Transformation of labour and future of labour law in Europe

Final report

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Introduction

Our group of experts[1] was assigned a very ambitious task, namely *Ato conduct a prospective and constructive survey on the future of work and labour law within a Community-wide, intercultural and inter-disciplinary framework, culminating in a conference and subsequent report on the subject@*[2]. The nature of the objective is therefore legal **B** to attempt to define the future evolution of the basic categories of labour law in European countries **B** but it can only be achieved by running a cross-disciplinary analysis of the changes taking place in the actual practice of labour relations. Any such analysis, moreover, should be comparative and take account of national diversity. Finally, the purpose of this analysis is not to deal with the present status of labour law, but rather to consider the question in the context of its historic dynamic, which calls for *a diachronic,* as opposed to a synchronic, approach to the issues to hand.

We should, from the outset, clearly identify the triple difficulty that this task entails.

Difficulties, firstly, associated with a cross-national approach. In the last fifteen years, the building of Europe has fuelled comparative social research. That experience has made the extreme difficulty involved in such comparisons acutely evident.

Secondly, difficulties associated with a cross-disciplinary approach. The legal categories to which we have been invited to direct our thoughts both determine and express conditions prevailing in society, sociologically, economically, politically and culturally speaking, etc. Such legal categories cannot be addressed, then, without some reference to actual practice. This, in turn, calls for a dialogue between legal theorists and social scientists.

Difficulties associated, finally, with a diachronic approach. Such an approach aims to break down the motivations underlying change into their component parts in an attempt to understand the course it takes.

In view of these difficulties, any expert group undertaking such a task must be urged to be extremely cautious, both when defining the scope of its work and when setting out the results.

Caution is called for in defining the scope of the survey, because it will certainly not be university graduates who provide the solutions to the enormous problems ensuing from the changing circumstances surrounding labour in today=s world. Rather, they will emerge with actual practice; it is the action and imagination of those who, at whatever level, work to make the world the way it is. The most *Aresearchers@* can do is to help formulate the problems and identify the pitfalls with which the possible avenues of change are strewn.

Caution is needed as well in the wording of the results, because the foremost experts in employment relations are the parties to such relations: workers, employers and their organisations. No matter how scrupulous he/she may be, the researcher=s work necessarily consists of abstracting syntheses from the diversity of individual experience, syntheses that are always questionably, always improvable.

Our understanding of changes in labour circumstances on the European scale is, then, necessarily incomplete and the most we have been able to do to participate in a rational approach to change in labour law has been to expand and diversify our sources of information as far as possible and subject our analyses to discussion and critique.

The group=s deliberations on the future of labour law have been organised around five major themes, which are addressed in the five chapters of this report:

- ***Subject No. 1: Work and private power***
- ***Subject No. 2: Work and employment status***
- ***Subject No. 3: Work and time***
- ***Subject No. 4: Labour and collective organisation***
- ***Subject No. 5: Labour and public authorities***

The following procedure was deployed in the analysis of each of these areas. A special rapporteur was appointed to draw up a questionnaire to which the group members replied in the form of written reports. Such special reports were contrasted and discussed during a working session. The special rapporteur then drafted an initial synthesis based on the written and oral contributions. Outside experts were also heard and their opinions incorporated[3]. One of these interviews provided the material for chapter 7 of the report on what is at stake, economically speaking, in future of labour law. An interim report was drafted halfway through the survey. That report provided material for an extensive discussion among social partner leaders and Community institutions, as well as among experts in the various European Union countries, during a conference held in Nantes on October 25 1997[4]. In responde to one of the conclusions of that conference, it was recived to expand the initial programme to include a chapter addressing the problems of gender equality . Althougt the principle of equality is a line of thought developed throughout our study (in particular in the chapter dedicated to work and time) It was felt that a synthesis of the expert group=s position on the issue would prove to be useful. Finally, a total of 45 national reports and 7 first draft syntheses per subject were compiled. The general rapporteur has drafted the present report on the basis of that body of 52 texts and the conclusions of the 10 working sessions to which they gave rise. The report is, then, the result of the endeavours of the expert group as a whole. The diversity of nationalities, disciplines and opinions represented in the group did not in any way prevent us from reaching a joint analysis; quite the contrary, it proved to be a stimulant for individual contributions and enhanced the final result of our work.

1. See above 1 for group membership.
2. Definition of the mission of the group of experts. Note dated 18 July 1996.
3. See above for the list of experts interviewed.
4. See above for a list of participants at that conference.

Chapter 1 B Work and private power

In labour law, the underlying notion of labour relations is both hierarchical and collective. The employment contract is basically defined in it by the bond of subordination it establishes between the worker and the party to whom his services are delivered. A business is conceived as a community of workers with different trades forming around a single economic activity under the supervision of a single employer.

This concept corresponds to what in the language of industrial relations is called the *AFordist model@*, i.e., a large industrial business engaging in mass production based on the narrow specialisation of jobs and competencies and pyramidal management (hierarchical structure of labour, separation between product design and manufacture). This model has been largely dominant throughout Europe in various different forms (in fact sociologists and political scientists speak of *Amodels of welfare capitalism or of welfare systems@*[5]) which, as well shall see, are also reflected in a certain variety of the legal and institutional assets (varying from the particular features of the Nordic or Scandinavian model, based on the diffusion of the universalistic welfare services provided by the state to citizens independently from the employment career, to the Southern European variants, based on the persistent importance of self-employment, micro-firms and emigration). However the core feature of the model, present everywhere to same extent, is the crucial importance of the standardised full-time non-temporary wage contracts (particularly for adult men), centred on the trade off between high levels of subordination and disciplinary control from the part of the employer and high levels of stability and welfare/insurance compensations and guarantees to the employee (to be extended to his family members through the high and homogeneous diffusion of stable forms of nuclear households.

It is hardly a novelty today to point out that these standardised patterns of social an economic regulation of employment are fast losing ground and this fact is reflected in various changes also in labour law throughout Europe. Under the triple influence of the rising level of employee skills and qualifications (and the consequent increase of the levels of professional autonomy of the workers, independently from contractual subordination)[6] the increasing pressure of competition on more open markets and the ever speedier evolution of technical progress (especially in the areas of information and communication), other patterns of work organisation have developed[7]. Moreover the massive entry of married women in the labour market and important social and demographic transformations (like the ageing of the population and increasing divorce, instability and heterogeneity in the household structure) have contributed to erode the power of the standardised assets based on the trade off between subordination and stability also on the social ground.
The problem is that there are several of these patterns, that the features are most of the time different in particular countries, even if deriving from the same global processes of transformation, and that the new regulation assets have not done away with the various forms that the Fordist regime of employment and welfare has assumed throughout Europe. Under current economic and social circumstances, a single pattern of labour relations cannot be expected to emerge because of the many different kinds of environments existing today[8]. The use of self-employed workers, sub-contracting or outsourcing of labour, for instance, may simply be strategies to evade labour regulations and reduce costs in traditional lines of business where there is little added value. But it may also tie in with strategies intended to implement an innovative approach in sectors requiring high levels of expertise. In the former case the aim is to reduce the costs of human resources; in the other the opposite aim is pursued, so that the impact of human involvement is enhanced (in terms of initiative, competencies and know-how). A new distribution of power and new balances between autonomy of work and socio-legal and welfare protection may arise in labour relations under a wide range of circumstances which call for an equally wide variety of legal approaches in addition to the awareness that the diversity which was typical of the Fordist regimes is not disappearing at the present but is, on the contrary, fostering a wide and complex set of trends.

From the legal point of view, these changes can be identified essentially at three levels:

a) fostering or development of self-employment as opposed to waged employment;
b) evolution of the principle of subordination which defines the nature of the employment contract;
c) outsourcing or sub-contracting of labour to businesses that are economically dependent on a principal.

A) Trends in Self-Employment

Employment contracts have never have never been the sole formula for engaging in remunerated work (or even the sole formula for dependent work, since in most European countries civil servants are not subject to common labour law). Many civil or commercial contracts concern work in exchange for a fee. Self-employment prevailed at the turn of the century when most workers were farmers (or farm labourers), tradesmen, craftspeople or free-lance professionals. Throughout this century dependent work has risen steadily, with a concomitant drop in the number of self-employed workers. In most countries, this trend, which went hand-in-hand with the rise in the Fordist model, was fuelled by the development of the social rights attributed to wage-earners, especially with respect to social security. The law or jurisprudence have aimed

5. See G. ESPIN-ANDERSEN, *The Three Worlds of Welfare Capitalism*, Cambridge 1990; M. FERRERA, *Le trappole del welfare*, Bologna, 1998.
6. See C. BERETTA, *Il lavoro tra mutamento e riproduzione sociale*, Milano, 1995, documenting with survey data how the number of workers feeling in full control is increasing and is particularly high (nearly half) in countries like the Netherlands and Italy.
7. See: European Commission, *Livre vert Partenariat pour une nouvelle organisation du travail*, '18 s.
8. See: R. SALAIS et M. STORPER, *Les mondes de production*, Paris,

to extend the scope of social protection by likening certain circumstances to those of wage-earners or the presumption of employee status.

Our working hypothesis was that the employment crisis and management changes would reverse the trend, increasing the number of self-employed compared to the number of employed workers. Although the results of our research do not fully support this hypothesis, it has proved useful because it has enabled us to highlight the main features of today's changing circumstances. This trend is encouraged at the Community level by the guidelines on employment adopted by the Council of Ministers on 15 December 1998, which link the development of self-employment to that of the entrepreneurial spirit.

1) Quantitative stability and qualitative changes

Measuring current changes is no easy task in view of the heterogeneity of the notion of self-employment. The statistical studies that are available do, however, evidence the dual phenomenon at work with respect to self-employment, namely, quantitative stability and qualitative change.

According to the statistics published by the ILO in 1990[9], self-employed and unpaid family workers in France accounted for 14% of total employment (82% in agriculture, 9% in industry and 11% in services), compared to 8% in the USA (44/6/8), 6% in Sweden (54/3/5), 11% in the United Kingdom (46/11/11), 9% in the West Germany (36/5/9), 21% in Italy (49/15/25), 9% in the Netherlands (50/4/10 and 18% in Spain (48/14/22).

A more recent survey carried out in Europe on the rate of non-wage-earners yielded very different results. The overall rate for 1994 was 24.1% in Italy, 22.1% in Spain, 12.9% in the United Kingdom, 11.8% in France, 9.3% in Germany and 8.4% in Denmark[10]. This confirms the importance of non-wage-earning work in the Southern European countries. In the nineties the proportion of self-employed workers outside agriculture has increased in the Union but at slower pace in respect to the second half of the eighties. The only member states where there has been a decrease being Belgium, France and the UK. On the contrary self-employment has been disproportional important for net creation of new jobs in the Southern European countries as well as in Germany, the Netherlands and Denmark[11].

The general trend is not therefore an increase in self-employment but rather stabilisation with respect to total employment. However, this quantitative stability masks some important qualitative trends: self-employment is increasing in the services sector (especially in services to companies which are thus able to outsource some of their functions), whereas the number in agriculture continues to fall.

Where self-employment is growing, such growth may be associated with either of the two opposing strategies mentioned above, i.e., lowering or enhancing the value of labour:

- the value is lowered where the use of self-employed workers is often intended to exclude unskilled and casualised workers from the protection afforded by labour law; self-employment under such circumstances may sometimes be regarded as an illegal method of deregulation whereby firms engaging in such practices elude the burden of non-wage labour costs incurred by their competitors (especially with respect to social insurance costs);
- the value is enhanced where the use of self-employed workers gives free rein to genuinely autonomous and often highly qualified workers' capacity for innovation and adaptation. This brighter side of self-employment is an ideal/typical form of post-Fordist labour. Flexible in terms of time, place, type of service and cost, it meets the needs of the most advanced economic sectors in which the requirement for innovation and quality depends on the quality and creativity of the people performing the work.

2) Legislative or jurisprudential expansion of the scope of self-employment

Firstly, it must be stressed that no European country allows the parties to an employer-employee relationship to define the legal status of this relationship, since this would make it optional to enforce labour law. The general principle, applied everywhere, is that ascertaining whether or not a given worker is self-employed is contingent not upon the existence of a conventional arrangement, but rather on the circumstances actually prevailing. And this principle must be firmly maintained if action is to be taken against fraudulent self-employment and the resulting unfair competition.

On the other hand, in several European countries the presumption of employee status has tended to recede and an effort has been made to provide a legal framework for genuine self-employment. Until the eighties, both to protect workers and to guarantee the basis for social security contributions, law and jurisprudence generally interpreted the notion of contract of employment for a wage in the broadest sense of the term, rendering self-employment more difficult to practise. The opposite is now true and the present tendency is to refrain from obstructing the development of genuine self-employment.

9. ILO, *Promotion de l'emploi indépendant*, Genève, 77° session de la conférence internationale du travail, rapport VII, 1990, tableau A1, p. 108.

10. *L'emploi non salarié en Europe*, (1983/94), SSL n°768 du 20 nov. 1995, source: Eurostat.

11. European Commission, *Employment in Europe*, Brussels-Luxembourg, 1996.

This concern has been expressed in the most recent Spanish case law which seeks alternatives to the employment contract *(vías alternativas al contrato de trabajo)* by allowing some leeway for the express will of the parties involved, providing they are not then contradicted by observation of their respective behaviour[12]. In Germany, the Federal Labour Court admitted **B** in a controversial ruling **B** that an employer was free to reorganise his company by preferably resorting to self-employed workers rather than hiring employees[13]. In France

12. Supreme Court Sentence, Sala de lo Social, 13 April 1989; see: M. RODRÍGUEZ-PIÑERO: *La voluntad de las partes en la calificación del contrato de trabajo*, in: *Relaciones Laborales*, no. 18, 1996, 3.

13. Bundesarbeitsgericht, 9 May 1996, *Der Bertrieb*, 1996, 2033 (Weichers suit). The

employer wanted to change his network of establishments into a network of franchises. His right was recognised to dismiss his staff for this purpose and to offer

the Madelin Act of 11 February 1994 on «*initiative and individual enterprise*» instituted the presumption of non-wage-earning status for persons registered under social security as self-employed workers[14]. This presumption in principle is a

14. *C. trav.*, art. L120-3; *C. sécurité.social*, art.L311-11; see: B. TEYSSIÉ: *Droit social*, 1994, 667; J. BARTHÉLÉMY, *JCP*, 1994, E, I, 361; M. LARCQUE, J.-E. FAY, F.

simple presumption which can be reversed if it is found that the activity of the parties concerned places them *Ain a situation of permanent legal subordination@* with respect to a principal. Such extension of the scope of self-employment risks depriving these workers of any social protection and of excluding them from labour law without offering them any other employment status. Unfair situations of this nature are to be found in most countries.

In France, for example, certain taxi companies have replaced their wage-earning drivers with drivers that rent the vehicle who are expected to assume all the risks of this *Abusiness@*; the company owners thus ensure themselves a safe income whereas the brunt of the financial risk is borne by the workers. In the Swedish forest industry there has been quite commn to replace employed wage earner with self-employed workers that rent or own the forest machine or the tractor.

Two conditions must be met to avoid these risks. Firstly, the principle of reclassifying false self-employment as wage-earning work must be firmly enforced and, secondly, genuine self-employment must be endowed with true employment status, primarily to guarantee social protection.

