, 495 (Henry LJ).

⁹ [1952] 1 TLR 101, 111.

¹⁰ B.Burchell, S.Deakin, S.Honey, ‘The Employment Status of Individuals in Non-Standard Employment’, DTI, Employment Relations Research Series No.6, 1999, 5.

¹¹ This includes looking ‘beyond and beneath’ the documents to what the parties said and did, both at the time when they were engaged and subsequently, including evidence as to how the relationship had been understood by them: *Raymond Franks v. Reuters Limited* [2003] IRLR 423, para. 12 (Per Mummery LJ).

¹² *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 2 QB 497; *Market Investigations v. Minister of Social Security* [1969] 2 QB 173; *Lee v. Cheung and Shun Shing Construction & Engineering* [1990] IRLR 236.

¹³ I.Smith, *Industrial Law*, (London, Butterworths, 2003).

¹⁴ B.Wedderburn, *The Worker and the Law* (3rd ed, Harmondsworth, Penguin,1986), 116.

contract of employment if they saw it.¹⁵

However, despite the evolution of a number of tests to be used to determine the existence of a contract of employment, in modern law one test seems to have taken precedence over all others, particularly in the context of atypical workers such as homeworkers,¹⁶ agency workers,¹⁷ zero-hours contract workers¹⁸ and casual workers. This is the test of mutuality of obligation – only if such mutuality exists will the individual be an employee. The importance of this test was emphasised by the House of Lords in *Carmichael*.¹⁹ Carmichael was employed as a tour guide at a power station, working on a ‘casual as required basis.’ She sought a written statement of the terms of her contract under s. ERA 1996. The employers resisted the complaint on the grounds that she was not an employee. The House of Lords had to consider whether she had a global contract spanning both the time she worked and the periods when she did not. The ET found that there was no global contract – that she was employed on a series of successive ad hoc contracts of service or for services and that when she was not working as a guide the employers were under no contractual obligation to the power station. The House of Lords agreed. Lord Irvine of Lairg (then Lord Chancellor) said that there was no obligation on the power station to provide casual work nor on Carmichael to undertake it. For this reason, there would be an absence of ‘that irreducible minimum of mutual obligation necessary to create a contract of service.’

For a similar reason, in the earlier case of *O’Kelly*²⁰ the Employment Tribunal found that a ‘regular casual’ waiter at a hotel was not an employee and so could not claim protection from dismissal on the grounds of trade union membership. The tribunal listed nine factors which were consistent with the regular casuals being employed under a contract of employment (eg they provided their services in return for remuneration for work actually performed, they did not invest their own capital or stand to gain or lose from the commercial success of the business, they worked under the employer’s discretion and control, wearing clothing provided by the employers, tax and national insurance payments were deducted at source). It then listed four factors which were not inconsistent with a contract of employment (eg they were not provided with a written statement of terms, there were no regular hours) and then five factors which were inconsistent with the relationship being that of an employer/employee (eg the engagement was terminable without notice on either side, the individuals were not obliged to accept work and the employers were not obliged to provide work and it was the practice of the industry that casual workers were engaged under a contract for services). Despite the fact that numerically the factors favouring a finding of a contract of employment outweighed those against, and despite the fact that if O’Kelly had turned down work without good reason he would have lost his status as a regular casual, the tribunal gave overriding weight to the absence of mutuality of obligation and so found that he was not an employee.

Decisions such as *Carmichael* and *O’Kelly* place casual workers in an invidious position. It cannot really be said that they are in business on their own account since they lack the relevant assets and so cannot enjoy the tax advantages connected with being self-employed. On the other hand, they are not employees who benefit from employment protection and social security benefits. They might be considered workers (see below) and so enjoy a certain number of benefits but they may not even satisfy that test.

Whichever test or combination of tests is used, tribunals are obliged to examine a number of factors to determine whether an individual is an employee. However, since determining whether an individual has a contract of service is said to be a question of mixed law and fact²¹ this means

¹⁵ See, e.g. *Cassidy v. Ministry of Health* [1951] 2 KB 343, Somervell LJ.

¹⁶ *Nethermere (St.Neots) Ltd v. Taverna and Gardiner* [1984] IRLR 240.

¹⁷ *Wickens v. Champion Employment Agency* [1984] ICR 365.

¹⁸ *Clark v. Oxfordshire Health Authority* [1998] IRLR 125.

¹⁹ *Carmichael v. National Power* [2000] IRLR 43.

²⁰ *O’Kelly v. Trust House Forte Plc* [1983] IRLR 369. See also *Clark v. Oxfordshire Health Authority* [1998] IRLR 125; *Stevedorning & Haulage Services Ltd v. Fuller* [2001] IRLR 627 where, by contract, the employer stipulated that the worker was not entitled to regular employment.

²¹ *Express and Echo*, above n.2, para. 23.

that an appeal to the EAT is possible only where the employment tribunal is wrong about the law (ie applied the wrong legal test) or reached a perverse decision on the facts (ie one which no reasonable tribunal could have arrived at).²²

2.2. What rights do employees enjoy?

As indicated above, employees enjoy the greatest protection. In particular, they are protected against unfair dismissal, and they enjoy rights to maternity and family friendly policies (such as the right to request flexible working). A full list is attached as an appendix.

3. Workers

3.1. Defining Workers

Although workers are increasingly enjoying individual rights (see below), the definition of worker was originally of most interest in the context of defining the collective right to strike (ie the immunity of strike organisers in tort). Thus, s.296 TULR(C)A 1992 defines ‘worker’ in much the same way as s.230(3) ERA and an equivalent definition is found in the context of the Working Time Regulations 1998 and the National Minimum Wage Act 1998.²³

As we have seen, the concept of worker includes employees but it also includes certain independent contractors who contract personally to supply their work to the employer.²⁴ Such individuals therefore have a relationship of dependence with the employer but without meeting the requirements of employee status. They have been referred to as the ‘dependent self-employed,’ a category which includes freelance workers, sole traders, home workers and casual workers.²⁵

The definition of ‘worker’ was recently considered in *Byrne v. Baird*²⁶ which raised the question whether the subcontractor in the building industry was a worker for the purpose of claiming holiday pay under the Working Time Regulations. Mr Recorder Underhill QC recognised that the intention behind the regulation giving rights to workers was to create ‘an intermediate class of protected worker, who is on the one hand not an employee but on the other hand cannot in some narrower sense be regarded as carrying on a business.’²⁷ He recognised that workers enjoy protection because of their subordinate and dependent position vis-à-vis their employers and for this reason the test for workers shared much in common with the test for employee, including control and mutuality of obligation but with a lower ‘pass-mark’ so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.²⁸

The position of those working for agencies is particularly uncertain. Given the lack of mutuality of obligation, it may be that they are not considered employees of the agency²⁹ but

²² *Edwards v. Bairstow* [1956] AC 14.

²³ In the guidance on the Working Time Regulations, a worker is described as someone who has a contract of employment or ‘someone who is paid a regular salary or wage and works for an organisation, business or individual. Their employer normally provides the worker with work, controls when and how the work is done, supplies them with tools and other equipment, and pays tax and National Insurance contributions’. This is distinct from someone who runs his or her own business, is free to work for a number of different clients and customers and can profit from the sound management of his or her own business.

²⁴ Although cf The Transfer of Undertakings (Protection of Employment) Regulations 1981 provides that “employee” is “any individual who works for another person whether under a contract for service or apprenticeship or otherwise” but goes on to specifically provide that it does not include a person who “provides services under a contract for services”. This unique coverage goes beyond the 1996 Act definition of ‘employee’, but not as far as the ‘worker’ definition in that Act.

²⁵ B.Burchell, S.Deakin, S.Honey, ‘The Employment Status of Individuals in Non-Standard Employment’, DTI, Employment relations Research Series No.6, 1999, 12.

²⁶ [2002] IRLR 96.

²⁷ Para. 17.

²⁸ *Ibid.*

²⁹ Although they might eventually become employees of the user undertaking if a contract of service between the individual and user could be implied: *Franks v. Reuters* [2003] IRLR 423, para. 33. Cf *Montgomery v. Johnson Underwood* [2001] IRLR 269 considered below.

legislation regards them as employees for the purposes of tax and national insurance law. The law has also expressly extended protection to agency workers in certain fields, such as the minimum wage, discrimination law, health and safety and working time.³⁰ In recognition of the need to protect such vulnerable workers, s.23 of the Employment Relations Act 1999 gave the government the power to extend the protection of employment rights to these individuals by secondary legislation,³¹ a power that Buckley J urged the DTI to use in one such agency worker case, *Montgomery v. Johnson Underwood*³² where the Court of Appeal found there to be insufficient control of the worker by the agency³³ (the alleged employer) for the agency worker to be employed by the agency (but insufficient mutuality of obligation to find that the user undertaking was the employer or that any contract existed between the worker and the user). The government has not yet used this power but has put the matter out for consultation.³⁴

3.2. What rights do workers enjoy?

The principal rights enjoyed by workers are those under the National Minimum Wage legislation, the Working Time Regulations, the Public Interest Disclosure Act and the Part-time Work Regulation (see Annex 1).

4. The Self-Employed

Some legislation extends to the self-employed or independent contractor, as long as s/he is contracted personally to execute the work in question. For example, s.82 Sex Discrimination Act 1975³⁵ defines 'employment' as

Employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour...

The discrimination legislation also gives certain rights to applicants for employment as well as to 'contract workers.'

The health and safety legislation (s.53(1) HASAWA 1974) is principally concerned with the protection of 'employees' (a term interpreted by the Court of Appeal in *Lane v. Shire Roofing*³⁶ sufficiently broadly to include workers) but also imposes certain obligations on employers to the self-employed, defined more broadly than the SDA as an 'individual who works for gain or reward otherwise than under a contract of employment, whether or not he himself employs others.'

5. Tax and Social Security

In tax and social security law, the concept of employee determines (in part) which workers are liable to pay Class 1 national insurance contributions (SSCA, s.2) and Schedule E income tax. This raises the question whether the same tests should apply to the definition of employees

³⁰ Most of these rights are enforced against the person who pays the individual.

³¹ Section 23(4) states that an order under the section may:

- a. provide that individuals are to be treated as parties to workers' contracts or contracts of employment;
 - b. make provision as to who are to be regarded as the employers of individuals;
 - c. make provision which has the effect of modifying the operation of any right as conferred on individuals by the order;
 - d. include such consequential, incidental or supplementary provisions as the Secretary of State thinks fit.
- The power in Section 23 applies to any right conferred on an individual under the following legislation:
- The Trade Union and Labour Relations (Consolidation) Act 1992;
 - The Employment Rights Act 1996;
 - The Employment Relations Act 1999;
 - Any instrument made under section 2(2) of the European Communities Act 1972;
 - The Employment Act 2002.