3) Pursuit of a suitable legal framework for self-employment

The wide range of specific situations prevailing in self-employment makes it difficult to formulate such a framework. This diversity is not always fully grasped, legally speaking. Certain countries, such as France or Sweden, make no distinction between a self-employed worker and a capitalist entrepreneur. In others, by contrast (Germany, Italy), a distinction is made between completely independent entrepreneurs subject to civil or commercial law, and self-employed professionals who are financially dependent on one or several principals.

These situations of semi-independence have given rise to legal provisions that vary from country to country, but all of which subject semi-independent workers: labour relations to selective enforcement of the rules or principles of common labour law.

German law, for instance, identifies three categories of independent workers. The first two cover entrepreneurs who may either work under a business contract (Werkvertrag) or

D ORO Y , J . - P . C H A U C H A R D a n d G . L Y O N - C A E N , *S u r l a l o i M a d e l i n* , i n : *D r o i t S o c i a l* , J u l y - A u g u s t 1 9 9 5 , 6 3 1 s .

under a free contract for services (freier Dienstvertrag). The difference between these two categories is that the purpose of a free contract for services is the mere obligation to perform a task (as with most liberal professions), whereas a business contract also calls for delivery of some result (as with craftspeople or traders). The third category is that of *Apeople similar to wage-earners@* (*arbeitsnehmerähnliche Personen)* who work within the framework of a free contract for services or a business contract but for a main principal on whom they depend financially. The law applies certain provisions of labour law to these legally independent workers relating to time off, labour disputes or collective bargaining. Worker working alone (without the help of other wage-earners), owing over half their income to the services rendered to their main principal, and whose need for social protection is similar to that of wage-earners are deemed to be financially dependent[15]. In the Italian notion of ›para-subordination‹ the approach is slightly different though the results are practically the same. This notion of para-subordinate workers was introduced under Act No. 533/1973 (classified under art. 409 c. proc. civ.) which extended the act on individual labour disputes to agents, commercial representatives and other similar relationships involving continuous, co-ordinated, personal work, even if there is no subordination (*Aaltri rapporti di collaborazione che se concretino in una prestazione d=opera continuativa e coordinata, prevalentemente personale anche se non a carattere subordinato@).* This is therefore an *Aopen@* category which in practice includes such widely differing professions as corporate attorneys or doctors in the national health service. What distinguishes them from German quasi-employees is that the need for social protection is not included in the definition. The debate in Italy turns on whether the criterion of economic dependence must be seen to be acknowledged in this notion, in which case labour law would, in principle, be applicable to *Apara-subordinate@* workers, or whether on the contrary the latter must maintain self-employment status **B** in which cases they would not be entitled to that right except in the areas expressly addressed by the act, i.e., primarily in legal action involving health and safety[16]. It is this second thesis that has prevailed in doctrine

15. See: sect. 12 a of the 1974 Act on collective bargainng (*Tarifsvertragsgesetz)*.

16. See: L. MENGONI, *La questione della subordinazione in due trattazioni recenti*, in: *Rivista italiana di diritto del lavoro*, 1986/1, pp. 5 s.; M. V. BALLESTRERO, *La nozione*

and in case law.

In the Netherlands, a bill of law currently under debate aims to guarantee financially dependent workers protection equivalent to that of employees.

In Spain, the Workers: By-laws provide for partial extinction of labour legislation on self-employment

Countries where there is no generic category covering such semi-independent workers have proceeded case by case and subject certain professions to partial enforcement of labour law. This is the case for example of certain professions covered by Book 7 of the French labour code (commercial representatives, managers of commercial branch offices, etc.), or of Spanish wage-earning managers who are only subject to part of the provisions of the Workers: By-laws, or brokers (*likställda uppdragstagare)* which Swedish law considers to be fall under the scope of laws on collective agreements. Therefore there seems to be a clear need for an intermediate legal category between employee and entrepreneur.

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di lavoro parasubordinato, in: *Lavoro e diritto*, 1987, pp. 41 s.

In this respect, it is of interest to note the intention of the ILO to introduce an agreement on work under contract. The ILO has clearly identified the existence of a large category of workers who are dependent but do not have employment contracts, at least not yet. According to the draft Agreement the expression *Awork under contract@* designates the work done for a natural or artificial person (the user firm) by a person (a worker employed under contract) when the work is carried out by the subcontracted worker personally under conditions of actual dependence or subordination with respect to the user firm similar to those characterising labour relationships as defined by national law and practice and when either the work is carried out under a direct contractual arrangement between the subcontracted worker and the user firm other than an employment contract, or the subcontracted worker is made available to the user firm by a subcontractor or intermediary. A first round of discussions was held on this *Adraft convention on subcontracting work@* during the ILO conference in June 1997. A *ARecommendation@* was attached to the Convention with a view to developing several matters in greater detail.

This new category of workers has yet to be clearly defined so they can be afforded a coherent and sufficiently attractive employment status. Seen in this light, both the German and Italian initiatives seem to leave plenty of room for improvement. The status of German *Aquasi-employees@* is hardly a model of legal simplicity. In Italy, the heated debate around the notion of >para-subordination= was kindled by the development of a new type of relationship called *Aco-ordinated, continuous collaboration@*. This relationship was first defined from the fiscal standpoint in 1986[17], before Act 335/1995 introduced a mandatory 10-% social contribution for old age, invalidity and death benefits[18]. It targets the deployment of labour involving a new form of subordination but within the framework of a stable relationship from the point of view both of the work performed and of the remuneration received in exchange.

These recent developments are indicative of the key role that matters relating to social protection play in this debate. Fostering self-employment is inconceivable if its aim or effect is to drain social security systems of their revenue[19]; nor is self-employment status attractive if, in addition to the inevitable financial ups-and-downs, it also entails inadequate social protection.

Ultimately, the rise in self-employment or semi-independent work involves handling the transition from one employment status to another. There has been some experience in this area, especially in France where efforts have been made to assist employees to set themselves up as self-employed workers, mostly where they have been the victims of redundancies (support mechanisms for the creation of businesses or the exercise of a free-lance profession), or of restructuring processes within their companies (technically called *essaimage*, or hiving off, where the company receives tax relief for helping its employees to set up on their own). Recognition of the rights of people taking such initiatives is emerging, albeit sketchily, not only in labour law but also as regards social security, vocational training and tax law, etc. Freedom to work is now considered a specific liberty which the law must not only allow but also facilitate. One of the major features of this freedom is that citizens should be entitled to embrace different employment statuses throughout their working lives (employee, entrepreneur, self-employed or semi-independent worker) without forfeiting the continuity of their social rights.

B) The Notion of Subordination B Trends

Important changes are taking place in the way power is exercised in companies. Such changes make it more difficult to deal with subordination as a criterion, even though it remains the major criterion in the definition of employment contracts. Discussion is under way in various countries with respect to the suitability of broadening such criteria.

1) Trends in practice

Here developments are ambivalent. In certain respects workers are acknowledged greater independence with regard to the organisation of their lives and work. In others, however, the preponderance of subordination in working relations is growing.

Advances in greater on-the-job independence constitute the bright side of current trends. They are the result of the development of new technologies, enhanced worker training, new participative management methods, etc. Wherever horizontal management tends to replace pyramidal management, power is wielded differently, on the basis of an evaluation of work performance rather than on the specification of job content. Salaries are linked more to results than to means. This affords employees much greater freedom in performing their work and encourages initiative. Constraint does not disappear B it is internalised. A growing number of wage-earners thus work under conditions that do not differ substantially from the terms for sub-contracted self-employed workers. Management avails itself of the contractual metaphor to conceptualise this new kind of working relationship between wage-earners in the same company.

This trend, which can be observed in all European countries, involves both the manufacturing sector and services. In Sweden worker participation in everyday organisation is a common practice in most companies with more than 50 employees. In Swedish firms 85% of the workers= job profiles define responsibilities[20].

These trends lead to a revaluation of the collective dimension of work. Workers are not, under these new arrangements, confined to a specialised task, but involved in collective pro-

17. *ASi considerano tali (rapporti di collaborazione coordinate e continuata) i rapporti aventi poer oggetto la prestazione di attività, non rientranti nell=oggetto dell=arte o della professione esercitata ai sensi del comma 1 dell=art. 49 del texto unico que pur avendo contenuto intrinsecamente artistico or professionale sono svolte senza vincolo di subordinazione a favore di un determinato soggetto nel quadro di un rapport unitario e continuativo senza impiego di mezzi organizzati e con retribuzione periodica prestabilita@* (*Testo unico delle imposte sui redditi*, decree of 22 December 1986, art.49-2-A).

18. Cf. C. LAGALA, *Il contributo del 10%* , in: *Diritto & Pratica del lavoro*, no 4/1997, 201; R. VIANELLO, *La nuova tutela previdenziale per le attività di lavoro autonomo, libero-professionale e di collaborazione coordinata e continuataive*, in: C. CESTER (dir.) *La riforma del sistema pensionistico*, Torino, Giappichelli, 1997, pp.270 s.

19. The Hesse and Rhenania-Westphalia Länder alone, in connection with a bill of law to fight against false independence (see below), estimated at 10 billion Deutschmark per year the losses in social contributions resulting from fictional independence.

20. LEVINSSON, K. and SCB. Inquiry, 1996.

duction[21]. Greater on-the-job independence should not, then, be taken to be a corollary of individualisation, since more often than not independence is collective; it is group dynamics that are sought. This aim may also ultimately cast some doubts on the viability of individualised salary policies that flourished in the 80:s.

21. LUNDGREN, K., *Livslängt lärande*, Nerenius & Santérus, 1996, pp. 114-115.

The growing weight of subordination is felt most directly in the new kinds of casualised employment, such as on-the-job training contracts offered to young people, or fixed-term contracts. In these cases, indeed, employers acquire, in addition to their usual power, the power inherent in the ability to extend the employment contract at expiration, at their discretion. This gives employers a powerful tool to influence worker behaviour, in particular in the case of young adults who more often than not begin their careers under this kind of contract.

Studies conducted in Italy indicate the importance of such informal pressures brought to bear on young adults hired under the terms of a *contratto di formazioni e lavoro* (on-the-job training contract) or a *contratto a tempo determinato* (set-term contract). Management is in a position to dissuade them from joining a union, participating in strikes, refusing to take on extra work, etc.

But even outside casual employment, employer power is strengthened by two factors. The first, obviously, is the high unemployment rate, which prompts employees to accept working conditions that they would refuse if they knew that they could readily find a job elsewhere. The second is the shift of large numbers of jobs from large to small and medium sized businesses. This trend is encouraged favoured by the rising incidence of the business networking model, whereby firms are interrelated by means of sub-contracting or outsourcing arrangements. In most EU countries, the figures show that small (under 50 employees) or very small (under 10 employees) companies account for most jobs. The regulation of employer power by labour law in such businesses is limited both for reasons of a legal (employee thresholds) and sociological nature (ineffectiveness).

2) Broadening of the concept of legal subordination

The changes observed in the exercise of power in labour relations have not to date led to questioning the notion of subordination as the primary consideration in the legal definition of what constitutes an employment contract. Consequently, the treatment of subordination is growing more and more complex, rendering the definition of the term >wage-earner= all the hazier.

The general trend in case law, at least until recently, has been to prevent the independence enjoyed by certain employees in the performance of their work from excluding them from the scope of labour law. Such jurisprudential policy goes hand-in-hand with the evolution of the legal notion of subordination, a concept which is no longer defined only in terms of submission to orders in the performance of work itself, but also of workers= integration in a collective organisational scheme designed by and for others. This broadening of the concept of subordination has made dealing with the concept more uncertain and above all more complex. Hence, when workers are afforded a certain degree of independence in the performance of their duties, other indications of their possible subordination must be sought to establish the legal status of their contracts. This technique, called A*indication clustering*@, has become a common feature in labour law in European countries. Rather than verifying that all indications conform to the situation under consideration, it consists of inferring, from the existence of several of such indications, that the resulting relationship involves subordination[22].

The items on such indication clusters vary from one country to another. By way of illustration, the following is the list (not exhaustive) in place under Swedish case law, as established during the preparatory work on that nation=s 1976 act on co-determination[23]:

- the party concerned is hired to undertake the work personally;
- means to do the job are furnished by the other party;
- professional expenses are defrayed by the other party;
- the work is remunerated;
- the worker=s economic and social status is equivalent to that of an employee.

It is understandable, then, that the changes observed in labour relations in practice have not entailed any change in the legal notion of subordination: indication clustering, initially formulated to *extend* the scope of labour law to professions whose nature calls for a certain degree of independence (doctors, journalists, teachers), can today be used to *maintain* employees affected by A*post-Fordism*@ and greater on-the-job independence within the limits of the definition of wage-earner. As is often the case, the law has evolved more slowly than the events it intends to regulate.

The broadening of the concept of subordination has made it possible to convert a large number of jobs into wage-earning positions. Labour law, no longer worker or employee law, has become common law for all working relations. The effect of such trends, prompted primarily by social security considerations, is the growing heterogeneity of the employee population. Such heterogeneity, in turn, favours fragmentation of labour law, which must adapt to a variety of occupational situations. Another effect, less often noted, is the inclusion of rules characteristic of self-employment in labour law, such as the no competition clause covenanted by sales agents[24].

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22. See in this regard the *Bundesverfassungsgericht* (German Federal Constitutional Court) decision of 20 May 1996 (1 BvR 21/96) according to which the definiiton of employee is an ideal, the various elements of which are simply indications of that status.
23. Act (1976: 580); cf. SOU 1975: 1, p. 722.
24. F. GAUDU, *L'application du droit du travail à des travailleurs non*

Generally speaking, the loosening of the bonds between subordination and wage-earner status has enabled workers with a high degree of independence (company managers, for instance) to benefit from the protection afforded by labour law, whereas workers in weaker positions are deprived of all or part of such protection because of the casual nature of their jobs or are even excluded from labour law altogether by means of false self-employment status.

These perverse effects, added to the legal uncertainty deriving from the dilution of the concept of subordination, explain why the scope of the definition of the term ›wage-earner‹ has again become a topic of intense discussion in several European countries.

3) The debate on the limits of the definition of wage-earner status

Two opposing tendencies are in play in this new debate on the scope of the definition of wage-earner status in several European countries.

3.1 Reduction of the scope of labour law

Ile de France, n° 39/40, 1996, 163 s.

The first consists of a *reduction of the scope of labour law*, returning to a strict interpretation of the notion of subordination. This tendency is the corollary of legislative and jurisprudential policies designed to allow self-employment a broader range for development for self employment.

Thus, in France the Madelin Act of 11 February 1994, mentioned above, introduces a reference to permanent legal subordination in the labour code as an indication of the existence of wage-earner status; French law had, until then, ignored such requirement, which exists nonetheless in other legal systems such as the British system and which can lead to the exclusion of temporary or intermittent employment from the definition of protected wage-earner status. Case law, in turn, which for the last 20 years had worked the notion of integration in an organised company into the definition of what constitutes an employment contract, has recently reaffirmed that subordination to the orders of an employer is the primary criterion for such definition[25]. Integration in a company belonging to someone else which had gradually become the main characteristic of subordination, is now relegated to being merely one of number of indications of such a relationship.

3.2 Broadening the scope of labour law

The second tendency, by contrast, consists of *broadening the scope of labour law*, by resorting to other criteria in addition to legal subordination. The two avenues currently being explored in this regard have given rise to doctrinal or legislative proposals.

3.2.1 Financial dependance criterion

To begin with, some authors propose replacing the notion of legal subordination with that of *financial dependence.* This idea had already been put forward early on in the establishment of labour and social security law (i.e., A*social*@ law in the French context) in various European countries[26]. The problem at that time was already a question of matching the scope of labour law to the actual need for protection. From that standpoint technical submission to someone else=s orders in the performance of work is less important than depending on that other person for one=s livelihood. That notion of financial dependence could have led to extending the scope of labour law to cover all those in a weaker position in working relations. The target population at the time, in addition to employees, essentially comprised workers in A*pre-Fordist*@ situations (agents or sales staff on commission, small tradesmen or people working out of their own homes) who practised their trade for the exclusive account of a single contractor who was, therefore, in a position to impose his terms. The problem was eventually solved either by the disappearance of such semi-independent workers, who were absorbed into Fordist model enterprises, or by the effects of *ad hoc* legal provisions, whereby such workers were covered by special arrangements (A*integration*@ contracts in farming) or likened to employees (sales agents, home workers).

This issue, which had been thought to be definitively settled, has re-appeared with the advent of new kinds (post-Fordist) of working arrangements, which have given rise to a new generation of home workers (with computer and telecommunications links to the A*worksite*@) and technically self-employed professionals who are nonetheless financially dependent. These are the reasons behind the renewed interest in financial dependence.

It is in Germany where this debate seems to be most fully developed. One doctrinal argument proposes to extend the notion of employee, to eliminate the loopholes in labour law. This position has been defended primarily by Professor Rolf Wank[27], according to whom submission to orders can no longer be considered the most characteristic feature of wage-earner status. Under this argument, the need for protection is not linked to such submission, but rather to financial dependence on a single employer, which may be characterised as follows:

- work performed personally, without the help of assistants;
- work performed for the account of a single employer;
- work performed essentially without any personal capital layout;
- work comprising part of someone else=s organisational scheme.

25. Cass. Soc. 13 nov. 1996 (Société Générale), in: *Droit Social*, 1996, 1067, obs. Dupeyroux.

26. See the articles by Paul Cuche in France in the 30=s, for instance.

27. In a publication titled *Arbeitnehmer und Selbständige*, 1988; see: *Der*

Workers meeting the above qualifications can still choose to keep self-employment status, wherever the market risks they incur seem to be consistent with opportunities.

This thesis has been accepted by certain jurisdictions, in particular by the Landesarbeitgericht (Labour Appeals Court) in Köln in an important decision dated 30 June 1996[28]. Under the terms of that decision A*the traditional notion of employee used by the Federal Labour Court, based essentially on the degree of worker subordination and taking account primarily of the existence of specific employer-imposed working hours, no longer suffices to guarantee the respect for fundamental rights*@. Applying Prof. Rank-s criteria, the Court ascertains whether the worker brings his skills independently to market, assuming business risks and opportunities. The Nürnburg Labour Court likewise adopted the financial dependence criterion in a case involving an A*outsourced*@ insurance employee[29]. Deeming that such employee was in no position to operate on the market with his own capital and organisation, the court considered him to qualify for wage-earning status. This interpretation, nevertheless, risks running counter to the legal existence of workers A*likened to employees*@ (see above) in Germany: this intermediate category between entrepreneur and employee obviously limits the extension of the scope of wage-earner status as such.

A bill introduced in 1996 by the Hesse and Rhine-Wesphalia Länder to curb the tendency to resort to false self-employment is relevant to this discussion. This draft legislation concerns social security rather than labour law. Nonetheless, it contains a precise definition of financially dependent workers, understood to be:

- not employing others in the course of their work, with the exception of family members;
- generally working for a single person;

28. Published in *Entscheidungsamlungs zum Arbeitsrecht* '611 BGB Arbeitnehmerbegriff n° 29.

29. Decision of 31 July 1996, published in *Entscheidungsamlungs zum Arbeitsrecht* '611 BGB Arbeitnehmerbegriff n° 57.

- performing work that can be likened to the work done by an employee;
- not marketing their services as a business.

According to this bill, the existence of two of the above elements would suffice as support for the presumption of fact of wage-earner status.

In the Netherlands, the issue *Flexibility and Security* has been under discussion in recent years. The result is a bill according to which, unless the employer can prove the contrary, persons working under *conditions similar to those that characterise labour relations* would be considered to be holders of an employment contract. This is what is meant by the expression *rebuttable presumption of the existence of an employment contract*. The essential aim is to guarantee the group in question protection equivalent to that enjoyed by holders of employment contracts.

In Sweden is the debate about labour changes still very much affected by a Keynesian an cyclical perspective, due to the deep recession between 1991-1996. The discussion abour self-employed, temporary workers and even part time workers is than very much related to the recession of the 90ths, rather than to the *third industrial revolution* and structural changes on the labour market.

3.2.2 Integration in someone else=s company criterion

Another possible avenue to broaden the scope of labour law would consist of replacing the concept of legal subordination with that of integration in someone else=s company. The idea is not new in this case, either, as it has already been implemented in the context of the indication clustering technique, in particular under French case law. Such integration could plausibly be considered to be the main criterion to establish the existence of a wage-earning relationship:

This thesis has firm supporters in Spain, in particular on the basis of the works of Prof. Alonso Olea[30]. According to this author, dependence or subordination are both merely the result of a fact which in itself characterises wage-earning work: the fact that the party concerned works for someone else instead of being self-employed. The party paying for the work, who markets the fruit thereof, is thus vested with the power to direct and control the work and to co-ordinate it with work performed by other persons, likewise remunerated. The forms that such supervision, control or co-ordination may adopt are, then, essentially irrelevant. Insistence on the concept of subordination can, from this standpoint, only lead to unsolvable contradictions, since the power of the party for whom the work is performed can be wielded in a variety of ways and with different degrees of intensity, whereas the fact that the work is performed for someone else remains unchanged.

This criterion of work performed for someone else is not, however, unanimously accepted. Most notably, it is objected that it leads to workers who are not employees today t be included as such (free-lancers, for instance). This weakness might be considered a strength where the objective is to extend the limits of wage-earner status to ensure that new forms of working relations B that are arising in and around business networks B remain under the coverage of labour law. It is, nonetheless, unlikely that a single criterion will one day suffice to characterise wage-earning status. This is not a given, something which exists in itself, but rather a legal construct continually in the making.

C) Dependent Businesses

Fordist companies undertook all the functions required to manufacture their products. One advantage of that solution was that it eliminated the transaction costs involved in dealing with suppliers and also made it possible to control the entire working process, including both core and peripheral aspects. Labour law was adapted to such a model to the extent that it was built around vertical unionism (as opposed to horizontal unionism, as in pre-Fordist days) and the collective bargaining it supported in turn targeted a business sector (industry-wide agreements) or a company in that sector (company-wide agreements) rather than a trade that could be practised in various sectors.

Several factors have cast doubts on this model. The tendency to cut back on costs and business overheads (so-called flexibilisation policies) have certainly played an important role and may explain the outsourcing of tasks requiring little skill (cleaning, gardening, catering, transport, etc.). But outsourcing tasks calling for higher qualifications has essentially been the result of two other factors. Firstly, technical progress (specifically, the role of new information and communications technologies) which has, at the same time, raised the level of skills required for certain tasks and encouraged outsourcing. Secondly, the evolution of contracting techniques, which today afford clients a fair knowledge of their suppliers, thereby eliminating the risks inherent in outsourcing or sub-contracting certain tasks (in particular, by requiring conformity with ISO 9000 quality standards).

The drawbacks to this new model have only just begun to become apparent (loss of skills in the user firm; higher transaction costs; vulnerability to sub-contractor failure, etc.). Certain large firms seek to reduce such risks by establishing stable co-operative relations with their sub-contractors, standardised on occasion under *Sub-contracting Charters*.

This trend has generally led companies to fall back on their core businesses and outsource auxiliary tasks to other concerns. As in the tendency to resort to self-employment, this poses two different types of problem with respect to labour law: one is labour fraud consisting of the establishment of a *front* company between a worker and his/her actual employer; the other relates to true outsourcing or sub-contracting, in cases where the company is placed in a position of technical or financial dependence with respect to its principal. The risk of fraud arises in particular where the supply of labour constitutes the main or only service that one company provides another. The purpose of the legislation on temporary work in effect for 20 years in most European countries (Italy was the last country to adopt it) was to regulate this kind of service and separate the wheat (flexibility of the temporary work market) from the chaff (trafficking in labour).

30. *Introduccion al Derecho del trabajo* , Madrid, Civitas, 5 ed., 1994, p.61 sq.

1) Temporary work and traffic in labour

Sub-contracting and outsourcing labour constitute a return to old (pre-Fordist?) forms of work organisation. It was common practice in the Nineteenth Century for workers to be subject to labour hire arrangements (as opposed to service contracting); such contracts could be signed by the workers themselves (who were hired for a specific task, hence the term piecework) or by a *"marchandeur"* or sub-contractor of labour who came to terms with a client on the work to be done and then proceeded to have it performed by workers he remunerated and paid directly (wherefore the generic term *"marchandage"* to designate that practice, which covered a variety of situations: from team hiring, where the *"marchandeur"* was the workers' representative, to labour sub-contractors where he appeared as their employer).

Virtually eliminated by Fordist work organisation, certain of these old forms were actually outlawed. Today in several countries the law draws a distinction between banned sub-contracting or trafficking in labour and sub-contracting or rendering services which constitute licit contracts[31].

Labour trafficking (*tráfico de mano de obra*) is likewise repressed by Spanish law, which defines it as the illegal exercise of temporary work (art. 43 of the workers' By-laws). It is nonetheless no easy task to distinguish it from the practice, which is licit in Spain, of team hiring – whereby an employer engages a group of workers as such and thereafter represents them as their team leader (*jefe del grupo*). The Spanish Penal Code calls for penalties of six months to three years in prison and fines of six to twelve months for *"those engaging in illegal labour traffic"*, and adds that the same penalty is applicable to *"whoever recruits persons or prevails upon them to leave their jobs, promising deceitful or false employment or Working conditions..."* (art. 312).

In Italy, especially in agricultural southern regions, and in the building sector, is still quite common the recourse at the *"caporalato"* as hiring system. This is in fact a sort of illegal labour trafficking, by which workers (illegal, immigrants, sans papiers, women...) in the *"black economy"*, are matched to their extremely precarious job by a *"caporal"* who take part of their salaries for his *"service"*. Such kind of labour intermediation is illegal, and almost always, it is controlled by the local criminality. Nevertheless, it is quite diffused in certain regions of southern Italy. The lower labour costs, the lack of controls, the scarce punishment for the firms who use this kind of *"recruitment system"* can help to understand its diffusion.

The rules against labour trafficking seem to be essential to fair functioning of the labour market. Just as a company should not be allowed to avail itself of a front to evade tax or environmental obligations, the rules of competition would be biased if certain companies were able to elude labour law by setting up a front employer between themselves and the employees, whose only function would be to permit such fraud. Domestic legislation can do very little in this regard, in view of the potential that the ability to render services freely throughout the European Union offers. The recent directive on delivery of services on the European scale is a clear indication that, in line with the principle of subsidiarity, it is at the Community level that this issue must be addressed.

2) Sub-contracting and labour law

Genuine sub-contracting poses problems of a very different nature, which are still poorly handled in European legislation.

The sub-contracting of former in-house activities entails obvious consequences for the workers concerned, who will no longer benefit from the working conditions deriving from collective agreements with the company in question and will be subject to different working conditions under their new employer, which are usually less advantageous than the ones to which they were initially entitled. The only protection offered them lies in the possible use of the *"transfers"* directive and any national legislation applicable to their situation. That protection is notoriously limited, as regards both the scope of application (requirement that the economic unit survives and preserves its identity) and effects (no transfer of collective benefits).

But the main problem consists of regulating the triangular relations between the user firm, the sub-contractor and the employees of the latter. In principle, under legal sub-contracting, there is no legal relationship between one company and the employees of another. And yet the employees' lot may depend more on decisions made by the principal than on those of their actual employer. This is particularly true where the sub-contractor is exclusively financially dependent on the principal, whose decisions may determine not only the number of jobs, but also vocational training policies, work organisation, etc. In such situations, most labour law provisions become ineffective. In particular, representation, negotiation and bargaining structures make it impossible to access the most relevant party, i.e., the principal. Although this problem has been clearly identified in the case of groups of companies, it still remains essentially unsolved among networked companies co-operating on a routine basis to manufacture a product or deliver a service.

Regulations on temporary work provide some idea of the kind of link that may be established between one company and the employees of another; but that model involves simple outsourcing of labour, in which the work is in fact performed on the user company's premises.

With respect to sub-contracting *per se*, only a few provisions here and there can be cited that are relevant to labour arrangements.

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31. In France, repression of trafficking in labour is based on two discrete but largely overlapping crimes (concurrent infringements):
   - the crime defined in article L 125-1 of the labour code to consist of: any *profit-making* operation involving labour, the *effect* of which is to impair employee interests or to elude enforcement of the law. This crime, defined, then, in terms of its effects, is committed wherever sub-contracting or rendering of services veils what is actually the mere supply of labour;
   - the crime defined in article L 125-3 to consist of: any *profit-making* operation whose *sole purpose* is to supply labour under terms outside the provisions of the law on temporary work. This infringement applies to both temporary work agencies that do not abide by the law and to transactions which double as sub-contracts for services, but which actually place third party labour under the authority of the presumed principal. Jurisprudence investigates the actual facts rather than the wording of the contract to ascertain whether what is actually being sub-contracted is a service or merely an illicit supply of labour.

Community Directive 92/57 of 27 June 1992 (temporary or mobile worksites) calls for companies conducting work on the same building site or engaging in the same civil engineering project to co-ordinate all measures relating to worker health or safety[32]. Such co-ordination involves the appointment of a co-ordinator, whose mission and powers are defined under contract, the possible creation of an inter-company collegiate body whose membership includes employees working on the site in an advisory capacity, and the extension of certain provisions of the labour code to self-employed workers. Such provisions make coactivity B a concept that many authors consider to be particularly fertile for labour law B more consistent, socially speaking[33].

In certain cases (in particular as regards health and safety) French law obliges companies in the same network or working on the same worksite to share or co-ordinate responsibility.(British law is similar) The labour code likewise imposes several liability of both companies involved in the event of undercover (art. L324-10 et L324-13-1) or sub-contracted (art. L125-2) work, or infringement of working hours in road transport.

In Spain, labour regulations on contracts for hiring labour for piecework and sub-contracting do not specify that the principal should be considered the employer of sub-contractor workers, but they do make the former guarantor of the employer=s solvency. Such guarantees are only applicable to worker hire contracts or sub-contracts A*involving the principal=s core business*@ (Art. 42 of Workers= By-laws).

The issue for the future, and one that is already being posed in labour law is, then, the impact of (functional or regional) networking arrangements on the status of the workers employed in such networks. Barring extreme cases (*de facto* management of the sub-contractor by the principal) sub-contractor legal and financial independence prevents the establishment of a direct legal link between the principal and the sub-contractor=s employees. But in certain cases the sub-contractor=s financial dependence on the principal may call that principle into question. Further in-depth research on the triangular relations developing in practice between principals, dependent firms and wage-earners in the latter would be welcome. Generally speaking, labour law should be made more effective in the context of networking. Attention may be drawn to the importance of ISO standards in this regard, as they tend to favour employee access to training in such networked companies.

D) Conclusions

There is a growing diversity in the kinds of contract covering paid work, which may initially be classified into three categories:

a) traditional wage-earners working under an employment contract in which subordination is an essential feature,
b) other contracts stipulating the performance of work in exchange for remuneration and
c) self-employed entrepreneurs.