³² [2001] IRLR 269, para. 43.

³³ Although there might be sufficient control by the user undertaking: *Motorola Ltd v. Davidson*

³⁴ DTI, *Discussion Document on Employment Status in relation to Statutory Employment Rights*, URN 02/1058

³⁵ See also s.78(1) RRA 1976 and s.68(1) DDA 1995 and s.1(6)(a) EqPA 1970

³⁶ [1995] IRLR 493.

for worker protection and for taxation purposes. Some suggest that the answer is no because, for the purposes of taxation, it is in the public interest to define the term employee as broadly as possible whereas, in the case of employment protection since no third party is affected the courts should respect the parties definition of status. For this reason there have been statutory extensions of the definition of 'employee' to prevent evasion of social security and tax law³⁷ and generally the test for the existence of the contract of employment is more easily satisfied for tax and national insurance purposes. This may well have the effect of individuals finding themselves classified as employees for tax purposes and so getting none of the tax advantage but not employees for the purposes of employment legislation and so enjoy no employment protection.

6. Conclusions

As we have seen, today the determination of employment status principally regulates the extent to which an individual can enjoy employment protection, some social welfare benefits and which taxation regime applies to them. This also has consequences for employers. Once courts decide that an individual is an employee this means that employers are subject to certain legal liabilities. As Burchell et al point out, this is based on the view that the employer is better placed than the employee either to avoid the risk in question by taking steps to contain or neutralise it (the *least-cost avoider* rationale) or to spread the risk through insurance or pricing policies (the *best-insurer* rationale), possibly in conjunction with the state through the social insurance or taxation systems. In other words, when a tribunal decides on the employment status of a particular individual, it is in effect deciding where the burden of taking precautions against the risk of a certain type of loss should be allocated.³⁸

³⁷ Eg agency workers: Social Security (Categorisation of Earners) Regs (SI 1978/1689; s.38 Finance (No.2) Act 1975. Labour-only subcontractors: ss.29-31 Finance Act 1971, ss.68-71 Finance (No.2) Act 1975; Finance Act 1980, sched 8

³⁸ B.Burchell, S.Deakin, S.Honey, 'The Employment Status of Individuals in Non-Standard Employment', DTI, Employment relations Research Series No.6, 1999, 6.

Diversifying Employment Patterns – the Scope of Labor Law and the Notion of Employees

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I. Legal Definition

1. German law differs between the contract of service (“*Dienstvertrag*”) and the employment contract (“*Arbeitsvertrag*”); both are contracts of service in a wider sense. Some rules are applicable to both types of contract, but a great number of laws is only applicable to employees. Most of the rules in sec. 611 – 630 BGB (Bürgerliches Gesetzbuch, Civil Law) are meant for both types of contract; but whereas sec. 621 BGB (periods of notice) is only applicable to a contract of service, sec. 622 BGB rules the same subject especially for employees. Some rules are only meant for employees, i.e. sec. 611 a, 611 b, 612 para. 3, 612 a, 613 a, 615 sentence 3, 619 a, 622, 623 BGB.

2. a) In a few cases there is a *definition of an employee in the statute*, like in sec. 5 BetrVG (Betriebsverfassungsgesetz, Law on Works Councils). But it says “employees meant by this statute,” that means that some of the ideas of this section may be valid in general, others, however, only for the Law on Works Councils.

b) Sec. 84 HGB (Handelsgesetzbuch, Commercial Law) differs between an independent commercial agent (para. 1) – who can in general dispose of his work and of his time, para. 1 sentence 2 -, and a dependent commercial agent (para. 2). In legal theory it is common knowledge, that a definition given in a statute is only valid for this special statute. Whereas for sec. 5 BetrVG this is accepted, the BAG (Bundesarbeitsgericht, Federal Court of Labor) and a lot of scholars regard sec. 84 HGB as basis for an analogy in general (see references in *Wank in Martinek/Semler/Habermeier, Handbuch des Vertriebsrechts*, 2nd ed. 2003, § 8).

But not even the legislator of sec. 84 HGB himself imagined it as a general definition. Besides, it does not correspond with the general definition normally used in labor law, because it only contains two items, different from the general definition.

In fact, although the BAG and some scholars claim, that they apply sec. 84 HGB in analogy, they do not apply this section seriously, but follow their own definition.

c) There is a legal definition in sec. 7 SGB IV (Sozialgesetzbuch IV, Social Security Law Book IV). It says in para. 1 sentence 2:

“Employment is non-self-employed work, especially in an employment relationship. Items for an employment are work following orders and integration in the work organization of the person giving the orders.” This corresponds with the generally used definition in labor law (see sub. III.).

From 1996 until 1998 sec. 7 SGB IV also contained an even more concrete definition in para. 4. Whereas sec. 1 para. 2 follows the prevailing opinion on the definition of an employee, para. 4 followed the definition given by *Wank*. As the new definition was rejected by employers, scholars and politicians, para. 4 was abolished in 1998, so that only para. 4 sentence 2 SGB IV is left. Although the definition refers to an employment contract, it is generally accepted that it deals only with social security law (see *Wank, Zeitschrift der juristischen Fakultät der Armori-Universität, Japan 2002, 118-138*).

d) In Germany *labor law and social security law* are regarded as two different materials. Labor law is part of the civil law, social security law is part of the administrative law. There are different courts for labor law and for social security law. Following this diversification, labor law and social security law have developed two different definitions of the employee. Concerning their relationship there are two different theories.

One theory says, that both materias have two genuinely own definitions. They may be similar, but each refers to another material (*Rolfs*, Erfurter Kommentar (ErfK), 4th ed. 2004, SGB IV, sec. 7 note 2 et seq.)

The other theory, which is more convincing, says that social security law follows labor law. It is the aim of social security law to address approximately the same people as labor law. Therefore in the inner core the definition of an employee in labor law and that in social security law is the same. There are only differences at the brim, following the different logic of private law and administrative law (*Wank*, Arbeit und Recht (AuR) 2001, 291, 297 et seq.). Then sec. 7 SGB IV reads like this: “An employee in social security law is a person which is an employee in labor law, as far as the different aim of these two materials do not require a differentiation.”

e) As far as *tax law* is concerned, there is also a difference between self-employed (Einkommensteuer, income tax) and employee (Lohnsteuer, employee’s tax). There is no legal definition. But the definition given by the BFH (Bundesfinanzhof, Federal Court of Finance) is very much similar to that in labor law. The problem is the same as between labor law and social security law. Tax law follows the labor law, and there is no reason for a difference. But there is a strong opinion that there are two genuinely different definitions of an employee in labor law and in tax law, which only by chance are similar.

II. Legal Circumscriptions

1. Besides these legal definitions in a lot of statutes in labor law there is something which cannot really be called a definition but rather a circumscription. The employee is not defined by items, but by enumeration, like sec. 1 para. 2 EFZG (Entgeltfortzahlungsgesetz, Law on Sickness Payment).

“Employees meant by this statute are *workers and employees as well as people in vocational training*.” For a long time there has been a difference in German law between workers and employees, meaning blue color work and white color work. Although this difference has today almost no more significance, the “definitions” have kept this difference. As far as people in vocational training are concerned, sec. 3 para. 2 BBiG (Berufsbildungsgesetz, Law on Vocational Training) says, that labor law is generally applicable, as long as specialities of the vocational training or of the BBiG do not require differences. Therefore the definition in sec. 1 para. 2 EFZG does not really give any information about who is an employee. There is quite a lot of circumscriptions like this in other statutes.

Even if there is a definition by enumeration, like in sec. 5 BetrVG, the law always says that this definition is only valid for this special statute. Another example is sec. 2 ArbSchG (Arbeitsschutzgesetz, Health and Safety Law). Besides there are statutes which refer to the *employee*, but do not give any definition (like sec. 1 KSchG, Kündigungsschutzgesetz, Law on Dismissals).

In all these cases the “definition” only says who is excluded or who is included, but does not give a real definition of what are the criteria for an employee.

2. There are different *methodological ways* to come up with this. One is to use the same definition of an employee throughout labor law (*Preis*, ErfK, sec. 611 note 45). The other way is to say, as every statute has its own aim, there can be a different definition for each statute.

In general there is the same definition of an employee in all parts of labor law. But the special aim of a certain statute may require a minor different definition.

III. Criteria for the Definition of an Employee

1. The BAG and the majority of the scholars use a definition like “*Employee* is who is on the basis of a contract in civil law obliged to work in the service of somebody else” (*Preis*, ErfK, sec. 611 BGB, note 45). Similar is the definition generally used by the BAG (latest judgement August 20th 2003, Neue Zeitschrift für Arbeitsrecht (NZA) 2004, 398; see also NZA 2000, 385; NZA 2002, 1412). This does not show which is the difference between working for somebody else as self-employed or as employee.

2. What is really important is which *sub-criteria* are used. It is remarkable that the BAG until today declares itself unable to give a definition; everything depends on the circumstances of the single case. It leads to the result that up to 36 (!) sub-criteria must be taken into account, without any preference or logical order. If one takes the jurisprudence seriously, it has no workable definition at all but only offers an unsorted number of sub-criteria.

On the other hand, if one tries to give this jurisprudence more sense than the BAG itself is willing to give, it reads like this: “Employee is who is *personally dependent*.” “Personally dependent is who is bound by orders.”

a) There is no clear statement in jurisprudence whether “dependence from orders” is the only relevant criterium or if there are the two criteria “*dependent from orders*” and “integration” (mixture in BAG, NZA 2004, 398).

As far as the dependence from orders is concerned, the BAG has no systematic approach, but refers somehow to a number of sub-criteria. If one tries to get a system into the sub-criteria of a definition, there should be, on a second level, a division between orders concerning the aspect of time, the aspect of the working place and the aspect of the contents of the work (the BAG in NZA 2004, 398 refers to contents, implementation, time, duration and place).

aa) A further systematic approach shows e.g. concerning the aspect of the *time* on a third level: hours per week/hours per day/beginning and end of the working day/the freedom to choose the working time in general/the degree of freedom according working time.

bb) There is also no distinction between constraints that come from the *kind of the work* (if school starts at 8 o’clock, teachers must also appear at 8) and others due only to the organizational orders of the employer. To summarize: There is not even a systematic approach concerning working time, let alone to the other sub-criteria. As far as the kind of work is concerned, it is remarkable that in some cases the BAG declares this main criterium as irrelevant. There is also no systematic approach which kind of orders are meant. So the orders can refer to minor details like which tool to use as well as to orders like which curricula are to be dealt with at school.

b) The sub-criterium of dependence on orders is completed by the sub-criterium “*integration*,” which is divided into: the necessity to work together with other employees of the other party to the contract and the necessity to use his rooms and materials. As an example, a TV producer who is either self-employed or employee: In the second case he is forced to use the organization of the TV studio.

c) It is further accepted that this is no *optional law*. The way the contract is fulfilled in praxis is a circumstantial evidence (BAG, NZA 1998, 873; NZA 2000, 447; NZA 2001, 210).

IV. Disputes on the Definition

The definition shown in III. is the one generally used by the BAG and by most scholars, with differences in detail but with agreement in general. This definition has been criticized by some LAG (Landesarbeitsgerichte, Labor Courts of the “Länder”) and by some scholars (see *Wank*, NZA 1999, 216, note 18). Whereas the critics agree in most parts in their critic, there are different proposals for an alternative.

1. The basic reason for the prevailing definition is that it has been *used for a long time*. Not even this correct. In the past, the RAG (Reichsarbeitsgericht, Reichs Labor Court) referred to personal and economic dependence and gave up this second criterium by reasons never explained.

2. **a)** A definition worth called a juridical definition to be taken seriously must be *teleological*. That means: Definitions cannot be created nearly from arbitrariness. But they fulfill a task in a legal rule consisting of “*Tatbestand und Rechtsfolge*” (elements of the rule/legal consequences). A definition is correct, when it is justified to apply the legal consequences. E.g. lively imprisonment as the most severe punishment is justified for murder as the most severe crime.

But if you try to find a connection between the legal element “dependence on orders” and the consequence “labor law is to be applied,” this connection does hardly show. What has the order to use a certain tool to do with the consequence that this person gets sickness payment? The defenders of the prevailing theory have so far been completely unable to answer this crucial question.

b) There is a connection between the dependence on orders and those legal consequences which help the employed person against arbitrary orders, like the rule that orders must regard the personality of the employed person or that a works council must be heard. As far as labor law looks for the *protection in the job*, the sub-criterion personal dependence is right.

c) As far as the *personal existence* of the employed person is concerned (like rules concerning the risks of sickness, old age, work accidents, maternity etc.), labor law must refer to the *economic dependence* and not to the dependence on orders. Therefore the right definition can only be: An employee is a person who is personally and economically dependent.

3. During the past ten years there has been an intensive *debate* in Germany about the right definition of an employee. It has ended by a victory of the defenders of the prevailing definition. But from a methodological point of view, these defenders have not been able to produce convincing arguments.

Most of the defenders deny their duty to give a teleological definition. Those who go into this subject accuse the critics that they argue in a vicious circle – but to mistake teleological thinking for false thinking shows a lack of basic legal reasoning.

V. How to Avoid the Problem of Definition

1. One of the aims of the critics and of the former sec. 7 para. 4 SGB IV was – besides a teleological approach – to give an *operational definition*. As the dispute has shown, the defenders of the prevailing opinion, instead of being ashamed that they have not been able during the last decades to produce operational criteria, are even proud that they do not care about the practicability of the definition at all.

2. If one wants to get an operational definition, one must refer to personal dependence and to economic dependence as well, and one has to proceed by criteria, sub-criteria and sub-sub-criteria. The new definition produced by the critics refers to *economic dependence*. Economically dependent is a person who

- works only for one party to the contract,
- without the help of other persons,
- without own capital or own organization.

These criteria have also been named in sec. 7 para. 4 SGB IV, which is meanwhile abolished.

As these are formal criteria they may lead to a result not intended by the idea of labor law. Therefore they can be controlled by the teleological idea of

- *combination of chances and risks*.

This means: If the employed person can make entrepreneurial decisions, he has the chance to earn more money, but also the risk to earn less. Therefore, another criterium must be added:

- the person works *on his own account*.

As far as the two requirements of a definition are concerned – teleological and operational – the dispute shows:

- So far the defenders of the prevailing opinion have not been able to prove the teleological connection between dependence on orders and those laws that protect the existence of the employee.
- They refer to “orders” as orders of any kind. Teleologically thinking, only entrepreneurial orders matter, at least as far as the protection of the existence is concerned.
- The common definition does not give any help concerning the weight and the number of criteria, it does not offer any operational definition.
- The criterium of “entrepreneurial risk” is said to be too uncertain. But the prevailing opinion

accepts orders of any kind. The new definition asks for entrepreneurial orders in opposition to entrepreneurial freedom combined with entrepreneurial risks. This is less uncertain than the prevailing opinion, because it indicates the direction where to look.

- There is the reproach, that “economic dependence” and “entrepreneurial risks and chances” refer to circumstances outside the contract. This reproach is based on deliberately false citation. It has always been argued, that only the entrepreneurial risks and chances as given by the contract itself matter.
- Finally the reproach that a new definition violates the legal system of labor law, because it omits the third category of quasi-employees, violates the basics of logic and of correct citation: According to the new definition, there are, of course, still quasi-employees. Only the number of employees is greater than according to the prevailing definition, because it also includes those people falsely called self-employed. By consequence there is a smaller number of quasi-employees.

VI. “Arbeitnehmerähnliche” (employee-likes, quasi-employees)

In German labor law, there is the fundamental division between self-employed on the one hand and employees on the other hand. Whereas a lot of protective laws exist for employees, self-employed must, as the general idea, care for themselves. Among the category of self-employed, however, there is a division between “Arbeitnehmerähnliche” (literally “employee-likes”) and other self-employed.

Reference: *Frantziach*, Abhängige Selbständigkeit im Arbeitsrecht, 2000; *Neuvians*, Die arbeitnehmerähnliche Person, 2002; *Schubert*, Schutz der arbeitnehmerähnlichen Person, 2004.

1. The quasi-employees are only mentioned in a few laws, sec. 12 a TVG, Tarifvertragsgesetz, Law on Collective Bargaining, sec. 5 para. 1 sentence 2 ArbGG, Arbeitsgerichtsgesetz, Law on Labor Conflicts, sec. 2 sentence 2 BUrlG, Bundesurlaubsgesetz, Law on Paid Leave, sec. 2 para. 2 no. 3 ArbSchG, Arbeitsschutzgesetz, Health and Safety Law, sec. 1 para. 2 no. 1 BeschSchG, Beschäftigtenschutzgesetz, Law on Sexual Harassment.

These laws include quasi-employees when they address employees. As a definition they use “economic dependence”.

2. Besides, there are special categories of quasi-employees in special laws.

a) There is a special law for *homeworkers*. It is remarkable, that it is only applicable on few people. Telework, e.g., is not covered by it.

b) *Commercial agents* working only for one enterprise and with a low income, sec. 92 a HGB, may sue at labor courts, sec. 5 para. 3 ArbGG.

c) The question is, how in the cases named above and besides for other laws, quasi-employees can be defined.

aa) There is (only) one real definition, meaning an operational definition, which is in sec. 12 a TVG. It allows quasi-employees, although they are self-employed, to conclude collective agreements. In practice, this rule is meant for people working in broadcasting, newspapers and in art, and there are only collective agreements in these areas.

The quasi-employee is here defined as:

- working on the basis of a contract of service
- for only one other person
- or getting from one person half of his income
- working for himself, without the help of others.

Sec. 12 a TVG shows, that economically dependence can be transformed into an operational definition. But it is also acknowledged that this definition is especially meant for the TVG and cannot be used for other laws.

bb) Therefore the problem is left how to define a quasi-employee *in general*. If the authors

defending the prevailing opinion are to give a definition, it runs like this:

- An employee is personally dependent, and not economically dependent.
- An “employee-like” (quasi-employee) is economically dependent.

This obviously does not make sense. An “employee-like” is, following this theory, ruled by the same laws as employees, because he has some criteria in common with an employee. But as the employee is qua definitione not economically dependent, this cannot be the criterium.

The comparable criterium also cannot be a personal dependence, because a quasi-employee is, as is generally accepted, a self-employed, and they are defined as personally independent. To summarize: an “employee-like” is like an employee, because he has a special criterium that the employee himself does not have and because he lacks a criterium that the employee has.

To make a systematic scheme the alternative is:

“Employee”: personally dependent and economically dependent

“Employee-like”: personally independent, but economically dependent

“Other self-employed”: personally and economically independent.

This is only a rough scheme. In reality, it is not a matter of dependent or independent, but of more or less dependent.

3. As no special law other than those mentioned above exists for employee-likes, some rules can be applied on them *by analogy*, which is accepted by the BAG and by scholars.

VII. People Working for Non-profit Organizations and Unpaid Workers

There are no special labor laws for non-profit organizations. An employer is defined as someone who employs at least one employee. Therefore the access to this problem must start from the definition of the employee.

1. There is a dispute whether it is a necessary criterium of the definition of an employee that he has the *intention to earn money*. To my opinion there are three questions:

- How far are labor statutes optional?

Does it depend on the fact, that the employee does not intend to earn wages?

E.g. the millionaire woman who wants to get to know working in an enterprise and does not need salary – can she dispose of health and safety law? Of maternity leave? Of protection against dismissal?

Almost all scholars agree that labor law is mandatory and does not refer to the special situation of the person employed, neither in an objective way (has the person other income?) nor in a subjective way (does the person intend to earn money?)

- There is a second question, and the two must not be mixed:

Are some areas exempt from labor law in which the person employed does not get money?

This is especially a matter of people working in *religious organizations*. If, e.g., a nurse of the Red Cross works for little or no salary because of her religion – shall labor law interfere? So far four cases of Red Cross nurses have been ruled by the BAG; in each case the argument was different. This shows that the BAG has no concept in this question. It is a matter of concurrence between two areas of law.

- Unpaid work may be accepted in special situations, where the employed person works for *other purposes than to earn money*.

The typical situation is vocational training. These persons earn money, although far less than employees; in most areas of labor law they are equal to employees (see *Berufsbildungsgesetz* etc.).

Other kinds are the so called “Eingliederungsverhältnis” in social security law, sec. 74 SGB V or the trainee.

References: Scholars in favor of the prevailing definition are to be found in the common textbooks of labor law.

A different definition is developed in *Wank, Arbeitnehmer und Selbständige*, 1988; Freie

Mitarbeiter und selbständige Einzelunternehmer mit persönlicher und wirtschaftlicher Abhängigkeit, Hrsg. Bundesministerium für Arbeit und Sozialordnung, 1997; Wank in Blanke u.a., Handbuch Neue Beschäftigungsformen, 2002, p. 1 et seq.; Die “neue Selbständigkeit”, Der Betrieb 1992, 90; Telearbeit, NZA 1999, 225; Ridefinire la nozione di subordinazione?, Giornale di diritto del lavoro e di relazioni industriali 86 (2000), 334; § 7 Abs. 1 und 4 SGB IV, AuR 2001, 291; 327 (also Zeitschrift der juristischen Fakultät der Armori-Universität, Japan 2002, 118 – 138).