The second category, (b), may be expected to develop further, although such development is still modest, quantitatively speaking. This surge in free contracts for services, subject here to social security, there to labour, elsewhere to commercial legislation, poses a crucial question for the future of labour law. The traditional view is that labour law applies only in situation where the worker is strictly subordinate.However, the expert group support the view that it is appropriate to extend covergage in some circomstances to include other kind of work contracts and relationships The approach, then, is to favour the existence of common, broadly-based labour law, certain branches of which might, in turn, be adapted to cover the many and varied kinds of labour relations (subordinate work in the traditional sense; A*para-subordinate*@, i.e., financially dependent work). The European Union may possibly have a role to play in the formulation of the basic rules to ensure basic protection for all financially dependent workers.

Generally speaking, the group believes that it is advisable to prevent a gulf from forming between employees protected under contract and persons working under other kinds of arrangements that afford less protection. One of the historic functions of labour law has been to ensure social cohesion. It will only be able to continue to fulfil that function if it is able to accommodate new developments in the way that labour is organised in contemporary society and refrain from reverting to mere coverage of the situations it was originally intended to address, which are becoming less typical.

32. Act No. 93-1418 of 31 Dec. 1993 and Décr. 94-1159 of 26 Dec. 1994, transposing the Community directive on *temporary and mobile worksites*, n1 92/57 of 24 June 1992: *C. trav.* art. L. 235-2 s. et R. 238-3 s.

33. M.-L. MORIN, *Sous-traitance et relations salariales. Aspects de droit du travail*, in: *Travail & Emploi*, n1 60, 1994, p. 23 s.; and, by the same author, *Sous-traitance et coactivité*, in: *Revue juridique Ile de France*, n1 39/40, 1996, 115 s.

Chapter 2 B Work and Employment Status

The whole concept of employment status as it was built up over the years by labour and social security law used to reflect the Fordist production regime, as articulated in the different variants already mentioned in Chapter 1. It was a relatively homogeneous and stable status whose ideal example was the male head of a household (the breadwinner) who would typically undergo a relatively short period of initial vocational training before working on a permanent basis in the same job or same type of job in the same company or at least in the same professional branch of work before taking well-deserved retirement just a few years before his death. The working carrier arrangements however varied depending on the importance of self-employment and micro-firms (typical of Southern European countries and reflected in the persistence of *Along@* family arrangements protecting young adults from a more difficult entry in the world of work), or, alternatively, the presence of an increasing number of foreign guest workers (particularly in Germany) with a clearly diversified formation-insertion-working carrier in respect to native youth (reflected in the importance of dual formation system).

As anticipated it was in Southern Europe where the *Afamilistic@* patterns inherent in that model were strongest. We shall refer here to data concerning in particular the Italian case, which more or less reflect the situation also of the other member countries of the area, particularly on the youth and female characters of unemployment and the consistent protection of the male breadwinner. In 1991 heads of households accounted for only 12% of all unemployment and only 4% of long-term unemployment. Unemployment seems in a way to preserve the father=s traditional *Abread-winner@* role which, moreover, burdens the family with the responsibility to support unemployed women and young adults. Italy is one of the countries in Europe which allocated the smallest percentage of public spending for employment policies (1992/93: 1.84% compared to 2.99% in France, 3.95% in Spain, 4.19% in Germany, 6.77% in Denmark).

The homogeneous nature of this status, from the point of view of both labour law and social security legislation, arose from the common interests of wage-earners, with trade unions as their natural representative.

The fact that this status really only benefited a proportion of the work force has not prevented it becoming a benchmark for all those who did not enjoy its advantages. Quite the contrary. Whole professional categories of workers (civil servants, self-employed workers, farmers, etc.) have all claimed for themselves either the direct application (through their becoming part of the body of wage-earners) of this status or for all or some of this status to be assigned over to them in the sense of its collective benefits (trade union rights, the right to strike, collective bargaining rights) and its advantages for the individual (income security, social protection). This has been the central reference point around which all employment relations have tended to revolve and it is not so much a benchmark for workers as for employees: the employee whose loyalty to the company has been secured and who devotes his whole life to the company which guarantees him a *Asteady job@* in return.

This same stability is what has been missing in post-Fordist models of labour organisation. Companies still demand a great deal from their employees B certainly much more than before B when it comes to their level of training, adaptability, ability to work on their own etc. (cf. 'I), but they no longer guarantee these same employees any job security in return. As a result, the terms of the trade-off on which employee status was always based, B i.e. subordination in return for security B are now turned on their head without any new ones taking their place. Companies cannot ask workers to become even more involved if they do not guarantee them any kind of future, either in it or outside it. The State, which has to pick up the question (and the costs) of managing the lengthy professional life of workers, is not really in the best position to find an answer. Its heavy intervention which causes a huge drain on public finances can only serve to alleviate the situation without getting to the very heart of the problem which is the creation of an employment status adapted to the new models prevailing in the employer-employee relationship.

Where the Fordist model hinged on the stable organisation of groups of workers, these new models are based on the opposite idea of the co-ordination of mobile individuals. Essentially, they deal with the necessity (and the difficulty) of drawing up an employment status that integrates individualisation and mobility of professional careers. If this individual mobility is to become the dominant characteristic in tomorrow=s world of work, labour law will come up against some rather formidable problems. In fact, not only the impact but also the goal of this law has been to ensure employment stability and thereby to guarantee workers real employment status. This latter aim has not lost any of its value but the problem to be solved today is how to adapt labour law rather than sacrifice it to change.

Management has readily understood this new pressing need for mobility and has therefore demanded *Aflexibility@* in the employer-employee relationship. From a legal point of view, this whole idea of flexibility B a management term B does not have much meaning. It really only makes sense when referring to the principle of professional freedom as understood from its two sides: the freedom to set up a business and the freedom to work. The claim for flexibility can then be understood in law as a demand for professional freedom to be enhanced within work organisation. Labour law should take this demand into account and not stand in the way of the evolution of work organisation methods. However, the fundamental question to be resolved today is not about *Aincreased flexibility@* (something that has already widely been taken up in legislation in a number of European countries), but about bringing the new imperatives of greater work freedom into line with the no less pressing need of every worker to enjoy a long-lasting real employment status which actually enables him to exercise individual initiative.

Even if no European country today seems to have managed to set up a new model of labour relations that meets these very different demands there are some important experiences of transition towards new trends of labour relations. It is crucial to mention that, contrary to media stereotype of incompatibility between welfare arrangements, on one side,

and job creation and flexibility, on the other side, some of these experiences combines high levels of innovative welfare protection with low and decreasing unemployment and extremely dynamic economies. It is the case, in particular, of Denmark and The Netherlands, but within the Union also Portugal, Northern Italy, Southern Germany and Austria have persistently maintained low levels of unemployment, below the publicised ones of the neoliberal experiences of the UK and the USA.

The United Kingdom cites a reduction in unemployment: around one million jobs have been created over the last four years. The drop in unemployment in Great Britain has largely been prompted by factors that are unrelated to labour law and particularly by the fact that employers had not maintained available work capacity during the previous recession. For the moment, there is no real evidence that the British culture of easy hiring and firing really does bring about a growth in average employment over the cycle, even if we think it may be one of the factors responsible for the drop in unemployment.

But the British example also throws up a problem. The growth in female employment has actually been double that of male employment and male unemployment mainly affects heads of households and this has implications for household income. The explanation provided for this phenomenon is that male unemployment remains high because women seem more ready and willing to accept non-standard employment and provide management with a pool of people who will take up such jobs. Then, when the employer turns these temporary jobs into permanent posts, the worker (usually female) continues in the same post.

It is interesting to see the absence of any significant shift in the United Kingdom away from permanent jobs and towards temporary jobs, even when there are no legal restrictions on it. Whereas temporary work used to account for 5% of total jobs, this figure has only risen to around 7% in the 1990s. A study explains this slight increase by the fact that large companies prefer to use temporary employees to cover staffing problems when employees are on sick leave, holiday or maternity leave rather than over-size their work force. There has certainly been an increase in the number of temporary workers, but the number of people actually working for temporary employment agencies is still under 0.5%. In addition, these agencies are more and more concerned with permanent jobs as they strive to submit competent employees to their clients. Spain lies almost at the opposite end of this positive trend seen in the United Kingdom. In fact, the high rate of unemployment in Spain is combined with a very high percentage of temporary work (42% in the private sector). In Sweden, with in comparison has highly regulated labour market with a high rate of unemployment, the group of temporary workers rose from roughly 250,000 persons 1990 to approx. 325,000 persons 1995. Self-employed persons without employees rose from roughly 230,000 persons 1988 to 270,000 1995.

It seems, therefore, that no member country is in a position to propose any sort of credible alternative to the wage-earning status which still remains as the reference point in labour law. However, every country is attempting to adjust this status by In Sweden, a recent proposal from the Ministry of Education has sparked off a real debate. The idea is to allow students to receive practical rather than theoretical training in their third year at university. This apprenticeship would form an integral part of the education system. The social partners seem to back the proposal which would allow for more extensive contact

reorganising the transitions within a working life which is no longer guaranteed to follow a straight line. We have, therefore, looked into how the law stands with regard to these main transitions. This survey detects the emergence of new laws and legal categories which are indications of the early development of a status for workers that no longer hinges on the holding of a job but rather depends on the continuity of an employment status that goes beyond the number of diverse jobs held. This new status is original in the way it brings the dynamic organisation of the transitions between successive employment situations to the static organisation of the employer-employee relationship. The constant aim of the organisation of these transitions is for employee status not to be linked to a stable job.

Three main situations can be distinguished within it:

- first of all, job-seeking, which may apply to young people who have finished their initial training or to the unemployed: a law on access to employment has emerged in response to this particular situation (A);
- next, job discontinuity, which may be the result of internal flexibility policies (job modification or transformation) just as much as of external flexibility policies (the use of casual employment contracts): labour law today tends to associate a principle of continuity of employment status with this job discontinuity (B);
- finally, job cuts: this is the traditional domain of legislation on redundancies whose sole aim is no longer to defend employees against the loss of existing jobs, but also to offer them new opportunities with the emergence of a right to redeployment (C).

This overview opens up new perspectives for the design of an employment status that combines both freedom and security.

A) Employment Status and Access to Employment

1) From initial training to employment

Initial training is provided both in education institutions and in companies. Its conditions vary according to the different European Union member states but all countries are committed to implementing reforms to improve initial vocational training and to smooth the transition from initial training to professional life.

1.1 Bridging the gap between school and employers

Initial training for young people is the subject of debates that directly concern labour law. One of the main issues in these debates is about the priority to be given respectively to academic training at school or university and to on-the-job training. Academic training is mainly aimed at the general job market whereas in-company training gives workers the skills they need for a particular company or similar kinds of companies. These two aims should be borne in mind when talking of a systematic strategy. The development of youth unemployment has led several countries to place the emphasis on practical training given in companies and to try and bridge the gap between schools and employers.

and better communication to be developed between schools and industry and would make education more flexible.

In France, too, initial vocational training was mainly of an academic nature whereas apprenticeship was something only followed by people learning a trade or craft. More recently, however, efforts have been made to encourage a more practical-style training. In 1990, France enacted a law setting out the right of each worker to obtain a vocational qualification and, in 1993, the right of every young person to specialised training. A number of different specific employment contracts now exist to ensure in-company training alternates with theoretical training (*contrat de qualification; contrat d=insertion professionnelle*). Some of these contracts are subsidised by the State. A proposed bill to integrate in-company training into the final part of university courses (called A*stages diplômants*@) is at an equally advanced stage. However, it is still facing serious opposition and it is not certain whether it will be implemented in the near future.

In the United Kingdom, the government has introduced the idea of modern apprenticeship although very few young people actually take part in this programme. In the framework of national vocational qualifications, the emphasis is placed on the specific levels or standards that must be reached rather than on their particular duration. however, employers are generally unwilling to train more young people than they actually plan to employ in the long term. There has, however, been a rapid growth in the numbers of young people enrolled in further education colleges, often on vocational courses.

The same problem of a lack of employers keen to train young people arises in Spain too. In that country, training contracts, which have been given a variety of names and been the subject of a series of successive legal regulations, have never satisfactorily served their purpose as training platforms, but rather have essentially been used as contractual devices for first jobs, for which young people are underpaid and hired under casual conditions, with no prospect of the such contracts leading eventually to steady employment. Despite all this and due to their similarity to other temporary contractual formulas intended to foster employment, their use has been relatively infrequent. Un faible pourcentage de ces contrats de travail particuliers a donné lieu à de véritables embauches. A very low percentage of these specific employment contracts have actually turned into real employment.

In Germany, the traditional apprenticeship system is also going through a difficult time. The fact is that employers are less and less inclined to train young people. They are seeking shorter apprenticeships. Some collective agreements that have been signed recently try to encourage companies to train young people by means of lower salaries, for instance, which might be as much as 15% in companies training young people for the first time or training more than before. Furthermore, many German companies are no longer willing to offer all their In Spain, some collective agreements have made provisions for lower salaries for new contracts: this leads to problems turning on the A*double salary standard*@ which distinguishes between workers hired previously and those joining the company after the entry into force of the new collective agreement. The question is whether or not such conventional regulations conform to the constitutional principle of equality. Legal doctrine is not unanimous in this regard and the issue has not yet been settled by the Constitutional Court. In 1993 the French Government has also tried to introduce a special contract to combat youth unemployment by providing for optional training and a salary that is lower than the minimum wage. However, student protests have put a stop to this initiative. In the German chemicals industry, a collective agreement has been reached allowing for a 10% reduction in the salary paid to the long-term unemployed during the first apprentices a permanent employment contract at the end of the training period.

With respect to Italy, we could say that the deregulation of work is applying mostly or almost exclusively to new entrants, that is young people. We can assist, in fact, to a sort of >opelegis precarisation= of the new labour relations. This is the case of *the contratti de formazione e lavoro*, introduced at the beginning of the eighties (laws n1 79/1983 and n1 863/1984). This kind of fixed term contracts (maximun length two years) apply only to young people (initially under 29, now under 32) and they can state wage and labour conditions which are inferior to those contracted for the rest of the workers, even if in the same plant or firm. Their scope was explicitly to introduce a sort of exchange on the labour market between more work opportunities against more labour flexibility, for younger people (with more fiscal benefits for the enterprises). When the contract expires, the employers can decide if hiring the young with a regular labour contract. Actually, the Italian labour laws pose a condition, for the firms, of a 50% hiring quota (that is 50% of the *contratti di formazione e lavoro* must be transformed in regular labour contract, when expired) to be allowed to stipulate new *contratti di formazione e lavoro*.

So, actually (1994) the quota of these CFL confirmed is around 60%.

As a factor of labour precarisation, however, must be underlined that the young workers hired with these contracts, do not result in the total number of firms employees which are legally determinant for the applicability of a larger system of labour laws and workers protections, a system known as A*Statuto dei Lavoratori*@ (law n1 300/1970) which in Italy applies only to firms with more than 15 employees.

By the end, apprenticeship contracts have been recently sustained and subsidised by the Italian government, to improve young people=s chances to enter the labour market.

There is a tendency developing in Europe whereby companies are no longer seen as simple *production* centres but as *training* centres as well. A nation cannot be trained in the schoolroom alone as training needs to take place in companies too. This concept should be recognised in all sectors of social security and labour legislation.

1.2 First employment contracts

One way of building a bridge between vocational training and employment is to use contracts that have no educational aim but that take into account the lower productivity of young people who are hired in their very first job. This type of contract authorises employers to pay such young people a wage under the statutory or normal minimum paid.

phase of their new job. The regulations for the National Minimum wage in Britain are likely to exclude trainees.