The Scope of Labour Law and the Notion of Employee: Aspects of French Labour Law

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French labour law grants the employee a status, whose application depends on the existence of a contract of employment. The importance of the protective rules contained in the status makes the qualification of contract employment a central issue for labour law and generates important litigation.

The issue of the scope of labour law has attracted much attention in the last few years in France, for two reasons at least. First, the criteria for the application of labour law, that is to say the criteria that determine the existence of a contract of employment, have encountered important evolutions in the last ten years. Second, there have been debates on the issue of para-subordination, with a discussion on the adequacy of the traditional criteria of subordination. The issue is of particular importance, considering the scope of social security law is closely linked to that of labour law.

The following issues will be dealt with¹:

1. The general context: changes as to power within the company
2. Labour law and social security law
3. The notion of employee
4. The extension of the scope of labour law

I. General Context: Changes as to Power Within The Company²

The scope of labour law rests on the idea of subordination. The criterion of subordination has been, in the last decades, under criticism, considering it does not fully cover all aspects of power within employment relationships. As a matter of fact, the vertical conception of power on which the idea of subordination is based, is strongly called into question. The development of networks is an example of these evolutions, considering the legal autonomy between the enterprises (franchiser and franchisee for instance). Is a franchisee likely to benefit from the application of labour law ? The power relationship relies on economic dependence rather than subordination. Another aspect of the issue is the transformation of job functions within the company. The classical model where the employee is dominated by the organisation, to such a point that he or she has no real initiative, is questioned. Another model develops, which gives more importance to the individual within the organisation. In this respect, the firm, today, relies more and more on the person and its personal capabilities.

The granting of more autonomy to the employees questions the classical idea of subordination, considering power becomes more diffuse. This helps to understand the calling into question of the border between dependent and independent work.³ On the one hand, the employee is not necessarily anymore an « agent » within a vertical organisation, dominated by a hierarchy and deprived of all initiative. On the other hand, the independent worker is not necessarily anymore free of all initiative. The question is thus raised of a law that would apply to dependant and independent workers.

In this respect, a major question, particularly raised by Professor *A. Supiot*, is that of the application of protection rules, at least rules relative to social protection, to the self-employed. The issue is complex, considering there exists no unity within independent work. However, self-

¹ Most cases referred to in the following text can be consulted by connecting to: www.legifrance.com/

² The following points have been underlined by A. Supiot. A. Supiot, *Les nouveaux visages de la subordination*, Droit social, 2000, p. 131; Same author, *Au-delà de l'emploi, transformations du travail et devenir du droit du travail en Europe*, Flammarion, 1999.

³ See Supiot.

employed workers have in common that they bear the risks of their activity. This may explain why they have, for a long time, not benefited from social security, the latter being seen as a counterpart for dependence.

This conception has weakened with the trend of generalisation of social security. This is evident in countries with a universalist conception of social security, such as the UK. It is not so evident in countries such as France with a social security that has been built on a professional basis. But, these have generalised the protection against certain risks (illness, old age; *see further*). This generalisation has been reached, either by creating new regimes for categories of independent workers, or by extending the initial regimes to independent workers.

It may be underlined that the qualification of « worker » in the field of social security law at European Community level is not based on subordination: it rests on the person who lives through his or her work, and who is ensured, to that purpose, in his or her own country.⁴

This leads us to the relationship between labour law and social security law, as far as the notion of employee is concerned.

II. Labour Law and Social Security Law

After preliminary statements, the general framework of the system of social security will be described.

1. Preliminary statements

The French model of social protection is built on a professional basis. Historically, the application of social security rules thus depends on the existence of a contract of employment, although it is not formally required by the provisions of social security law.⁵ The general debate as to subordination is thus as essential with regard to social security law as it is within labour law. In this respect, the definition of subordination is the same for labour law as well as social security law, to such an extent that the Court of Cassation⁶ frequently refers to the provisions of the labour code as well as those of the social security code in its decisions relative to subordination.

This professional basis must be tempered in two ways.

First, the protection afforded to an employee is extended to his family (French law uses the concept of “*ayant droit*” which should not, however, be assimilated with that of family), that is to say his sons and daughters, his wife or husband, or the person with whom he might have a contract of partnership.⁷

Second, the general context (see above) has led to an extension of the scope of social protection on criteria other than work. An essential evolution is « universal protection against illness » (*couverture maladie universelle- CMU*.) which extends illness protection to all persons who have their residence (a stable residence) in France. This applies to any person, whatever his or her situation with regard to work. This fundamental evolution was decided with a purpose to fight against exclusion in the French society.

2. General framework of social security law

Social security law is divided into two types of regimes: the general regime and the special regimes.

⁴ See G. Lyon-Caen, *le droit du travail non salarié*, Paris, Sirey, 1990

⁵ Art . L311-2 Social security code : « are obligatorily affiliated to social assurances, whatever their age and even if they have a pension, all persons whatever their nationality, whatever their sex, employed or working (...) for one or several employers and what ever the amount or nature of their remuneration, the form, nature or validity of their contract » (“Sont affiliées obligatoirement aux assurances sociales, quel que soit leur âge et même si elles sont titulaires d’une pension, toutes les personnes quelle que soit leur nationalité, de l’un ou l’autre sexe, salariées ou travaillant à quelque titre que ce soit pour un ou plusieurs employeurs et quels que soient le montant et la nature de leur rémunération, la forme, la nature ou la validité de leur contrat ».)

⁶ The highest Court with regard to private law issues.

⁷ It is a “revolution” in French family law : the recognition of a contract between two unmarried persons (who can be of the same sex) that grants them legal recognition in different spheres of law (social security, tax, ...)

a) *The general regime*

The general regime (by far the most important) is composed of four branches:

1. Illness, maternity, invalidity, death
2. Old age
3. Industrial accidents and industrial illness
4. Family

The principle is that a contract of employment is necessary for the application of the “general regime.” Yet, there exists broadly two exceptions.

First, the benefit of family allowances is not dependent on the existence of a contract of employment.

Second, the creation of the “universal protection against illness” extends the protection. The criterion is stable residence in the French territory, the only exception being an irregular title of stay in France. It must be stated that the universal protection is limited to the costs for care (*prestations en nature*). The daily indemnities that are meant to compensate the absence of wages do not apply to the CMU, considering they have been elaborated to apply to workers.

b) *The special regimes*

Some professions (agriculture for example) have “special regimes.” An interesting point is that these regimes are rarely dependant on the existence of a contract of employment. They are rather “corporatist,” so that the criteria of application depend on activity.

Despite these exceptions, the scope of social security law and labour law rely on the notion of employee.

III. The Notion of Employee

With the exceptions stated above, the notion of employee determines the application of both labour law and social security law. More precisely, the issue is not presented as one of definition of the employee, but as one of definition of the contract of employment (these are only formal differences).

Three preliminary remarks are necessary.

First, there exists discussion as to the requirement of a written statement for the validity of the contract of employment. In principle, according to the rules of contract law, the validity of the contract does not require a written statement; in French law, a written statement is exclusively (with some limited exceptions outside labour law) a requirement of proof. Labour law follows this rule, and the requirements of a written statement laid down by European Community law⁸ are not a requirement of validity. Yet, there exists numerous exceptions with regard to specific contracts, that, as a rule, do not lead to nullity. It is the case for fixed terms contracts, that are re-qualified into unfixed terms contracts if they are not made under the proper written statement.

Second, the definition of the contract of employment is not a statutory definition. The fact that it developed through case law explains the adaptability of the definition to the evolutions in labour relations. However, this adaptability has raised criticism, in the name of stability and “legal security.” A statute law of 11th February 1994⁹ that introduces a presumption of self-employment for workers registered as self-employed¹⁰ is an example of this. Recently, a group named to make proposals for the reform of labour law has suggested to introduce a provision in the labour code that would define the contract of employment, including subordination.¹¹ The main purpose is undoubtedly legal security.

Third, the parties are not entitled to chose the qualification of the contract: « the existence of an employment relationship depends neither on the will expressed by the parties, nor on the denomination that the parties have given to their convention, but on the factual conditions

⁸ Directive n° 91/533/CE, adopted on the 14th October 1991.

⁹ Art. L 120-3 Labour code.

¹⁰ There exist different registers (Registre du commerce et des sociétés, répertoire des métiers, ...)

¹¹ Rapport De virville, proposal n° 21, www.travail.gouv.fr/pdf/rapdeVirville.pdf

according to which the activity of workers is accomplished ». ¹² This can be understood by referring to the idea of status, that has an important heuristic value in French labour law. Status, unlike contract, applies independently of the will of parties. The idea of status explains the unity in the definition of employee with regard to labour law and social security law. Both branches of the law take part in the definition of the status of employee.

The contract of employment is defined as a contract whereby a person puts her activity at the service of another, under her authority, in consideration of a remuneration.

Three criteria are required : the employee has to perform work; he must receive wages, which excludes unpaid workers from the qualification of employee. The main distinctive requirement is subordination, which deserves particular attention.

Central to the understanding of subordination in French labour law is the debate that developed at the beginning of the 20th century, between an analysis of subordination as economic dependence and one as legal subordination. Although subordination has not moved to proper economic dependence, the analysis of case law demonstrates that the judge does not content himself with the analysis of the provisions of the contract of employment, considering the latter does not always describe the true modalities of work. The analysis of subordination is thus a factual issue, that involves the analysis of the employment relationship in the context. The judges take account of multiple factors based on the control by the employer of the activity of the worker. It is only in 1996, in a social security law case, that the classical contextual approach to the notion of subordination has been consolidated by the Court of cassation. In a case decided on 16th November, 1996, ¹³ the French Court has, for the first time, drafted a definition of subordination, by laying down criteria. The definition is the following: subordination is characterised by the « execution of work under the authority of an employer who has the power to give orders and directives, to control their execution, and to sanction the breaches of his subordinated ». ¹⁴

Although French labour law has not recognised economic dependence, the movement in the 20th century is that of an extension of subordination. An important stage in this movement of extension was, in the seventies, the admission of a new approach to subordination, that echoes what is qualified in other countries as the integration test. ¹⁵ A worker can be considered as an employee if he is integrated into service within the company, which implicates that the modalities of his work, such as working time, the place of work, or the material used to work, are determined within the service. This criterion has enabled the application of labour law to some doctors, house employees, professional sportsmen, or lawyers.

The movement of extension is tempered by the introduction, in 1994, of a presumption According to Article L 120-3 of the labour code, those who are registered at the register of trade and industry ¹⁶ are presumed not be under a contract of employment. The presumption can be overruled if the worker proves that he is under permanent subordination with his employer. The definition of subordination elaborated by the Court of cassation can be understood in the light of this evolution. Indeed, the Court does not content itself with laying down criteria to define subordination. It limits the scope of the integration test, by asserting that integration can only be taken account if the working conditions are unilaterally determined by the employer ¹⁷.

The notion of subordination, as defined by case law, has left relationships governed by mere economic dependence outside the scope of labour law. It is through statute law that these relationships have, in part, been integrated.

¹² Cass. Ass. Plén. 4th March, 1983, see Legifrance.com/

¹³ Cass. soc. 16th November, 1996, Legifrance.com/

¹⁴ Le lien de subordination est « caractérisé par l'exécution d'un travail sous l'autorité d'un employeur qui a le pouvoir de donner des ordres et des directives, d'en contrôler l'exécution et de sanctionner les manquements de son subordonné ».

¹⁵ See notably Catherine Barnard's paper.

¹⁶ This also includes other registers.

¹⁷ Cass. soc. 16th November, 1996, see above.

IV. The Extension of the Application of Labour Law

The labour code contains provisions that extend the application of its provisions, or of some of its provisions, to workers other than those who meet the requirement for a contract of employment.

Two approaches may be distinguished.¹⁸

The first consists of a legal qualification of a contract of employment. The second consists of an assimilation of some categories of workers to employees. In the first case, the worker is an employee. In the second, he is not an employee but benefits from the application of some labour law protection. Despite this distinction, the overall logic remains in both situations to extend the benefit of the employment status to categories of workers that do not meet the criteria of subordination.

1. The legal qualification of a contract of employment:

Without the intervention of the legislator, some journalists, some artists, and other workers in a relationship of dependence, would have been independent workers. Despite the absence of true subordination – which is not the case for all workers within these categories, labour law takes account of their dependence. The idea is not only to protect these categories of workers, but also to reduce the uncertainty that characterises their situation. These employees have sometimes been called « employees by determination of the law ». Rather than developing a general approach and, thus, define a third category, that could be designated as workers, French law has had an instrumental approach to the issue, leading to specific provisions referring to different categories of workers.

a) Sales representatives

As far as sales representatives are concerned, the requirements of the labour code to benefit from the presumption are close to those of the traditional contract of employment.

According to article L 751-1 of the labour code, conventions whose object is the representation, between sales representatives (freelance workers) and their « employers », are contracts of employment when certain conditions relative to their activity are met (exclusive and constant activity, absence of commercial operation for their own interests, determination of an area of activity, ...). The contract, or each of these contracts, between the sales representative and one or several firms, which complies with the latter requirements, is deemed to be a contract of employment. There is no room to reverse the presumption, and prove that there was no subordination.

b) journalists

Concerning journalists, the requirement bears more originality. Article L761-2 of the labour code refers to a “principal, regular and paid occupation” that provides to the person “most of his or her resources.” This can be applicable to any professional activity. However, the laws adds that this activity must be exercised “in one or several daily or weekly publications (...).” This requirement of permanence thus excludes the occasional journalist.

The classical requirement of subordination reappears when the courts overrule the presumption where the journalists chooses freely the subjects that he deals with, on his own initiative, without instructions, directive or orders.¹⁹

c) Artists and models (Art. L 762-1 Labour code)

The presumption of artists and models is far from the idea of subordination. The presumption of *artists*, indeed, remains “what ever the modality and amount of the remuneration, as well as the qualification given to the contract by the parties. It is not overruled either if there is proof that the artist keeps his freedom of expression of his art, that he owns part or all of the material used or that he employs one or several persons to assist him, if he

¹⁸ On the difference between these approaches, cf A. Jeammaud, *L'assimilation de franchisés aux salariés*, Droit social, 2002 p. 158.

¹⁹ Cass. soc. 9th February 1989, Legifrance.com.

personally takes part in the performance.

Concerning models, the presumption is not overruled by the fact that the model keeps the entire freedom of action on the execution of his work as a model.

2. The assimilation to employees

Some individuals are assimilated to employees on grounds of economic dependence, but are not employees. In this respect, the reluctance of the labour courts to recognise economic dependence as an alternate to subordination is limited by these legal provisions that recognise, in limited situations, economic dependence. These are not employees, and their contract is not a contract of employment.

a) Articles L 781-1 ff. Labour code

According to articles L 781-1 and forward of the labour code, some individuals at the head of an individual enterprise can benefit from the rules of the labour code. The criteria are mainly economic: exclusive or quasi exclusive activity for a dominant company, prices imposed by this last company. These provisions enable the application of the labour code in the absence of true subordination. Examples of application include managers of petrol-stations, licensees, exclusive distributors and, more recently, franchisees.²⁰

It must be stated that, contrary to the legal qualification of employee, the assimilation does not grant the quality of employee, which means that the labour code is not necessarily applicable as a whole. In this respect, these categories of workers are entitled to invoke the qualification of employee and obtain the qualification of contract of employment, if they happen to meet the case law definition of subordination. Those who benefit from articles L 781-1 ff. can also opt out of this provision, in order to benefit from a conventional status. This is however strongly criticised, concerning it denies the imperative effect of these provisions of the labour code, and more generally, of the provisions of the labour code.

b) Articles L 782-1 ff. Labour code

Articles L 782-1 ff. authorise the application of certain provisions of the labour code (notably those relative to minimum wages) to managers expressly named “non – employees.”

c) Articles L 721-1 ff. Labour code

Articles L 721-1 ff. Labour code apply to home workers, to whom the provisions of the labour code are applicable (article L 721-6 Labour code).

d) Art L 784-1 ff Labour code²¹

The legislator, in 1982, has dealt with the situation of a person who is employed by his wife or husband. Although the legislator had referred to a requirement of “authority”, subordination is not required anymore, according to a recent case of the Court of cassation. The reasons for this court decision may be found in family law. Requiring subordination would have been, indeed, contrary to the principles of family law that consider the equality between the husband and his wife as a fundamental principle. It is sufficient that the wife or husband effectively takes part in the activity of the enterprise and receives wages above the minimal standard.

The lack of a general approach to the question of para-subordination, concept borrowed from Italian law to define the situation of those workers at the border from employment and self-employment, is open to criticism. Rather than elaborating a general category of worker²², that would be wider than that of employee, French law contents itself with specific provisions.

²⁰ Cf A. Jemmaud, *L'assimilation de franchisés aux salariés*, see above.

²¹ “The provisions of the labour code are applicable to the husband or wife of the head of the company, employed by him or her, and under the authority of whom he is deemed to work, if he or she effectively takes part in the company or to the activity of his wife or husband as a professional and regularly, and receives wages that are not be lower than the minimal required” :“Les dispositions du présent code sont applicables au conjoint du chef d'entreprise salarié par lui et sous l'autorité duquel il est réputé exercer son activité dès lors qu'il participe effectivement à l'entreprise ou à l'activité de son époux à titre professionnel et habituel et qu'il perçoit une rémunération horaire minimale égale au salaire minimum de croissance.”

²² Contra. UK law, see Catherine Barnard's paper.

The issue is however complex. The elaboration of a category of worker would undoubtedly affect the foundations of labour law, that rest on subordination. The question remains open, for more comparative discussions.

Employment Contract: Disputes on Definition in the Changing Italian Labour Law

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I. The Scope of Labour Law

Starting from the fact that legislative provisions and prevailing case law allow for any working activity to be carried out either as subordinate (i.e. salaried) employment or as self-employment, labour law provisions strictly speaking – the part of the legal system regulating the rights and obligations of the individual worker *vis-à-vis* the employer – are applied only in cases in which the working activity is characterised by the juridical element of “subordination,” reflecting the fact that the worker is subject to the management and control of the employer with regard to the way in which the work is carried out.

The legislative provision for the identification of “subordinate” labour is Article 2094 of the Civil Code, which specifies that “a subordinate worker is one who agrees to collaborate with an enterprise for remuneration, carrying out intellectual or manual labour in the employment of and under the direction of the entrepreneur.”

This Civil Code definition of subordinate labour, laying down a formulation that is extremely vague with regard to the numerous possible forms of employment contract, leaves a considerable margin of discretion for the courts to provide a clear definition of employment relations.

As a result, the classification of work as subordinate or self-employment is a problematic issue that is however fundamental for identifying the body of law to be applied in specific cases.

It should also be noted that the dividing line between the two types of contract (subordinate or self-employment) is not clear but represents a vast area of uncertainty (known as the ‘grey area’): as a result in many cases it is extremely difficult to establish the exact nature of the employment relationship, and therefore of the applicable legal provisions.

Moreover, in recent years the concept of subordinate employment as defined in traditional legal provisions and case law has undergone profound changes.

These changes reflect changes in the Ford-Taylor model of production that have been taking place over the past 30 years, together with the progressive and unstoppable expansion of the tertiary sector, and more recently the advanced tertiary sector, that has made a major contribution to the considerable expansion of the grey area between subordinate employment and self-employment.

Legal scholars have increasingly made contributions aimed at providing materials and proposals for intervention by the legislator in relation to the fundamental categories of employment.

In this connection a proposal has been made to overcome the problem of how to classify employment contracts by removing the general and abstract definition of subordinate labour. The proposal aims to safeguard labour rights in a pragmatic manner, identifying the field of application of protective measures for the employee in various cases.

In particular, based on the view that the traditional legislative approach with its marked distinction between subordinated and self-employment is outdated, it is proposed to identify a set of fundamental rights for every worker, to be safeguarded both at individual and collective level. Alongside this bedrock of fundamental and inalienable rights, providing the basis for a modern Statute of Labour, there could be a series of additional variable rights, reflecting the degree of economic dependence of the employee. With regard to these additional rights, a

further option is the definition of a series of semi-negotiable rights to be determined by collective bargaining.

In this connection it is important to note that the recognition of these fundamental rights for all workers engaged in productive activities for third parties (employers, entrepreneurs, public bodies, clients and so on) does not respond solely to the need to safeguard the contractual position and person of the worker, based on considerations of social justice. Rather, the recognition of minimum levels of rights for all workers, today more than ever before, also safeguards fair competition between economic operators, combating 'social dumping' practices (that may take various forms, such as black-market labour, the exploitation of under-age labour, and so on).

In this way legal rights can be developed in keeping with the aims of labour law. In contrast with the traditional protection of subordinate or salaried employees, defined in an abstract manner by the law, this approach is a step towards safeguarding labour in all forms.

II. The Notion of Employee

It has already been noted that the notion of employee is laid down by Article 2094 of the Civil Code, which specifies that "a subordinate worker is one who agrees to collaborate with an enterprise for remuneration, carrying out intellectual or manual labour in the employment of and under the direction of the entrepreneur."

At the same time Article 2222 of the Civil Code defines the self-employed worker as a person "who agrees to carry out work or services for remuneration, mainly by means of his own labour and without a relationship of subordination in relation to the client." Self-employed work is therefore characterised essentially by the fact that it is carried out without a relationship of subordination.