2) From unemployment to employment

Whilst unemployment was not widespread and was of short duration, it could be considered as a small risk in a linear career. This risk was covered through an insurance-based logic guaranteeing workers an income, often indexed to their salary until they found another job matching their skills. As mass, long-term unemployment has taken hold today this model of unemployment has needed to be rethought. The duty to work has now emerged as the other side of the equation where the unemployed are guaranteed an income. This new element of employment status means that a worker must be prepared to change his occupation or to take up a job that is less well-paid than the one he lost. This new pressure put on the unemployed has gone hand in hand with recruitment incentives offered to employers in the form of subsidised jobs. The aim of this new type of job has been to bridge the gap between unemployment and employment although their many detrimental effects have not yet been fully assessed.

2.1 The duty to work

The explicit aim of the policies implemented by European Union member states is to increase employment levels as high as possible. But what should employment priorities be? Is it a question of guaranteeing a certain level of income or of guaranteeing an employment status at the same time? The analysis of current changes shows a shift in the idea of an occupation, as defined by qualification, towards that of a job for which the only benchmark is money.

This trend is clearly visible in the analysis of the criteria governing the right to unemployment benefit and to a pension which are increasingly emphasising the recipient=s earning capacity and less and less his previous occupation. This indicates how any guarantee of continuing in the same occupation is partly or wholly sacrificed to a quantitative and monetary assessment of people=s position in the job market. In the past, in all countries, the decision on whether an unemployed person was suitable or not for a job partly depended on their occupation. Now, more and more importance is placed on the potential earnings.

In the United Kingdom, a certain period of grace (usually three months for skilled workers) was traditionally granted to the unemployed to allow them to find a job in their own professional field. Now, however, they are being forced to accept any job **B** even a non-skilled one **B** if they do not want to lose their unemployment benefit.

In Sweden, in the past an unemployed person (particularly a white-collar worker) would not be asked to accept a job that did not correspond to his previous profession. This practice has changed and that same person now has to accept any job whose salary equals at least 90% of the unemployment benefit. The critical point, however, is very much linked to the ability to find a new balance between those in the labour force who are in training and those on jobs on the regular labour market. One the big challenges are, in other words, to hinder the risks of inflation that follows from a shortage of labour, due to broad training and education programs. Short and relatively rapid cyclical changes on labour market make it very difficult to constantly find this balance between demand and supply of labour. As w know, training and education programs often are long running tasks.

This trend is observed in all countries, with the only difference being the level of acceptable earnings. In Spain and France, the pay must be the normal salary paid in that particular sector. In Spain, previous pay levels and the amount paid in unemployment benefit are not taken into account. In France, the proposed salary must be at least 80% of the previous earnings. In Germany, a person can turn down a job during the first period of unemployment if the proposed salary is under 80% of the previous earnings. This falls to 70% under 70% during a subsequent period of unemployment and, after 6 months of unemployment, they must take any job that pays at least the amount paid in unemployment benefit.

In the case of disability benefits paid when there is a reduced earning capacity, the trend seems a little more uneven.

In France, people with a disability, making them unfit for work, are not subject to any kind of control when seeking a job. The mechanisms used to calculate these benefits, however, take into account the residual work capacity of the person, whether or not this is actually put into practice. A person with a disability, an incapacity to work, is one who cannot **B** *in any occupation* **B** obtain a salary that is more than one third of the normal remuneration paid in his previous occupation. Disabled people who are still able to obtain a paid job despite this 2/3 incapacity are paid a benefit that is only equivalent to 30% of their previous remuneration.

In Spain, the different degrees of disability are establish in terms of the handicapped person=s ability to do his or her usual job or any job. The recent act of consolidation and rationalisation of the social security system, adopted in 1997, sets out the degrees of permanent disability **B** the percentage reduction in the working capacity of the disabled person would be assessed in line with an approved statutory list of illnesses **B** and widen the concept of usual profession on which these assessments are based. In fact, this bill defines occupation as A*the occupation held previously by the person in question or the occupational group in which he worked before the event causing his permanent incapacity took place*@[34].

34. Article 8 of the Bill consolidating and rationalising the Social Security

l of the Spanish Parliament, December 26th, 1996). The Bill is the result of the agreement on the consolidation and rationalisation of the Social Security System

reached between the Government and the majority trade unions (Trade Union Confederation of Workers: Commissions and General Workers Union), on October 9th, 1996, which

2.2 Employment subsidies

with the opposition of the employers: association, the CEO.

Most European countries seem to have tried out the policy of using public finances for employment. The idea is to use public money – unemployment insurance funds first of all – to finance employment rather than to support the unemployed. In practice, this leads to subsidising employment. Two different methods have been tried. The first is to encourage employment in the business sector by giving financial aid to companies that hire people. The second is to support the emergence of new types of employment in the non-business sector.

As a result, the number of subsidised jobs has grown drastically in most countries although the importance of these subsidies and the number of people that benefit from them varies greatly. Subsidies sometimes come from unemployment insurance and sometimes from public funds.

2.2.1 Subsidised contracts in the business sector

The aim of this first type of subsidy is to lower labour costs for employers likely to hire new workers. These subsidies were initially thought of as temporary measures but have now become firmly established in labour law and in some cases have become definitely tied to certain types of jobs which the public authorities are keen to foster because they enable a greater reduction in the number of people unemployed (e.g. part-time jobs).

In Germany, financial aid for recruiting unemployed workers is mostly targeted at the non-business sector. However, this method is increasingly criticised because such work lies outside the normal economic cycle and may even compete with it and prompt the disappearance of non-subsidised jobs. Another option that is now being tried is to foster the recruitment by companies of unemployed workers who are finding it difficult to re-enter the job market (such as the handicapped or older age groups) by means of subsidies that may be equivalent to as much as 50% of the salary over a period of 24 months. These amounts are paid to the employers.

In Spain, until the appearance of the *Acuerdo para la Estabilidad en el Empleo* (Agreement on Steady Employment) negotiated by the most representative trade unions and management in April 1997 and lated enacted as RDL 8/1997, annual employment assistance programmes have been developed for companies. These are targeted at the handicapped, the long-term unemployed (more than one year out of work) or older people (aged over 45). The term of these employment contracts is 1-3 years and the advantage for the employer is that they pay lower than normal social security contributions. Subsidies are also given when a company takes on its first employee or makes temporary employees into permanent employees. However, these contracts are rarely used.

Spanish Employment Policy maintains the temporary contracting programmes for handicapped. In addition, the intent of the above *Acuerdo para la Estabilidad en el Empleo* is to eliminate temporary employment by subsidising – and reducing certain severance indemnities – the employment under stable terms of unemployed workers and workers with Direct employment subsidy policies in the job market have now been seen to have a number of adverse effects (deadweight and substitution) and to be ineffective in reducing unemployment in the long term. From a legal point of view, public subsidies for employment could also turn out to be contrary to the principles of Community competition law[35].

temporary contracts by creating a new contractual device known as the ›contract to foster open-ended employment.‹

The same type of subsidised contracts exist in France too (through a reduction in the social security contribution paid or the payment of a subsidy to employers equal to the unemployment benefit that the worker would have received) but over time they have led to a shift in unemployment from one category of worker to another and have not brought about any real rise in employment. French unemployment insurance also helps to the unemployed who want to set up their own business or to become self-employed. It is also possible in France to do voluntary work, undergo training or take up temporary or part-time work whilst still being paid unemployment benefit. This measure has been designed to improve the chances for the unemployed of finding permanent jobs in the future. This opportunity is only available with very strict constraints in Germany.

In Belgium since the beginning of the crisis, a number of employment promotion plans provide for subsidies for recruiting new employees. Such plans offer either lower social security contributions or co-funding schemes in which public money is involved. Such plans are usually applied selectively to target populations (long-term unemployed or young adults, for instance).

In the United Kingdom until recently there have only been a few local examples of employment subsidies. However, from April 1 a new programme of guarantees to young people under 25 has subsidised employment as one of its options, as does a similar scheme for people aged over 25 who have been unemployed for more than two years. Previous experience with job subsidies suggests that they become less effective at creating additional job opportunities the larger the number of subsidised jobs. The most effective schemes have provided one new job for every three jobs subsidised, with typical outcomes closer to one new job for every five subsidised.

Sweden is an example of yet another country that has designed a great many programmes relating to the job market without any signs as yet of an improvement in the employment situation. Under the Swedish system, unemployed workers are paid benefit for 300 days and then they are obliged to participate in one of the job market programmes during 6 months in order to be able to claim a further 300 days of unemployment benefit. Training allowances are equal to unemployment benefit. A government proposal for the social security system to take responsibility for the payments after a certain period of time has been withdrawn following strong opposition. Some notable Swedish programmes are: work experience systems, employment training, on-the-job training, temporary public work, computer centres, programmes for young people run by local councils, salary benefits, recruitment benefits, protected employment with public employers, setting up grants and all sorts of training programmes. However there has been a positive trend in the Swedish employment figures under 1998.

35. See the case-law of the Court of Luxembourg in this regard and especially

Therefore, it is reasonable to think that direct aid to companies is unlikely to be the way forward in the future. Public aid should, on the other hand, lead to the building of real professional career paths within a policy of equal opportunities in the job market, and to the creation of opportunities for the workers themselves. The policy of directly targeting these subsidies on the basis of socio-economic criteria can therefore be questioned. Such targeting helps to divide of wage and salary earners into two groups and to develop second-rate jobs. It would be much better to start off from a dynamic basis of the freedom to work and to offer all workers new opportunities. Public money to help finance special leave B particularly for training, family circumstances or setting up businesses B could, both create new activity opportunities for their recipients and provide opportunities for the unemployed to be given a job.

2.2.2 Subsidised contracts in the non-business sector

The general idea here has been to explore new forms of employment. These are jobs that meet collective needs which are wholly or partly by the business sector. Public money helps to A*prime the pump*@ of the creation of this type of job, in the expectation that it will then stand on its own in the voluntary sector, public sector or business sector.

In the United Kingdom there is growing interest in the role of the voluntary sector intermediate labour market in providing a route back to market employment for those who have been out of work for some time. Its key features are the undertaking of socially useful work (energy saving projects in public housing for example) and wages rather than unemployment benefits. The most successful schemes seem to rely on the ability of talented social entrepreneurs to bring together funding from a variety of sources, including the European Social Fund, to make a viable

In Spain, the unemployed must carry out voluntary work if they are not to lose their unemployment benefit. Specific agreements exist between the national employment agency and public bodies or charitable foundations offering temporary work in the public interest. Unemployed persons working under such arrangements are not subject to an employment contract and can continue to recieve their unemployment benefit.

In Belgium, A*Local Employment Agencies*@ (ALE) have been created to promote jobs for the long-term unemployed. All workers wholly unemployed for over three years are automatically enrolled. Unemployed workers may be called upon to provide services at 150 BEF per hour, without forfeiting their unemployment benefits, up to a total of 45 hours per month. This work consists of tasks that would not otherwise be done and that involve functions characteristic of the primary labour market. It covers such jobs as helping people in their homes, gardening, child care, helping volunteer or educational organisations, local authorities B particularly in the area of environmental conservation B and seasonal agricultural work. In practice, such local employment agencies (system_generalised under the act of 30 March 1994) are meeting with mitigated success, with enormous differences from one place to another. Whereas the ultimate objective is to place the long-term unemployed back on the labour market, in reality most of these people remain in this subsidised work system.

In France, the experience of working for the benefit of the general public through employment-solidarity contracts has also responded to a similar logic. Social security or tax advantages have also encouraged the development of personal services, notably domestic jobs. A new step has just been taken in this direction with the announcement in August 1997 of the creation of new general interest jobs corresponding to specific occupations in the field of education, the environment, etc. The novel aspect of this scheme is that they are full-time, long-term (5 years) jobs. It is thereby hoped that a number of the adverse effects of previous schemes (casualisation of public employment; advantages obtained for high income brackets) will be avoided.

In Italy there are what are known as *Lavori socialmente utili*

(LSU) or jobs with very short working hours almost entirely paid for by the State. Initially limited to social service work, this kind of subsidised employment was extended to State-owned companies and Government under a law enacted in 1996.

The formation of this non-business sector which some people see a *Asecond job market@* is one of the biggest issues of the moment. It is not clear who is to set the rules and to run this *Asecond job market@* on a daily basis. This question has already been answered in the United States through the creation of a *Workfare* system run by private companies and public authorities as the project managers. The United Kingdom seems to have opted for the same solution. The trend in Belgium is more towards rejecting compulsory work for the unemployed and allowing the social partners (trade unions and management) to run the second job market, working together with the local authorities. This option may seem an interesting one provided that the *Asecond markets@* can act as a nexus between *new* supply and demand in employment. In this latter sense, the *Asecond job markets@* could be used to promote economic solidarity and to become The Italian experience with the *Cassa Integrazione Guadagni* constituted one of the first legal devices designed to combine corporate restructuring with continuity of the status of the employees involved. Formally, the bond between employees covered by this Fund and their former employers is not broken, but their salaries are paid (80% replacement rate) with public funding (from the National Social Provision Institute).We have to note, however, that this Fund has operated like an unemployment fund just for a very little part of the *Aprimary sectors@* labour force over the last two decades. Some authors stressed, in fact, that the CIG mechanism realised a form of macro-flexibility for firm downsizing.

Nowadays, there are plans to replace it by a system comprising three levels: 1) income insurance in the event of temporary redundancies; this insurance would also be available for self-employed workers; 2) unemployment insurance for employees who have lost their jobs; and 3) social support for unemployed with no insurance coverage. (However, we have to stress that this third measure of unemployment subsidy, not connected to the previous work status, is still under evaluation in Italy).

The idea advocated today is to allow the employee to alternate between working periods and training or holiday periods, whilst enjoying good, secure economic conditions. This is the idea on which the *Aactivity contract@* proposal, put forward in the Boissonnat[36] report, is based. Research on the continuity of employment status can be seen in a different light, depending on whether the mobility in question is within the same company or involves movement between a number of different companies.

1) From One Job to Another within One Company

Within the same company, the model of the linear career can be thrown off course in two different ways. The first case is where, for technical or economic reasons, the position

36. Commissariat général du Plan, *Le travail dans vingt ans,* Rapport de la commission Boissonnat, Paris, Ed. O. Jacob, 1995.

part of a dynamic social process in a co-ordinated project. In this case, it would not mean setting up a cheap market to compete with the primary market but rather a new market within a dynamic framework of co-operation that aims to meet collective needs that the primary market does not satisfy.

B) Job Discontinuity and Continuity of Employment Status

Policies designed to introduce greater flexibility lead to an increase in situations of job discontinuity, when the wage-earner=s periods in work are followed by periods of inactivity. This tendency generally takes the form of a series of employment contracts each of a specified length or involving temporary assignments, or work on a sporadic basis. A series of contracts may be entered, either with the same employer or with different employers.

Provisions are now emerging in the legislation of certain countries with the aim of ensuring a certain degree of continuity in employment relationships, in an effort to overcome this job discontinuity.

occupied undergoes substantial change. In this type of case, labour law can favour what are known as policies of internal flexibility, which consist of arranging for employees= in-house mobility, rather than making them redundant and hiring others in their place. A second scenario is where, in the context of an external flexibility policy, a series of casual employment contracts are offered within the same company, thus raising the question of whether such contracts could entitle the employee concerned to certain rights.