However, the two different forms of work, subordinate labour and self-employment, do share certain characteristics. First of all there is a requirement for there to be **remuneration** for the work carried out in both employment types. The activity provided in the contract may be identical, based on the supposition that every kind of labour for which payment is calculated, whether intellectual or manual, may take the form either of self-employment or of subordinate employment. Therefore, as confirmed by recent case law, for the purposes of the distinction between subordinate and self-employment, the essential factor is not the type of work to be carried out but **the way in which it is carried out**.

With regard to collaboration, this simply means cooperation with the other party, in accordance with the normal parameters of diligence required by the nature of the obligation laid down in the contract, for the purposes of meeting the needs of the party making payment. As a result collaboration does not have any bearing on the classification of a particular activity.

In practice, case law has identified a series of characteristic features of subordinate labour, with reference to certain circumstances that take on a particular significance in terms of the classification of subordinate labour in specific cases. These circumstances are normally referred to with the term "indicators of subordinate employment," an open list that is liable to change in relation to changes in the processes of production.

Among the various indicators provided by case law, mention should be made of the following:

- the **technical and functional integration** of the worker into the productive and organisational structure of the entrepreneur, that is the characteristic situation in which the subordinate worker is placed, whereas this is not true of the self-employed worker who makes use of his own organisational resources;
- the exercise of **managerial and disciplinary powers**, that is to be found, strictly speaking, only in subordinate employment. With regard in particular to disciplinary powers, they must be of a structural nature, presupposing a position of supremacy by one party to the employment contract over the other; they are therefore to be distinguished from the sanctions that may be applied in the case of self-employed labour, such as penalty clauses, provisions relating to non-compliance, termination of the contract for

non-compliance, and so on;

- the **commercial risk** relating to the productive activity specified in the contract. In fact, whereas the self-employed worker bears the risk relating to non-completion of the work to be carried out under contract, the subordinate worker is subject to obligations relating to the work itself rather than the final result, and the proper execution of the work depends on the degree of diligence observed;

- ownership of the **raw materials, equipment and tools**. The raw materials, equipment and tools utilised usually belong to the enterprise in the case of subordinate labour and to the worker in the case of self-employment;

- the **premises** where the work is carried out. Subordinate or salaried workers normally work on premises made available by the employer, whereas self-employed workers operate on their own premises;

- **working hours**. Subordinate employees are usually required to comply with working hours laid down by the employer, whereas self-employed workers are free to decide when the work is to be carried out;

- the form of **payment**. Remuneration tends to be fixed and paid at regular intervals for subordinate workers, whereas it is variable and depends on the results achieved and the deadlines laid down for completion of work in the case of self-employed workers.

III. Disputes on Definition

The problem of the exact classification of types of labour arises above all in cases on the border line or grey area between self-employment and subordinate employment. Classification continually gives rise to a considerable amount of litigation.

The number of cases is so extensive that it would be impossible to give an adequate account here. By way of example, however, mention should be made of certain types of employment contract that most often give rise to disputes and legal action about classification: motorcycle messengers who pick up and distribute mail in urban areas, meter readers, tax collectors, consultants, door-to-door vendors, sales representatives and business agents, freelance newspaper reporters, medical and scientific representatives, holiday club entertainment staff, part-time university language tutors, telephonists, hotline staff, nightclub dancers and television horoscope readers. The vast range of cases found in case law reports shows that the greatest problems in the classification of the employment relationship are related above all to new professional roles or those that cannot easily be fitted into organisational models and the division of labour of the traditional enterprise.

On the basis of the principle of *iura novit curia*, only the courts are competent to classify a contract as subordinate or self-employment. As a result the description or *nomen iuris* given by the parties during the negotiation of the contract is not decisive. However, mention should be made of a significant change in the orientation of case law, that has moved from largely disregarding the *nomen iuris* adopted by the parties, towards greater attention for their stated intentions, and the most recent tendency is to legitimate the *nomen iuris*, unless sufficient evidence is produced to nullify it.

However, the *nomen iuris* adopted by the parties is superseded by any agreement implemented after the signing of the contract. Therefore in clarifying the nature of the employment contract, the courts tend in any case to assess the way the contract has been implemented in practical terms, since changes may have modified the nature of the original agreements.

IV How to Avoid the Problem of Definition

With a view to reducing the amount of litigation arising from the classification of employment contracts, the Italian legislator, with the Biagi Law in 2003 (Legislative Decree no. 276/2003), introduced procedures for the “certification” of employment contracts. These procedures are intended to ascertain whether the intentions of the parties regarding the classification of the employment contract comply with the legal provisions. First of all the new

law assigns certification powers to bodies possessing a sufficient degree of competence and authority, namely:

- a) bilateral or joint bodies consisting of workers' and employers' representatives;
- b) provincial labour offices and the provincial authorities;
- c) public and private universities, including University Foundations, registered for this purpose.

These certifying bodies carry out consultancy functions and actively assist the contracting parties. During the initial phase in which the terms and conditions of employment are laid down, an assessment is carried out of the rights to be negotiated, providing useful information about the most suitable and most appropriate contractual arrangements in legal terms for the type of work specified in the employment contract. In particular, the certification of the employment contract helps to redress the more limited access to information on the part of the employee.

The certification procedure for employment contracts is voluntary and must lead to a written agreement between the parties to the employment contract.

With reference to the judicial applicability and reliability of certification, provision is made for the effects of the procedure to stand, also *vis-à-vis* third parties, until a definitive ruling is handed down by the courts in cases initiated by either of the parties or by a third party (such as social insurance and social security bodies, or the Ministry of Finance) in relation to which the certification is to have some effect.

It is in fact possible for either of the parties to impugn the certification before the courts, by presenting a claim for the reclassification of the employment contract arising from a discrepancy between the certified employment contract and its implementation.

The certification procedure represents a significant innovation in the Italian system, and should have the effect of reducing the vast amount of litigation relating to employment contract classification. Clearly, however, the effectiveness of this measure can only be properly assessed when it has been in operation for a considerable period.

V. The Protection of Self-Employed Workers

The category of self-employment should be taken to include those employment relations known as quasi-subordinate, that is to say collaboration of a continuous and coordinated kind, mainly concerned with personal services though not of a subordinated nature.

These employment relations, though classified as self-employment, are characterised by elements, such as coordination with the client's organisation and continuity of employment over time, that to a significant extent bring them close to being subordinate or salaried employment. Above all in recent years quasi-subordinate contracts have undergone a huge expansion, in many cases for the purposes of avoiding the employer's responsibilities in relation to what should be salaried workers. Since these positions are classified as self-employment, quasi-subordinate workers are not subject to the main provisions of labour law.

This has given rise to a debate in the field of labour law aimed at introducing substantial safeguards also for quasi-subordinate workers, reflecting the finding reported by numerous empirical research projects that some 90 per cent of the two and a half million quasi-subordinate workers actually work for just one "client," and of these some 66% carry out their work on the client's premises, often with working hours and conditions that are no different to those of company employees working alongside them.

The recent pension reform law provided for the extension to these workers of obligatory general insurance contributions for invalidity, retirement and survivors' benefits, as well as health insurance and industrial injury insurance.

With the Biagi Reform of 2003, the legislator drew a clear line between subordinate and quasi-subordinate work, providing particular forms of protection for the latter category.

The choice made by the legislator was not to extend the protection afforded to subordinate workers also to quasi-subordinate workers, but on the one hand to bring continuous and coordinated contracts back into a sphere of autonomy from the employer/client, and on the other hand to make specific provision for taking into account the imbalance of contractual power

between the employer and the employee.

As a result, quasi-subordinate employment contracts can now be stipulated only for the purposes of a specific project, programme or phase of production. For this reason the old continuous and coordinated collaboration contracts have now been replaced by “project work.”

The project work employment contract must clearly specify the remuneration. The amount paid to project workers must be proportionate to the quantity and quality of the work performed, and must take account of the rates normally paid to self-employed workers in the areas where the work is carried out.

Project workers are protected by health and safety at work provisions, when the work is carried out on the employer’s premises, as well as provisions relating to industrial accidents and occupational diseases.

For project workers pregnancy, illness and injury do not lead to the termination of the contract, which is suspended in a similar way to that of subordinate or salaried workers, though no remuneration is paid for leave for these reasons. Project workers also have the right to recognition as the inventors of any new products developed in the course of their contracts.

The collaboration comes to an end upon conclusion of the project for which the contract was signed. Termination of the contract prior to its expiry is possible only in the presence of a justified reason or on the basis of the procedures, including the giving of notice, established between the parties in the individual employment contract.

VI. The Notion of Employee in Social Security Law and Tax Law

With regard to social security and tax law, the concept of subordinate employment is broader than that of labour law. Indeed, on the basis of the “Tax Annex” of the Budget legislation for 2000 (Article 34, Act no. 342, 21 November 2000), income from continuous and coordinated collaboration contracts (so-called quasi-subordinate employment) is treated as equivalent to income from salaried employment.

This assimilation of the two kinds of income, by express legislative provision, is valid only for tax purposes. The placing of income from quasi-subordinate work in the same category as salaried work (Article 47, Act no. 917/1986) does not have, and could not have, any effect on the classification of the employment relations under examination with regard to the application of labour law. From this point of view, the presence of a tax classification for this type of employment (that of Article 34(1), Act no. 342/2000) that is partially incongruent with the labour law classification does not give rise to any particular problems of interpretation, since the two sets of laws were enacted for different purposes. It must therefore be noted that whereas the tax provisions assimilate these two employment types, labour law continues to treat them as separate entities.

With regard to the concept of subordinate employment in social insurance legislation, it should be noted that European Union law adopts a broader concept than the one found in the Italian system. In fact, in EU law, due to the effect of the case law of the European Court of Justice, and EC Regulation 1408/1971, for social insurance purposes subordinate and assimilated workers are those covered by compulsory or optional insurance in a Member State, as long as this insurance is linked to a social security system set up for the benefit of subordinate workers, or to which the individual concerned is obliged to make contributions in his or her capacity as a subordinate worker.

In the Italian social security system, on the other hand, the concept of subordinate worker coincides with that adopted in labour law, though insurance and social security provisions are extended in certain cases also to self-employed and to unemployed workers.

VII. Protection for People Working for Non-Profit Organisations

The expansion and the increasing social importance of the voluntary sector, that is to say of unpaid employment for non-profit organisations, has led the legislator to lay down a minimum framework of legal protection to safeguard the social value and work function of voluntary work.

Voluntary work is considered to be any activity carried out for the purposes of solidarity in a spontaneous, personal and unpaid capacity, through an organisation that operates on a non-profit basis. In this sense, the activity identified by the law excludes any activity for which remuneration is paid, as well as any position of subordination of a hierarchical or functional nature in relation to the organisation concerned.