1.1 Job Modifications

The next step was to examine the influence of those models using internal flexibility (e.g. the Japanese model), which consists of adapting to economic constraints whilst maintaining an employment relationship rather than making employees redundant. Two contrasting situations have developed in the EU. In those countries which are traditionally more flexible, the implementation of European legislation has reduced, or will slightly reduce, the amount of flexibility involved, whereas in systems which are traditionally less flexible, there is a tendency to ease up on legal restrictions.

In the United Kingdom, contractual freedom has been the dominant factor determining working hours and conditions. It is, for example, quite rare to find agreements as to the number of working hours per year. This freedom will be restricted by the implementation of the directive on working time, which will take place in October 1998. Despite this flexibility, there are seldom cases in which modification of the terms and conditions of employment avoids redundancies. In some firms, the employees have agreed to reduce the number of working hours to avoid redundancies. Unemployment insurance, which does not recognise partial unemployment, is an obstacle to this type of agreement. Furthermore, in view of the fact that employers have no obligation to train their employees to meet changing employment needs, the redundancies are very often due not only to a surplus of workers, but also to the unsuitability of their skills. This is a further obstacle to avoiding redundancies.

In Sweden, there is little scope for individual agreements and

the unilateral modification of the terms of a employment contract by an employer is not permitted. However, collective agreements stipulate that manual workers must carry out all the tasks they are obliged to perform and which are covered by the agreement in force. The implementation of European legislation has basically strengthened the fundamental, individual rights of employees in employment relationships and has done so to the detriment of Swedish collective legislation on employment.

German legislation has not yet reorganised to the model of internal flexibility. For example, there is a regulation according to which part-time jobs must always stipulate a certain number of hours and the pattern, but not the conditions, of a part-time job may be modified. However, a range of collective agreements has led to greater freedom. They enable workers, together with their representatives in the company, to agree on a reduction of working hours and/or wages, within certain limits and for a certain period, if the employer neither hires nor fires during that time. Certain collective agreements have also introduced flexibility in working patterns in such a way that labour can be adapted to the firm=s needs without either reducing wages or paying overtime.

In France, it is now possible to introduce a great amount of flexibility in the organisation of working hours through collective agreements. Moreover, the law has encouraged the review of collective agreements, and judicial precedents greatly favour any action aimed at internal flexibility; an employee is not permitted to set an individual refusal against modifications of the collective workers= status as determined by common practice or the collective agreement. On the other hand, individual employment contracts are not possible without the employee=s consent and the employer is under an obligation to train the employee to deal with changes in his/her job. However, if the modification proposed is for a legitimate reason, an employer may dismiss an employee who refuses it. Recent case law establishes: a) that in ascertaining the collective agreement which is most favourable to the a wage-earner account should be taken of the interests of wage-earners in general, and not just a particular individual; and b) that such appraisal should take account of possible guarantees of maintaining employment levels. Therefore, an amendment to a company agreement calling for lower salaries in return for a commitment to maintain employment levels may be considered to be more favourable for wage-earners[37].

37. Cass. Soc. 19 fév. 1997 (Cie générale de geophysique), *Droit Social*, 1997,

Legislators tend to encourage job sharing and part-time work. A1996 law, the so-called *Robien act*, permits a reduction in social security contributions if there is an agreement to reduce working hours which will help create new jobs or preserve old ones. New job creation equivalent to 10% gives the firm the right to a 40% exemption in the first year and a 30% exemption for the next six years. If the proportion of new jobs increases to 15%, this exemption will be 50% and 40% respectively. This law has been a huge success, although it has given rise to considerable debate, which has grown more controversial on the occasion of the act instituting the 35-hour work week (see chapter 3 below). A 30% reduction in social security contributions is also applicable for each part-time job created, or for the transformation of any full-time job into a part-time job, providing this results in the creation of a new post.

In Spain, a 1994 law also introduced greater flexibility regarding working hours, wages and contractual modifications and contracts may now be substantially modified without administrative authorisation. These modifications must be justified by economic, technical, production-based or organisational reasons and the workers' representatives must be consulted where collective modifications are involved. Conditions concerning the place of work, working days or hours, shift work or wage systems or employees' duties may now be modified without the employee's consent. If an employee disagrees, he will be asked to leave.

The Italian system of industrial relations, while constituted, until nowadays, a valid system of labour protection against the risks of downsizing, making more difficult for the firms to proceed with individual firings, at the same time has assured a very large quota of functional flexibility at the interior of the productive processes. In Italy, in fact, even in larger plants in which Internal Labour Markets are prevalent, seniority rules never constituted an element of tightening of the work relations, as in the United States, for example. On the contrary, in Italy, internal mobility has always been regarded as a form of upskilling, both by the workers and the trade unions. During the 1970s, most collective labour agreement stated the principle that job rotation among different work positions were to be taken as a pre-condition to reach higher positions in the internal occupational ladder.
Recently, the so-called 'legge Bassanini' which reformed the employment status of public employees, stated a new regulation for the job mobility of such employees. This is a great innovation, for the Italian public employment system, as the law states that public servants, if redundant, can be moved to other jobs and duties in the Public Administration sector, even in a different territorial area. The law recognises to the workers the right to refuse such movings, but after three refusals, they can be fired.

1.2 Jobs in Succession

We were then interested to know whether there were any provisions for calculating the number of years of service, regardless of any discontinuity there may have been between successive working contracts with the same employer.

The law in Sweden stipulates that parental leave, military service, education, and training do not interrupt the employment relationship (the situation of so-called atypical workers is more difficult). Part-time work is considered in the same light as a normal job and the same rule is applied. Similar provisions are found in French and Belgian legislation.

In the United Kingdom, by contrast, employees must reach an agreement with their employers if they wish to interrupt their work for parental leave, public service or charitable work whilst retaining their job continuity. The exception is for maternity absence where a gap of up to 40 weeks does not interrupt continuity of service. Needless to say, such agreements are few and far between.

In some cases in Sweden, France and Britain, once certain limits have been reached, consecutive contracts of specific duration may be reclassified as a single contract for an unlimited period. In France, however, several contracts of specific duration may follow on one after another if there is a minimum period of inactivity between them. In this case, all the contracts are considered to be different contracts of specific duration (with service discontinuity).

In Spain, if there are a number of consecutive contracts with the same employer, these are not generally included in the calculation of years of service, although there are some exceptions to this rule. These include those jobs which then become permanent, training contracts, subsidised contracts or in cases of fraud in to observe the law.

2) From One Job to Another with a Variety of Employers

2.1 Single Job with Several Employers

Under some circumstances, where a single job has been performed under employers which constitute different legal entities, the law may consider this to represent a single employment relationship.

2.1.1 First of all, this possibility is offered in the case of groups of companies

Some member states do not consider these to represent different employers, whilst others do partially or completely accept this to be the case.

In Germany, employment by different companies within the same group are generally treated separately. In Spain, however, although the same rule exists, there are a number of exceptions to it. These include workers working for all group companies simultaneously, those cases where there is a single set of assets and where there is external unity or a single management structure.

French case law has also established certain exceptions in the case of dismissal for economic reasons. The seriousness of the economic motives is studied in the context of the general sector of activity to which the group belongs. There is also analysis of the possibility of offering the person concerned an alternative position in any of the group companies whose activities and organisation would allow transfer of all or part of the personnel. More commonly, French law permits the continuity of the employment contract within a group which is part of the same economic and social unit.

British legislation considers that companies with the same shareholders are linked and represent a single employer. This makes transfers within the group easier and allows continuity of services.

2.1.2 Another situation involves networked companies *which share employment of the same workers*

The French report shows a number of examples of this type. This may involve legitimate, shared systems organised in the conventional way, whereby, say, several companies form an association of employers whose aim is to take on workers who will then work for all the association=s different members. The law has developed a number of similar solutions to encourage businesses to take on the unemployed. The French government has announced in its action Plan for Employment relating to the implementation of the Community guidelines that, in the field of plural employment, consideration will be given, in an initial stage, to the establishment of provisions that will be to enable workers holding several different jobs to take their holidays at the same time, to take into account the refusal to work additional hours when this is due to the concomitant conduct of an activity with another employer, and to permit a single medical examination if certain requirements are satisfied. Moreover, the government undertakes to examine the way of removing the obstacles to the developments of groups of employers=. It may, on the other hand, involve an unlawful operation, in which case the law makes all the employers involved liable. Charges of illicit employment can then be brought not only against the direct employer, but also against other indirect employers who have used illegal workers, provided these latter employers were aware of the illegality involved.

2.2 Consecutive Employment with Several Employers

Labour law may, under certain circumstances, make a connection between consecutive jobs held with different employers. This is the case where there are rules prescribing job continuity when a company changes hands. This continuity principle is recognised at Community level by the A*Transfers of Undertakings*@ directive. The same is true for temporary employment in the national legislation of certain countries. There are forerunners of the A*activity contract*@ in the field of temporary work, where the law or collective agreements will guarantee the workers concerned a certain continuity in their status which overrides the discontinuity of the tasks actually assigned to them.

The national legislation of a number of countries makes the employer of temporary staff responsible for or guarantor of certain obligations towards the workers, particularly health and safety at work or payment. However, there are many countries in which the situation of temporary workers is still extremely precarious, income is irregular and access to continuing vocational training is difficult. The tendency in several member states is to facilitate the continuation of such temporary assignments. In Belgium, some so-called A*atypical*@ contracts are used to fight unemployment. A law passed in 1994 allows certain exceptions to the ban on repeated successive temporary contracts. At a certain wage level, there is no longer any legally binding period of notice and this may be stipulated on the employment contract. The danger is that an employee accepts a very short notice period simply to obtain the coveted job. Sweden has also abolished certain restrictions on the use of temporary work. Since January 1997, temporary contracts no longer depend on the type of job to be performed and are permitted, for any reason, for up to 12 months in any three-year period or for up to 18 months for companies taking on staff for the first time. The only restriction is that no more than five temporary workers may be employed at any one time. In Britain, there is and has never been any restriction on temporary employment.

It seems appropriate to consider the methods which would make it possible to reconcile the discontinuity of temporary assignments with a true employment status which would guarantee that workers= individual and collective rights could really be exercised. Some collective agreements in this sector already contain interesting provisions in this respect, in particular in the field of training. This is a direction which could be encouraged at Community level.

Under the Italian industrial district model the human resources in the district are rather informally pooled. The weak point of the model is, however, the absence of any co-ordinated management of what is clearly a common good, namely, the vocational training provided by the companies involved in this kind of networks.

Given their limited size, vocational training in such companies is often non-existent outside simple on-the-job training, whereas for specific or particularly highly skilled occupations, the prevailing solution is to resort to the skilled labour market, often attempting to attract a competitors= skilled workers. Considering, moreover, that nearly 85% of the Italian work force is employed in small enterprises, in which the job turnover rate is over 40%, it is readily understandable that vocational training remains a minor concern for these companies and therefore for much of the productive sector in Italy.

C) Employment Status and Job Loss

Labour law first tackles what happens before redundancy, by imposing a procedure that must be observed and organising a review of the reasons behind the dismissal. The aim in this case is to safeguard existing jobs. However, jobs can also be protected after the dismissal. This does not protect the wage-earner from the redundancy decision itself, but against the consequences of this redundancy, permitting the person concerned to find a new job within a short space of time[38].

38. For a comparison of national legislations, see: European Commission

1) Protection against Dismissal and Safeguarding Existing Jobs

A debate has opened up in a number of countries on the efficacy of this protection. Some argue that protection against dismissal is more of a barrier to employing people than it is a help in safeguarding existing jobs..

tion de travail. Situation juridique dans les Etats membres de l'Union européenne, 1997, 66 p. + annexes.

In Italy, one of the proposals which has aroused greatest controversy is the elimination of the restrictions that presently make it difficult to dismiss individuals for justified, objective reasons, in line with a de-regulatory and liberal interpretation of the labour market[39] B which, freed of the rigidity inherent in the rules and constraints intended to protect labour B would be able to freely expand. Under the proposal it would essentially be possible for a company to dismiss an employee whenever the cost of maintaining the job is higher than the productivity deriving from it. It should be noted that such cost is understood to be A*opportunity cost*@ and therefore also as the possibility of increasing profits as a result of eliminating the job.

In Italy, there are two main insurance unemployment benefits: the *Indennità di mobilità*. Both are granted to workers who have been dismissed or have lost their job. So, as it is not the case for Cassa Integrazione, this labour market measures interrupt the continuity of the status of the employees involved, breaking any bond between employees covered by this Fund and their former employers.

Since 1994, the *Tratamento ordinario di disoccupazione* has been equal to 30% of the worker=s remuneration during the three months preceding unemployment and can be obtained for a maximum of 180 days. To qualify for this benefit, a laid off worker must have been employed for at least two years and must register with the state employment service. (this kind of benefits are also used to compensate seasonal workers).

The *mobility benefit* is 80% of gross remuneration during the first year unemployment, but there is a maximum amount payable that makes it equivalent to about 65% of the remuneration of the average worker. It last up to a maximum of three years for older workers in the South of Italy. To qualify for the mobility benefit, a worker must have an employment record of 12 months and be laid off within collective dismissals due to restructuring or company crisis. in addition, workers have to been employed in industrial companies with more than 15 employees, or in commercial companies with more than 200 employees. During the 93-94 crisis, the possibility of access to the *Cassa Integrazione Guadagni Straordinaria* and the *mobility benefit* was extended to some other service sectors.)

By the end, we have to stress how in Italy *disability pensions* have been frequently used as assistance benefits for workers with difficulties in finding a job. In fact, in the 1970s it was establish that the degree of disability (and hence the pension amount) should be determined in part on the basis of the person=s socio-economic environment, and in particular on his/her employment potential.

We are interested in discovering the influence this reasoning may have had on legislation in the EU=s member states The national reports show that European governments have generally tended to relax regulations on redundancy, although they have done so on very different levels:

In Britain, redundancies are generally authorised, provided there are economic reasons, or changes in the nature of the work to be done. Compensation must be paid to the employee who has been made redundant and the choice of persons dismissed must be fair. The courts have made a mission of ensuring this is carried out, although employers may choose among volunteers: the people concerned must, for example, be those last taken on, those able to receive pensions, the most expensive workers, those with least experience or the least productive. Where there is an intention to make workers redundant, it is also compulsory that their representatives are previously notified and consulted, so that an attempt can be made to prevent the redundancy. According to the British report, there is no pressure to strengthen protection from redundancy, as the view is that this would lead to the more widespread recourse to temporary employment.

In Germany, protection from redundancy is equally weak, with the courts leaving employers to decide whether or not there must be downsizing of the work force. Even labour selection criteria (younger rather than older employees) have recently been blurred. It is always compulsory to agree on a labour compensation plan in the event of collective redundancy. Protection against redundancy in small companies has been reduced still further (there is no protection in companies with fewer than 11 employees). The upshot is that there is no more than the mere appearance of protection against redundancy in Germany, although even this apparent protection is supposed to dissuade employers from taking more people on, because they fear they would then not be able to dismiss them.

In Sweden, dismissals must be based on material or staff-related circumstances. If the motives are economic, transfer possibilities must be studied. If the reasons are staff-related, employers must do everything in their power to find an alternative to redundancy. There is a fixed order of redundancy for employees, but the employer and the unions

39. A. ICHINO, P. ICHINO, *A chi serve il diritto del lavoro?*, in: *Rivista italiana di diritto del lavoro*, 1994, n 1.

can agree on different selection criteria. There is a constant debate in Sweden as to whether the protection laws discourage employment.

In France, prior administrative authorisation of redundancies for economic reasons was abandoned in 1986. It is still compulsory for the labour representatives to be consulted. Any workers dismissed for an economic reason must be offered a conversion agreement designed to help them find a In Spain, a law passed in 1994 has reduced the number of cases where administrative authorisation is required for collective redundancy, although without abolishing this requirement completely. Judges now only deal with the admissibility of individual redundancies. In companies which employ at least 50 people, the employer must arrange a labour compensation plan, which offers financial compensation and may include training or other measures aimed at facilitating the search for a new job. At the same time, the new law has restricted temporary work still further. This law has been greatly criticised for not going far enough, both in terms of reducing barriers to dismissal and for increasing the restrictions on temporary work. The scope of the problem becomes evident if we consider the number of dismissals declared illegal or null and void by the courts (61% according to one study) and the very high proportions in temporary work The subsequent legal reform of 1997, a result of the above Agreement of Steady Employment, restricts the terms of casual hiring while broadening the financial, technical, organisational or production-related reasons justifying non-collective redundancy and reduces, in certain cases, the indemnities corresponding to such dis missal where declared by the courts to be wrongful.

2) Protection against the Consequences of Job Loss and the Right to New Placement

Traditionally, the manner in which an employment relationship is established is separate from the way in which this relationship is broken. Recent developments, however, show that the situation can be tackled in a different way: the employer=s right to dismiss the worker can be linked to the worker=s right to be placed in another job.

Member states have put considerable effort into this matter, mainly on a voluntary basis. In France, dismissed employees must necessarily be offered conversion agreements to assist their search for a new job. These agreements stipulate that the person concerned must receive remuneration for a certain period, an assessment of his/her professional qualifications and an offer of training. In the event of *Amass@* redundancies, the accompanying labour plan must use every means at its disposal to offer a worker another post in the company or its group (new internal placement).

In Belgium, this kind of conversion is primarily negotiated by the social partners, although the resulting agreements may later be made lawfully binding. In Spain, labour plans in large public corporations in particular sometimes also include training measures and assistance in the search for a new job. In Britain, in those cases where redundancy affects thousands of employees, some employers have hired special organisations which help find the employees new jobs, set up in business on their own, retrain or become involved in setting up new enterprise in the region. There are not many such new job. In the event of *Amass@* redundancies (companies with fewer than 50 employees and dismissing at least 10 at any one time), a labour compensation plan must be arranged. This will include alternatives to redundancy or new job creation. If this is not done, the dismissal is null and void. The judiciary strictly enforce the procedures and content of the labour plan which accompanies dismissal.

agreements, but those that do exist appear to have met with some success. In Sweden, some collective agreements require employers to contribute to a *Asecurity fund@* designed to finance training activities which will enable employees to remain in the company and to help them find a new job or set up a business. Many of these agreements has shown to be quite succesful.

D) Conclusion: Towards a New Professional Condition for People

1) Understanding the change

Given increased flexibility, the major division in the area of employment status will now be the distinction between typical and atypical jobs. How should we interpret this trend?

An initial interpretation could be couched in the following conventional terms: the destabilisation of the employment relationship demonstrates a revival of the class struggle, and more specifically the struggle between capital and labour. This interpretation assumes that the nature of labour has not undergone any fundamental change in post-industrial society. What has changed, on the other hand, is the relationship between the forces involved. Capital has reorganised in the course of the last 20 years. The changes include a marked increase in the autonomy of financial capital when compared to industrial capital; capital has spread throughout the world, opening the way for a mass movement of delocalisation and relocation; capital is increasingly less fixed and is growing more and more flexible. These transformations of capital have brought about a management offensive which seeks to adapt workers to the new conditions of capital development. It is here where deregulation comes into play. Deregulation involves dismantling a certain number of barriers which capital faces on the labour market (regulations inherited from Fordism) and restoring to capital its discretionary power. And that involves the destruction of the protection associated with the employment relationship.

A second interpretation argues that it is not only capital which has changed, but that, in a partially autonomous way, *labour* has also changed. We have moved from the job whose prototype was manufacturing (working on something material) to a new type of work, where the prototype is the service relationship; here work involves more interaction and manipulation of symbols than working directly on something material. This is one way of describing the movement to a tertiary economy and the new technological revolution. And just as the nature of work has changed, so have the rules of *organisation* and *co-ordination* of that work. From this perspective, the employment relationship can be understood as an institutional form adapted to a certain prototype of work. Given the transformation undergone by this prototype, we need gradually to seek new institutional ways of protecting the workers. In short, the destabilisation of the employment

relationship is due, not only to the transformation of capital, but also to changes in labour itself. It is this second, more complex type of interpretation which should, it seems, be the focus of our attention.

According to this interpretation of events, labour law and social partners are faced with a strategic choice. If we follow the first of these two interpretations, labour law (the legislative powers and the judiciary) and unions will find themselves faced with a duty to *resist*. This resistance will involve defending the employment relationship whatever the cost. It would involve the utmost effort to maintain a stable status for the worker with a single employer for an indefinite period of time.

A second strategy would involve mere *adaptation*. This involves acknowledging a relationship of strength which is both strong and flexible and adapting this by *uncoupling* two

A third strategy may also be envisaged, i.e., active adaptation to avoid such risks: this would consist of re-institutionalising the employment relationship. Re-institutionalisation is used here to mean setting *rules*, allocating *negotiating forums* for these rules and enabling the *collectives* involved to intervene effectively. The comparative analysis presented shows that the basic outline for a re-institutionalisation of this type is already in place in national legislation. Employee status, which makes security contingent upon subordination, should be succeeded by a new employment status based on a comprehensive approach to work, capable of reconciling the need for freedom and the need for security.

2) Mastering change

The need to transcend the employment model is common to all European countries. Broaching this issue at the Community level is particularly difficult. To illustrate this difficulty, we need only to refer to the way the employment model has asserted itself throughout Europe: on the one hand employment has given rise to very different legal constructs in Europe (evidenced by the diversity of national labour law) (see Chapter 5 below in this regard); but on the other hand the common issue is the creation, in the framework of a contract (the employment contract), of a status able to afford protection for the person so covered. The divergent and convergent forces at work in the evolution of the various national bodies of labour law must not be underestimated. Moreover, though there is no way at this time to predict what specific legal forms this superseding of the employment model will assume in each country, it is possible to define the conceptual framework in which it will take place. It is not the purpose of our endeavour here to anticipate the legal formulas that may eventually be applied in different countries. Rather, we have been called upon to explore the ideas ensuing from an analysis of current changes in employment status which are precise enough to be operational but general enough for each country to be able to adapt them to its own circumstances[40].

2.1 Employment, work and activity

To escape the influence of employment in our understanding of people=s occupational status, we have to start with a different systems. On the one hand, there is a need to preserve the employment relationship as far and as extensively as possible. On the other hand, we must endeavour to alter the non-employment status, guaranteeing a minimum amount of social protection. In this case, the unions would have to become more A*co-operative*@ and less confrontational. They would need to offer services managing flexibility and human resources, rather than playing the part of the industrial rearguard in a post-industrial society.

Neither of the two strategies is really satisfactory. Both divide society in two. The first, in particular, could have the perverse effect of turning labour law into an elitist and corporatist form of protection for the happy few who enjoy the status of wage-earner.

comprehensive review of working life not just limited to paid work. In building up the concept of employment we have ignored all non-marketable forms of work, such as training on one=s own initiative or unpaid work. The concept has also developed in contrast to self-employment, incorporating the split between the private and public sectors. The reason is because paid employment, as an occupational status, is merely the projection of Employment as an exchange value on the labour market. Accordingly, the employment relationship is taken into account by labour law only in so far as work is the subject of a contract. The difficulty nowadays is to perceive the occupational status of persons as extending beyond the immediate contractual commitment to their work to cover the diverse forms of work experienced during one=s life.

Non-marketable forms of work are in fact those most crucial to humankind. A general strike might bring the market to a temporary halt, yet it would not jeopardise the survival of a country; (France regularly indulges in such brouhaha). Nevertheless, society could not survive for more than a few days disruption of the domestic work which secures every day life. It is this unremunerated work which bears the real burden of economic life and markets. Japanese men could not work such long hours, for example, if their wives did not assume sole responsibility for the upbringing of their children at the cost of complete or partial withdrawal from the labour market on marriage. Disregarding these close ties between work inside and outside the market is tantamount to disregarding both the circumstances of people=s lives and those of the market, and setting a course for disaster. Treating work as an infinitely flexible A*resource*@ compromises not only workers= living conditions but also the conditions under which their children are brought up.

Furthermore, the issue of occupational status must now include the requirements of equality between men and women, continuing training, the undertaking of activities of common benefit and career choice. That means that various forms of work must be perceived more through what they have in common than through their differences. It is along those lines that we can hope to define an occupational status which reconciles diversity and continuity in working life.

Very encouraging forward-looking considerations have been put forward in that direction in France, including the idea of

40. The following discussion draws heavily on analyses previously published in *Du bon usage des lois en matière d=emploi*, in: *Droit Social* 1997, 229.

the activity contract presented in the Boissonat Report[41], and developed by Thierry Priestly[42]. The great merit of the

41. *Le travail dans vingt ans*, Commissariat général du Plan, Paris, O. Jacob, 1995, notably, pp. 278 et seq. and the proposal of a *Statut de l'actif* pur

42. TH. PRIESTLY. *A propos du contrat d'activité*, Droit social, 1995, 955, and the proposal of a *Statut de l'actif*, in: *Droit social*,

proposed activity contract is to draw attention to the need to develop an occupational status which breaks with referring only to employment and makes undertakings seek viable alternatives to this model. Its weakness lies to some extent in the antithesis of its merits: its purely experimental and voluntary nature. Rather than any contract *per se*, it is legal status that should be at the core of debate on seeking ways for people:s in any labour market contractual arrangements. Moreover, the notion of activity is too imprecise to be legally relevant. Activity is an integral part of life, the social rights connected with life are universal social rights. Accordingly, the reference to activity is not appropriate as a way of providing a basis for specific rights.

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The only concept which extends beyond employment without encompassing life in its entirety is the concept of work and it is therefore the only concept which can provide the basis for occupational status. The distinction between work and activity should not be made by the nature of the action accomplished (the same mountain walk is a leisure activity for the tourist but work for the guide accompanying him). Work is distinguished from activity in that it results from an obligation, whether voluntarily undertaken or mandatorily imposed. This obligation may result from a contract (employed person, self employed person) or from legal condition (civil servant, monk). It may be assumed against payment (employment) or without payment (voluntary work, traineeship). But work always falls within a legal relationship. That is why we can speak of school work although school attendance is compulsory, work in the domestic sphere although the bringing-up of children is a duty linked to parental authority, the work of elected representatives while procedures for loss of office apply to those not fulfilling their remit properly, etc. It is necessary and sufficient that the effects of law be attached to a commitment to act for such action to be described as work. This status depends ultimately either upon a voluntary commitment or on the law enshrining the social usefulness of certain tasks.

2.2 The four circles of social law

In considering the future of social law (in the broad sense: labour law and social security), some experts maintain that a recovery in employment is the only way of providing funding for social security once again and of giving everyone a genuine occupational identity. Other advocate, on the contrary, a complete break between social protection and work, with universal minimum social benefits and leaving the rest to market forces. The disadvantages of these theories is that they put all social rights on the same footing, whereas history has demonstrated, on the contrary, that we must distinguish between social security risks and degrees of dependency in employment relationships. They also confuse work and employment: in-between employment and citizenship they consider that there is nothing on which specific social rights could be based. This is broadly refuted by scrutiny of positive law where social rights fall into four concentric circles.

- The first circle covers *Auniversal@* social rights, that is rights guaranteed to everyone irrespective of any kind of work. This *Auniversal@* coverage applies today in the case of family benefits. It applies more or less in the field of health care insurance. It remains a principle as regards entitlement to vocational training.
- The second circle covers rights based on unpaid work (care for other people, training on one=s own initiative, voluntary work, etc.) Such work is in fact recognised under social law. Many texts attach rights or social benefits to the pursuit of socially useful activity (that is unpaid work: e.g.: retirement benefits linked to child rearing, accident coverage for certain kinds of volunteer work, etc.).
- The third circle covers the common law of occupational activity whose bases are to be found both in Community law (health and safety, for instance).
- The fourth circle covers the law relating to paid employment which contains provisions directly connected with subordination only and provides for a scale of rights related to the degree of the subordination.

The principle of equal treatment for men and women, however, applies to all the four circles.

This typology could provide a useful framework for defining an occupational status covering people from cradle to grave and covering both periods of inactivity proper and periods of training, employment, self-employment and work outside the labour market. The paradigm of employment would thus be replaced by a paradigm of occupational status of persons, not defined by pursuit of an occupation or a specific job, but covering the various forms of work which anyone might perform during his/her life.

2.3 Social drawing rights

This occupational status of persons must incorporate the need for freedom of work, understood as a practical freedom, and must facilitate change from one type of work to another. This is essential to rule out the risk of becoming stuck in a given work situation. Providing for individual freedom in the definition of social rights means departing from the prevailing perception of these rights, which have been regarded as the counterpart to risks or specific constraints. This perception is linked in part with the view of the employed person as passive and subject both to the risks of life and to the burden of subordination.

Here again, however, scrutiny of positive law reveals that a different legal figure has emerged: the worker entitled to switch from one work situation to another. The first measure introducing this right of initiative was doubtless the granting of time off to employees holding a position of collective responsibility (staff representative); in the same vein, special leave and the right to absence (which have increased in recent years); training leave; time saving accounts; assistance for the unemployed creating or taking over companies, training vouchers, etc. We are surely witnessing here the emergence of a new type of social right, related to work in general (work in the family sphere, training work, voluntary work, self-employment, work in the public interest, etc.) Exercise of these rights remains within the bounds of a previously-established claim, but they are brought into effect by free decision of the individual and not as a result of risk. This twofold feature can be seen in the terms frequently used for these rights: accounts, credits, savings, vouchers, etc. These new rights could be described as *social drawing rights*.

They are *drawing* rights as they can be brought into effect on two conditions: establishment of sufficient *Areserve@* and the decision by the holder to make use of that reserve. They are *social* drawing rights as they are social both in the way they are established (different ways of building up the reserve) and in their aims (social usefulness). In contrast to the holder of a bill of exchange, the *Adrawer@* has a right only with a view to a specific social purpose. His personal right is a functional right which cannot be transferred to a third party at will. However, the social usefulness of the function provides for the undertaking or the community to build up the reserve. This concept should be clarified by distinguishing between the two facets of this type of right.

They operate firstly by releasing time and the procedures

differ at present according to whether the rights are used under an employment contract, whether it is suspended or whether they fall outside such a contract (usually following termination). The problem of the continuity of the legal, occupational condition arises in different ways according to the above situations. In the context of an employment Secondly, social drawing rights provide for work to be funded outside the market. Such funding is most frequently on a joint basis. The reserve can thus be built up: by the State (this is the case in most tasks of general interest), by the social security services (for example: benefit subject to having a dependant), by joint mutual insurance bodies (training leave for example), by undertakings (continuity of employment contract, time off, parental benefits, etc.) , or by the worker himself, who may supplement the other contributions (time-saving account, use of holiday entitlement, giving up part of

contract, such time may be regarded as working time for the purposes of the benefits connected with continuity of the contract. Outside that context, various techniques have been applied, including treating such time as working time under social security law.

previous income, etc.).

There is no general framework for this heterogeneous set of rules which could amalgamate all the consequences of the principles of continuity and mobility inherent in the occupational status of persons. Nevertheless, the employee with full-time, open-ended subordination is surely not the only model for working life. Another figure can be discerned on the horizon: a worker who can reconcile security and freedom.