The voluntary work framework legislation (Act no. 266, 11 August 1991) introduced significant tax concessions and economic incentives of various kinds in favour of voluntary work where the work is carried out for a voluntary organisation recognised at a regional level. Moreover, the legislator also provided for supplementary pension and supplementary health insurance funds to be set up under the regulations of non-profit organisations.

The Personal Scope of Labour Law and the Notion of Employee in Sweden

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1. Introduction

The personal scope of Swedish labour law is defined by use of *the notion of employee*. While employees are covered by labour law and the protection it affords, independent contractors and self-employed workers are, in principle, covered (only) by the provisions of general civil law.¹ In short, an employee can be described as a person who, on the basis of a contract, personally performs work for someone else, under his or her direction, in return for remuneration.

The outline of the paper is as follows. Section 2 supplies an account of the notion of employee in Swedish labour law, and its content and extent. Section 3 deals with the notions of employee in other areas of law. Section 4 discusses the existence of categories of ‘quasi-employees,’ as a way of extending the personal scope of Swedish labour law. Finally, in section 5, I relate to the ongoing debate on the need for redefining the personal scope of labour law, *inter alia* in the light of the flexibilisation of working life.

2. The notion of employee in labour law

The function of the notion of employee is to demarcate the personal scope of Swedish labour law. The so-called *civil law notion of employee* (*det civilrättsliga arbetstagarbegreppet*) has the same meaning in all areas of labour law, as in general civil law.² The notion of employee is not statutorily defined. Instead its content and meaning have been described and developed by the courts in case law and the legislator in preparatory works.³ The development during the 20th century has gone towards a uniform and far-reaching notion of employee. Swedish labour law in general is characterised by its uniform and extensive personal scope, and a traditionally high degree of equal treatment of different categories of employees, for instance of blue- and white collar workers and public and private sector employees. During the 20th century the extent of the notion of employee has continuously widened, aiming at providing additional groups of workers with the ‘safety net’ afforded by labour law and labour law legislation.⁴

The notion of employee is a mandatory concept. In order to prevent the contract parties from circumventing labour law legislation and depriving the employee of protection, the courts are not bound by the description or definition of the relationship given by the parties themselves, for example, in a written contract. The court makes an independent assessment of the legal nature of the relationship on the basis of the actual situation at hand. However, the contract parties are, in principle, free to organise their relationship, and the ways in which the work will be carried out, in practical terms. A court may then find that these practical arrangements, and the overall situation of the worker, best fit the description of an ordinary self-employed worker.⁵

In order to determine whether or not a specific person is an employee the court makes an

¹ The *notion of employee*, which is the main focus of this paper, is a well-known and relatively uniform legal concept. By contrast, the term *self-employed worker* is a broader, multi-faceted and not primarily legal notion, encompassing persons who work for a living without being employees. *Independent contractors* can be described as individuals living off selling their labour to private and public employers, while a *worker* is anyone who performs remunerated work personally. In this paper I will mainly use the term self-employed worker, when discussing persons, other than employees, performing work. Cf. Engblom 2003, p. 13 and Ds 2002:56, pp. 80 ff.

² For a classical and comprehensive study of the notion of employee see Adlercreutz 1964.

³ See Adlercreutz 1964, Schmidt *et al.* 1994, pp. 59 ff., Källström 1999 and SOU 1975:1, pp. 721 ff.

⁴ See Ds 2002:56, p. 82 and Engblom 2003, pp. 141 ff.

⁵ See Ds 2002:56, pp. 112 f., Lunning and Toijer 2002, pp. 22 f. and Labour Court judgement AD 1990 No. 116.

overall assessment of the situation, taking all the relevant factors of the individual case into consideration. The multi-factor test applied by the courts focuses on the individual person in question, and on whether the overall situation of this particular person is similar to that of an ordinary employee or an ordinary self-employed worker. An employment relationship must be based on a contract, and only natural persons can be employees. If the principal/employer has concluded a contract with a juridical person it is, however, possible for the courts to 'see through' this arrangement and find the individual actually performing the work. According to Swedish law employment contracts can be entered into freely, and without any formal requirements. Employment contracts concluded orally or through the actions of the parties are therefore as valid as written employment contracts.^{6 7}

The courts take the following factors into consideration when making their overall assessment: (1) a personal duty to perform work according to the contract, (2) the actual personal performance of work, (3) no predetermined work tasks, (4) a lasting relationship between the parties, (5) the worker is prevented from performing similar work of any significance for someone else, (6) the worker is subject to the orders and control of the principal/employer concerning the content, time and place of work, (7) the worker is supposed to use machinery, tools and raw materials provided by the principal/employer, (8) the worker is compensated for his expenses, (9) the remuneration is paid, at least in part, as a guaranteed salary,⁸ and (10) the economic and social situation of the worker is equal to that of an ordinary employee.⁹

The above-mentioned factors all indicate that the person in question is an employee. However, no single factor is considered necessary or sufficient for the existence of an employment contract.¹⁰ By the courts explicitly taking the person's economic and social situation, the 'social criterion,' into consideration a worker's dependence and insecure position can grant him or her employee status. In three similar cases concerning a lease, common within the hairdressing business, whereby a hairdresser rents a work space at a hairdressing salon owned by another hairdresser, the Labour Court applied the 'social criterion.' The Labour Court found in favour of an employment relationship in one case where the hairdresser was young and inexperienced and had previously been dismissed when working as an apprentice of the owner of the hairdressing salon, and it also found in favour of self-employment in two cases where the hairdressers were experienced, had built their own stock of clients and had established a reputation.¹¹

Modifications of the 'general' notion of employee, resulting from established custom in a specific branch of business or regulation in collective agreements, are respected by the Labour Court, and often prove decisive for the overall assessment of a person's status.¹² This is understandable given the 'Swedish Model' of industrial relations, characterised by a high degree of autonomy of the social partners and collective bargaining as the main instrument for regulation of employment conditions and employment relationships.

The Labour Court is sensitive to attempts trying to circumvent labour law legislation, and will many times find in favour of an employment relationship if the person in question has gone from being an employee of the employer to an 'alleged' self-employed worker.¹³

⁶ Cf. Ds 2002:56, pp. 110 ff., Engblom 2003, p. 149 and Källström 1999.

⁷ As a result of the so-called 'Cinderella' Directive (91/533/EEC) an employer is, however, obliged to notify the employee of the essential aspects of the contract or employment relationship, cf. section 6a of the 1982 Employment Protection Act.

⁸ The payment of remuneration is not a formal or necessary requirement for the existence of an employment relationship. However, the fact that the work is unremunerated strongly indicates that the relationship in question is not an employment relationship, cf. Ds 2002:56, p. 111. Against this background there is also no particular discussion regarding persons working for non-profit organisations or unpaid workers.

⁹ Cf. SOU 1975:1, pp. 721 ff., SOU 1993:32, pp. 216 ff., SOU 1994:141, pp. 74 ff. and Källström 1999, p. 167.

¹⁰ Cf. Engblom 2003, p. 149. Cf. also Labour Court judgements AD 1978 No. 7, AD 1982 No. 134, AD 1990 No. 116, AD 1998 No. 138 and AD 2002 No. 40.

¹¹ Cf. Labour Court judgements AD 1978 No. 7, AD 1979 No. 12 and AD 1982:134 and Källström 1999, pp. 181 f.

¹² Cf. Engblom 2003, pp. 154 f. and Ds 2002:56, pp. 120 ff.

¹³ Cf. Ds 2002:56, pp. 118 ff.

In a recent comparative study of Sweden, the United Kingdom, France and the United States Engblom concludes that the Swedish notion of employee is the most far-reaching. Furthermore, in Sweden less emphasis is put on the subordination of the worker, traditionally a fundamental criterion for the existence of an employment relationship.¹⁴ The far-reaching notion of employee in Swedish labour law, and the multi-factor test applied by the courts, has proved to provide adaptability and flexibility with regard to changing labour market conditions and organisational changes.¹⁵

Nowadays only a few cases from the Labour Court involve questions regarding the notion of employee and the distinction between an employee and a self-employed worker.¹⁶ There is therefore no need for specific mechanisms to avoid such disputes. This does not mean, however, that these questions are entirely undisputed. Disputes may exist, but be resolved before they reach the courts. The Swedish Labour Court (*Arbetsdomstolen*) was established in 1928, originally aiming at resolving disputes relating to the collective bargaining system and promoting industrial peace. Nowadays the jurisdiction of the Labour Court is the widest possible, and encompasses all kinds of labour disputes concerning the application of labour law legislation or collective agreements. The Labour Court is a tripartite body comprised of judges with judicial background and of members representing both sides of the labour market. The representatives of the social partners constitute the majority of the court. The Labour Court acts as the Supreme Court in labour disputes. It is also the first instance in all proceedings filed by an employers' organisation or a trade union. That is to say, in the absolute majority of cases the Labour Court serves as the first and only instance, leaving no room for an appeal.^{17 18} The Labour Court only tries about 200 cases each year, for which reason only a small proportion of all Swedish labour disputes reaches its courtroom. The main reason for this is that in order for the Labour Court to try a case all possibilities to solve the dispute by way of negotiation must have been tried and ruled out. Thus, negotiations both at local and national level have to have been conducted, and failed in order for the case to be admitted to the Labour Court. As a result many disputes – probably also some disputes concerning the distinction between an employee and a self-employed worker – are settled out of court.

3. The notion of employee in other areas of law

Traditionally the courts applied two clearly different notions of employee in civil and social law respectively. While the civil law notion of employee was narrow and contract-based, the social law notion of employee was far-reaching and encompassed social factors. In 1949 in a landmark decision, the Supreme Court reshaped the content of the civil law notion of employee, putting more emphasis on the economic and social situation of the worker (see section 2 above).¹⁹ Since then the legislator has intended the notion of employee to be uniform and coherent in all areas of law. Despite this, however, different notions of employee have developed in civil and labour law on the one hand, and in social security law and tax law on the other.²⁰

Today the existence of (at least somewhat) different notions of employee in labour law, social security law and tax law is generally acknowledged.²¹ Källström argues, however, that case law of recent years indicates an increased coordination between labour law, social security law and tax law regarding the notion of employee.²²

¹⁴ Cf. Engblom 2003, pp. 206 ff.

¹⁵ Cf. Ds 2002:56, p. 131.

¹⁶ Since 1998, in principle, only three or four cases have concerned questions regarding the notion of employee.

¹⁷ When the applicant is not a member of a trade union, or his or her organisation has chosen not to represent their member, the case is heard, in the first instance, in a general district court with ordinary judges as in other civil cases. The Labour Court then serves as the final court of appeal. The same rules apply to employers who are not bound by a collective agreement.

¹⁸ The procedure in labour disputes is regulated by the 1974 Act on Litigation in Labour Disputes.

¹⁹ Supreme Court judgement NJA 1949 p. 768. Cf. Adlercreutz 1964.

²⁰ Cf. Källström 1999, pp. 161 ff.

²¹ Cf. Ds 2002:56, p. 124.

²² Cf. Källström 1999, p. 163.

In social security law and tax law the notion of employee is used primarily to determine whether a particular person is an employee or a self-employed worker, and whether the employer or the self-employed worker him- or herself is liable for paying tax and social contributions. As a result the authorities apply a rather standardised assessment. However, the importance of the notion of employee is diminishing in these areas of law. Nowadays the distinction between an employee and a self-employed worker is often made with reference to the person holding (or not) a so-called Business Tax Certificate (*F-skattsedel*), preliminary stating that the person in question fulfils the requirements for conducting operations as a businessman, in other words being a self-employed worker.²³

EC law contains a separate and autonomous notion of employee. This notion of employee ('worker' in Article 39 of the EC Treaty) has been developed for the purpose of promoting and ensuring freedom of movement for workers. The notion of employee in EC law is far-reaching. The European Court of Justice (ECJ) has declared that it has a Community meaning, and must be interpreted broadly. It may not be interpreted differently, and restrictively, according to the law of each Member State.²⁴ In *Lawrie-Blum*²⁵ the ECJ stated that: '(t)hat concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'. The ECJ has, for example, irrespective of the notion of employee in the national law in question, found that on-call-workers and trainees have been employees.²⁶

EC law in the areas of non-discrimination and health and safety also applies to large groups of workers. Non-discrimination law, in principle, applies to both employees and self-employed workers, while health and safety law often applies to more than merely employees. In other areas of EC labour law, for example, regarding information and consultation, collective dismissals and transfers of undertakings, the point of departure is the different national interpretations of the notion of employee.²⁷

4. 'Quasi-employees' and extensions of the personal scope of labour law

The personal scope of labour law can also be extended to different categories of 'quasi-employees.'²⁸ The only such category in Swedish labour law is the so-called *dependent contractors* (*jämställda/beroende uppdragstagare*). This category of 'quasi-employees' was introduced in collective labour law in the 1940s. Today section 1 paragraph 2 of the 1976 Co-determination Act states that: 'the term "employee" as used in this Act shall also include any person who performs work for another and is not thereby employed by that other person but who occupies a position of essentially the same nature as that of an employee. In such circumstances, the person for whose benefit the work is performed shall be deemed to be an employer.' The 1976 Co-determination Act is the legislative centre-piece of collective labour law in Sweden and encompasses rules regarding *inter alia* freedom of association, collective agreements, rights to information, negotiation and co-determination and industrial action, and in all these respects dependent contractors are afforded the same rights (and duties) as employees.²⁹

However, as the extent of the notion of employee has widened, the importance of the

²³ Cf. Källström 1999, p. 163, Ds 2002:56, pp. 78 ff. and pp. 124 f. and Engblom 2003, p. 156.

²⁴ Cf. Nyström 2002, pp. 151 ff., Ds 2002:56, pp. 107 ff. and C-53/81 Levin v. Secretary of State for Justice [1982] ECR 1035.

²⁵ C-66/85 Lawrie-Blum v. Land Baden-Württemberg [1986] ECR 2121.

²⁶ Cf. Nielsen 2000, pp. 251 ff., Nyström 2002, pp. 151 ff. and Ds 2002:56, pp. 107 ff.

²⁷ Cf. Ds 2002:56, pp. 108 f. and Nyström 2002, pp. 151 ff.

²⁸ Compare, for example, the concepts *worker* in the United Kingdom and *arbeitnehmerähnliche Personen* in Germany, cf. Engblom 2003, pp. 226 ff., Ds 2002:56, pp. 95 ff. and the contributions by Barnard and Wank in this publication. Cf. also Engblom 2003 for a general discussion of different techniques for extending the personal scope of labour law.

²⁹ Cf. Edström 2002.

category dependent contractor has diminished. Most of the workers that the legislator originally intended to protect are nowadays covered by the notion of employee and labour law in general. Many argue therefore that the category of dependent contractors lacks practical relevance, or even is obsolete. Others suggest that the category of dependent contractors can be interpreted in new and extensive ways, in order to extend the personal scope of collective labour law to new workers in need of protection, for example, to persons working in the franchising business.³⁰

The personal scope of Swedish labour law is also in some other respects extended to self-employed workers. The personal scope of the 1977 Work Environment Act, safeguarding the health and safety of employees, is far-reaching, and in fact encompasses dependent contractors described above, and in some cases also other self-employed workers.³¹ Furthermore, self-employed workers increasingly become members of trade unions. Some professional unions, organising, for example, dentists and architects have high rates of self-employed workers among their members, and some white-collar unions, for example, in the engineering sector, witness a rapid increase in the number of self-employed members.³²

The Swedish social security system has (like the labour law system), a very homogenous and uniform character, and covers not only all categories of employees but also self-employed workers. Self-employed workers can therefore be recipients of unemployment benefits as well as receive compensation for work injuries (cf. the 1976 Work Injury Insurance Act and the 1997 Unemployment Benefit Act).³³

5. Redefining the personal scope of labour law?

The ongoing flexibilisation of working life is often described as an increase in adaptability and allocative flexibility, and as a shift from traditional to atypical employment.³⁴ As important background reasons for this flexibilisation process the increasing globalisation of economy and commerce, new technology, international competition and the emergence of the Knowledge and Information Society are frequently mentioned.³⁵ Atkinson's model of *the flexible firm* is often referred to in this context, as are the concepts numerical, functional and financial flexibility. Numerical flexibility relates to both the form and duration of the employment contract and to working-time arrangements, and it primarily serves the purpose of achieving greater flexibility in the numbers of workers employed. In focus are, for example, self-employment, fixed-term and part-time work. According to Atkinson employers use 'distancing strategies' in relation to external groups of workers. Work traditionally performed by employees is replaced by work performed by self-employed workers or temporary agency workers.³⁶ Functional flexibility is a matter of adaptability and versatility within permanent relationships, and it primarily affects the so-called core group of workers. The aim of functional flexibility is to vary the content of work in relation to the changing demands of production. In order to achieve functional flexibility, the employer can widen job descriptions and the obligation to work in general, and invest in training and education. Financial flexibility, finally, is concerned with making wages more adaptable to circumstances such as the profit of the business or the employee's knowledge and efficiency.³⁷

Since the 1990s the Swedish labour market has witnessed an increase in atypical employment and working arrangements and numerical flexibility. The number of fixed-term

³⁰ Cf. Bergqvist, Lunning and Toijer 1997, pp. 45 ff., Engblom 2003, p. 143 and Schmidt et al., 1994, p. 70.

³¹ Cf. Engblom 2003, pp. 265 ff.

³² Cf. Engblom 2003, p. 32.

³³ Cf. Christensen 2000.

³⁴ Traditional employment can be described as wage labour in a secure full-time permanent employment with one employer, at a workplace which belongs to this employer, and with working conditions typically decided collectively within certain legal frames, see Numhauser-Henning 1993, pp. 255 f.

³⁵ See Numhauser-Henning 1993 and van den Berg, Furåker and Johansson 1997.

³⁶ Collins describes how this *vertical disintegration of production* places many workers outside the personal scope of labour law. He concludes that a mandatory imposition of employment rights by reference to social and economic criteria, reducing as far as possible the influence of the employer's choice of organisational form, is required, see Collins 1990.

³⁷ See Atkinson 1984, Atkinson and Meager 1986 and Numhauser-Henning 1993.

workers increased from approximately 300 000 in 1989 to 500 000 in 1999. Temporary agency work increased five-fold during the 1990s (though only accounting for about 1 percent of total employment in 1999). In 2001 self-employment accounted for about 6 percent of total employment. In line with the general trend in Europe, however, there was no increase in self-employment, instead the development represented a qualitative change with self-employment decreasing in the agricultural sector and increasing in the service sector.^{38 39}

These developments have given rise to a debate about the need for redefining the personal scope of labour law. In the wake of the increased importance of self-employment many argue that the personal scope of labour law should be extended also to self-employed workers, who perform work personally and are more or less economically dependent on a single principal/employer.⁴⁰

In the Swedish context the questions raised above have for the moment been answered. The National Institute for Working Life was commissioned by the government to, *inter alia* against the background of the ongoing flexibilisation of working life and the increased importance of self-employment, examine the appropriateness of the current civil law notion of employee and the personal scope of labour law. The examination focused on the predictability and transparency of the legal rules and principles in question, the relevance of the criteria used by the courts in their overall assessment, and on whether certain groups of workers in need of protection fell outside the scope of labour law. In their final report presented in the autumn of 2002 (Ds 2002:56 *Hållfast arbetsrätt – för ett föränderligt arbetsliv*) they found, in all accounts, in favour of maintaining status quo. They found no need for statutorily defining (and thereby perhaps changing the meaning of) the notion of employee. Instead the courts should, in their overall assessment and application of the multi-factor test in individual cases, be able to adapt the notion of employee to ongoing changes in the labour market and the work force. The courts were, however, recommended to put greater emphasis on the economic dependence of the worker. Furthermore, there was no need to extend the personal scope of labour law to new categories of ‘quasi-employees.’^{41 42}

Inevitably, though, the growth of flexible employment and working arrangements challenges the traditional notion of employee. The dynamics of EC law may contribute to the future reshaping of Swedish labour law in these respects. The focus in EC law on non-discrimination and equal treatment of different categories of employees (cf. the Part-time and Fixed-term Directives) implies that characteristics of the traditional employment relationship can, and should, no longer be determining factors in the courts’ overall assessment of whether or not an employment relationship actually exists. Furthermore, the wide extent of the notion of employee in EC law and the emphasis on fundamental rights for all (workers) and non-discrimination may eventually result in an undermining of the notion of employee as defining the personal scope of labour law.⁴³

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³⁸ Cf. Ds 2002:56, pp. 202 ff., Supiot *et al.* 2001, pp. 4 f. and Storrie 2002, pp. 27 ff.

³⁹ Taking also the high proportion of part-time work in Sweden into account one may even question the ‘hegemony’ and *typical* character of traditional employment.

⁴⁰ Cf. Supiot *et al.* 2001, Davies and Freedland 2000, Engblom 2003 and Deakin 2001.

⁴¹ Cf. Ds 2002:56, pp. 75 ff.

⁴² In their reactions to the government report the social partners and other labour law-actors, in principle, agreed with these conclusions.

⁴³ See Nielsen 2002.

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