Chapter 3 B Work and time

Introduction

In pre-industrial labour relations, the question of time and its measurement never acquired the importance it has today. Since such relations were seen more in terms of a personal connection than an exchange of services, the issue of measurement, keeping detailed accounts of working time, simply made no sense.

This pre-industrial view still prevailed, for instance, in the relations between master and servant in the Swedish regulations of 1833. Servants were hired on a yearly basis (from October to October), the relation was tacitly renewed and could not be cancelled at just any time. Masters had to continue to attend to their servants: needs when they were ill or old, in view of their many years of loyal service. In return, servants did not count their working hours and were at their masters: permanent disposal. These regulations were not formally abolished until 1926.

The industrial revolution imposed another approach to time, in which the Taylor model for organisation of work was seen as the ideal. With the A*scientific organisation of labour*@ advocated by Taylor A*the stop-watch made its way into the workshop*@[43]. Under this analytical view, the time line is divided into homogeneous and abstract moments, defined prior to any specific action, leaving no room for uncertainty. Such coding of work has both qualitative and quantitative aspects[44]. Qualitatively, it provides a precise definition of the coordinates of optimum action, establishing a strictly frugal A*code of motion*@. Quantitatively, it measures the productivity of movements and enhances their intensity. The latter calls for a control mechanism along the assembly line itself rather than a strictly centralised hierarchy. The pace of work is set from outside by the A*conveyor belt*@, that new technique making it possible to keep workers at their respective work stations by mechanising carriage of the parts on which they work. Machine settings constitute a way of controlling the productivity of effective working time. Moreover, meticulous and authoritarian supervision provides for strict monitoring of the adequacy of even the slightest movement.

This new approach to time became an integral part of a model of labour relations, whose major features were as follows:

1) Hierarchical dependence on the company manager;
2) Exclusive nature of the relationship with the employer, which lies at the root of the permanent nature of the employment contract, as well as the obligation to be A*loyal*@ and A*discreet*@ that many legal codes require of workers;
3) Integration in company organisation.
4) Worker obligation to make his time available to the employer (within the limits of the employment contract);
5) Fixed work schedule and patterns for organisation of work to be done.

The above, broadly speaking, covers the basic characteristics of the model for regulating work in medium-sized and large enterprises. Obviously, that general outline leaves room for specific national or regional regulations; likewise, the social security system has a substantial effect on women:s participation in the labour market: in Europe social security has usually led to an employment model built around a primarily male A*family breadwinner*@. Recent historic analysis has shown that that model was unevenly and more or less belatedly disseminated and systematised, depending on the country. Today, Fordism seems more and more to have also been, in a way, a widespread scale against which production patterns were interpreted, and which tended to tone down certain persistent differences[45].

43. B. CORIAT, *L'atelier et le chronomètre*, Paris, Christian Bourgois éditeur (Choix-essais), 1994, 12.
44. B. CORIAT, *op. cit.*, 62-63.
45. C. SABEL et J. ZEITLIN, *World of Possibilities: Flexibility and Mass*

This model was the axis on which so-called *AFordist@* productive entities turned, since with the success of standardised mass production, the patterns for organising working time and work schedules tended to become more stable. The introduction of shifts (generally on the basis of two 8-hour shifts, 5 days a week) made it possible to increase production levels and therefore the level of utilisation of equipment while technological innovation ensured higher productivity per work unit.

Labour law systematised that model. Time was conceived as an objective reference that could be used to regulate working relations, both individually and collectively (A). Doubts have been cast on this conception in view of recent changes, leading to individualisation and greater heterogeneity of working time (B). That, in turn, has meant laying down new perspectives for labour law, in which time is perceived in a personal and subjective dimension (C) [46].

46. The point of departure for this chapter was the summary report by Prof. Mingione and Barbieri. Certain of the analyses reworked here ensued from prior works by the members of the group of

experts, where more thorough discussions of them can be found (J. DE MUNCK, *How to regulate working time? From the homogenization to the proceduralization of time*

, in press; A. SUPIOT, *Temps de travail: pour une concordance des temps*, in: *Droit Social* 1995, pp. 947-954, published in English in *The International Journal of*

A) Working time as an objective reference

From the legal standpoint, the reference to time has played a dual role in labour relations: on the individual level as a way of measuring subordination and therefore wages[47]; and,

47. On the advent, in Anglo-Saxon political economy, of the idea whereby

Comparative Labour Law and Industrial Relations, Vol. 12, n° 3, 1996, pp. 195-212

, et in Italian in: *Lavoro e diritto*, 1997/1, 15-34). *A Work is time@, see:*

collectively, as a way of establishing discipline and therefore solidarity.

1) Measure of subordination

D. MÉDA, *Le travail, une valeur en voie de disparition*, Paris, Aubier, 1995.

In labour law, the reference to *working time*, on the one hand, limits the employer's hold on the worker's life and on the other allows the employer to evaluate his services. Time is at one and the same time a limit to worker obligations and a standard against which to value what labour is worth. The legal limitation of working hours and a model for working life thus defined lead to considering *working time* and *free time* as contradictory terms and make very light of unpaid work.

1.1 The legal work week

With the exception of the United Kingdom, all European countries have a legally defined work week. In the United Kingdom, regulations limiting the working week will take effect on October 1998.

Legal work week:

Regulation of working time

	Legal annual weeks	Contractual annual weeks	Legal weekly hours	Contractual hours	Maximum annual over-time (hours)	Restriction on night-work (0-2)	Summary restrictions rank*
Belgium	46.14	44.14	38	38	200	2	5.0
Denmark	47.14	47.14	39	37	144	0	2.0
France	46.94	44.84	39	39	233	1	7.5
Germany	46.94	44.53	48	38	540	1	6.0
Greece	47.34	45.14	40	40	135	1	10.0
Ireland	47.54	46.34	48	39	300	0	3.5
Italy	48.14	48.14	48	39	363	1	3.5
Netherlands	46.74	45.64	48	38	540	2	7.5
Portugal	45.34	45.14	48	42	120	1	11.0
Spain	44.34	44.44	40	39.5	80	0	9.0
UK	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	1.0

* Summary restrictions on overtime, flexible, weekend and night work (Source: Grubb & Wells, OECD ECONOMIC STUDIES, N° 21/1993).

It is in this framework, in terms of time, that the Fordist production model took root and developed. Its main characteristic is the formal standardisation of working hours. Such standardisation was directly linked to the organisational characteristics of the mass production of standard articles.

By contrast, the world of self-employment eluded this aspect of the model. There was a dual system in which normal paid working time co-existed with other ways of organising time (agriculture, small shops, family enterprises or free-lance professionals). Indeed, the only limitation that could be imposed on the working time of self-employed workers ensued from the nature of the products and services offered (agriculture and other seasonal activities), market organisation (for instance, rules on closing shops on Sundays) or provisions relating to health and safety (such as restrictions on driving time in road transport).

Inside large Fordist companies, the model is somewhat rigid, as regards both production and the organisation or work, working time and schedules; in all others, with the exception of specialists and maintenance crews, it was the rigidity of the technological solutions in use that determined the rigidity of the ways time and working schedules are regulated, calling for regulations covenanted with trade unions. The extreme rigidity This feature is still in place today. The development of non-standard/flexible work that has developed over the last twenty years is in addition to, not in lieu of, the primary source of flexibility, which is overtime. To understand this, account must be taken of what might be defined as the European style of production and work organisation (or better yet, continental European, since the situation is different in this regard in the United Kingdom). Here emphasis must be placed on the diversity of the various kinds of capitalism[48], which do not all of technological solutions makes them fragile and thereby enhances the *negative power* of organised labour. For this reason, the general flexibility of production times must necessarily be regulated via collective bargaining between management and labour. The latter, in turn, become (formally speaking, at least) spokesmen, in their demands, of what continues to be, at such stage and under such an organisational model, the priority aim of workers; the reduction of the work week, i.e., mass working time.

In a traditional industrial setting the main way to adapt working time to the needs of industry is to resort to *overtime*, i.e., hours worked beyond the legal work week. Such time is usually paid a higher rate. Its use is regulated in different ways in different countries, but generally speaking there are two kinds of regulation. Firstly, the definition of a *maximum number of working hours* that may not, in principle, be exceeded. And secondly by systems calling for *prior authorisation*: such authorisation may be required either from the first hour of overtime or after a certain number of legally or conventionally defined hours. Such regulatory conditions are never very restrictive and the recourse to overtime has constituted the main way to flexibilise working time in all European countries.

48. C. CROUCH et W. STREECK, *Les capitalismes en Europe*, Paris, La

conform perfectly to the single model proposed in this respect by standard neo-laissez-faire economic theory. The existence of a stable and skilled (such as in Southern European countries, in particular Italy) or highly skilled (such as in Germany) workforce constitutes a the foundation for diversified and high quality production in continental Europe. The recourse to overtime makes it possible to adapt the volume of this human resource to market demands, without having to resort to further hiring or redundancies. When new needs arise companies prefer to use their permanent and skilled staff rather than to have to hire new personnel, which entails high costs and uncertain performance.

1.2 Working life

The normal kind of employment (permanent, full-time work) has been associated with a normal kind of working life. Taken as a cognitive model, the salary-based relationship that corresponds to that pattern constitutes the definition of normal and standard work, which Ulrich Mückenberger calls the *ASER (Standard Employment Relationship) model@*[49]. Under such a model employees typically work full-time on a permanent basis for the same concern for their entire career, with promotions as appropriate. This standard can be used as a reference, in terms of which more or less all other kinds of work are conceived or structured.

Generally speaking, time as defined by labour law was what might in effect be termed *homogeneous* time. *Substantially,* what is involved is the establishment of a stereotype of *Anormal time@* corresponding to a standard salary-based model. That is to say, there is a set time that defines a standard working day (from 8:00 a.m. to 5:00 p.m.); a standard work week (more or less 40 hours, from Monday through Friday, with the week-end *Aoff@*); a standard working year, with customary, seasonal leave time (Christmas, Easter and summer holidays); and, in short, that determines the framework for a standard working life, consisting of apprenticeship during youth (not postponable or repeatable during adult life), working years, and finally retirement during old age (beginning at 60 or 65). Consensus based on that model makes it possible to synchronise education, social and economic time. The *formal* aspect of that rule lies in its general, standard and *a priori* nature. The rule governing time is not open to question in terms of constraints on individual action or preferences.

Sociological analysis would demonstrate any number of informal practices generated by such formalism (evening work among teachers and executives, weekend work, etc.), as well as the importance of the sectors that have in fact escaped the Fordist model.

The situation is completely different among small and medium enterprises, which today form a majority. A distinction must be drawn between small enterprises with very specialised labour (particularly in certain manufacturing and hand-craft industries) and marginal or semi-marginal enterprises that adopt competitive strategies based on price and are, therefore, interested in maximum saturation of working time. By contrast, in small specialised companies, work is barely standardised and workers are often in possession of know-how that allows them a good deal of operational independence and a large amount of control over their own working conditions. Under such circumstances, negotiation of working time often becomes a kind of personal agreement in which the skilled worker sets the price of his/her own professional experience and technical expertise. It is not by chance that under such circumstances, it is rare to find professionals or skilled workers who prefer regulated working times and production schedules; they prefer, rather, to set their own schedules, especially if that involves some financial advantage, such as piece-work or overtime.

The literature on industrial sectors in Italy and more generally, the *Athird Italy@* model, together with the large number of micro manufacturing firms in certain regions of Southern Europe, has revealed that in fact in small companies working time and work schedules have been regulated to rise to the challenge inherent in demands for flexibility largely by combining the elements of the formal regulation of work schedules (legislation, collective agreements, company-wide agreements) with informal solutions.

Nonetheless, such proliferation of informal models has not, for a long time, entailed any challenge to the formal and official standard. It is not until the plurality in the forms of co-ordination and work that goes hand-in-hand with the surge in product and service diversity can no longer be confined to the informal domain B where Fordism had hitherto relegated them B that the crisis hits. Such plurality *Aovertakes@* Fordism's formal standard, questioning it *as an ideal,* which is exactly what occurred in Western countries after the 1973 economic crisis. Homogeneous time is no longer the central reference for regulating time.

That time norm related to a reciprocal commitment between employers and employees, a commitment that benefited both[50].

49. U. MÜCKENBERGER, *Non-Standard Forms of Work and the Role of Changes in Labour and Social Security Regulation*, in: *International Journal of the Sociology of Law,* n1 17, 1989, 381-402.

50. D. SOSKICE, *Wage determination: the changing role of institutions in*

Employers obtained in-house trained labour that accepted the Fordist-Keynesian *commitment* which, even from the ideological viewpoint, favoured growth; workers, in turn, were afforded the security associated with internal labour markets (union protection, fringe benefits, training, internal promotion, etc.). Such an exchange benefited primarily male labour employed in the manufacturing industry. By contrast, women were essentially relegated to a reproductive role and had access to the labour market under less favourable conditions.

1.3 Working time and *free* time

The approach to time in that model of industrial rationalisation leads to considering working time, likened to subordination time, and *free time*, likened to inactivity, to be diametric opposites. Directive 93/104 of 23 November 1993 reinterprets such opposition in its own way by classifying as a *rest period* any period during which the worker is not at the employer's disposal[51].Time measured as the term of execution of the contract is insulated from the contracting party's life time, thereby legally ratifying the economic fiction that work is detachable from the worker. Such fiction veils everything that in economic life is not directly subject to the logic of exchange.

1.3.1 Reproductive work

51. See: *Directive 93/104 concerning certain aspects of the organisation of working time*, arts 2-1 and 2-2.

Oxford Review of Economic Policy, n° 1, 1990.

Separating working and free time in this manner ignores, firstly, reproductive work, i.e., on the one hand household work and child-rearing, reserved primarily to women (domestic chores, care and upbringing of children) as well as academic and vocational training (with the exception of apprenticeship). It also ignores time constraints associated with work-related activities, in particular the time needed to get to work from home or free time in fact spent working (as in virtually all creative jobs or jobs involving responsibility, which weigh on the mind long after actual working hours).

The work thus performed during *Afree@* time is not counted as working time (in particular by major economic indicators). As essential to the survival of society as air or water, it is treated, like them, as something in unlimited supply; it is considered under another conception of time: *Aion*, the eternal and inexhaustible principle of creation, and not *Chronos*, the devourer of energy, which presides over paid work[52]. Just as no provision is made in the accounts for the industrial world=s impact on the most essential environmental resources (air, water, land), that world likewise ignores the actual place that work occupies in a person=s time. That *actual burden of work* should be the sole item relevant to the use of the *Ahuman resource@*. What in fact happens is that part of the cost (reproduction, commuting costs, etc.) of the human resource used by employers is borne by wage earners or society as a whole.

1.3.2 On-the-job inactivity

Conversely, considering working and rest time as contradictory terms leads, in principle, to ignoring on-the-job inactivity and obliges employers to pay for working time, regardless of how efficiently or inefficiently it is used.

French law, for instance, provides that *Aeffective work@*, within the meaning laid down in art. L.212-4 of the Labour Code, whereby the wage earner is at the employer=s disposal at the workplace in order to be able to set to work if needed, but without having to participate in any task, no matter how minor, must nonetheless be paid at the same rate as normal working hours[53].

This favours the employee, but not the employer. Directive 93/104 seeks to reduce the consequences of such situations. Working time is not actually defined therein simply as a *Aperiod during which the worker is (...) at the employer=s disposal@*; the worker must, in addition, be *Aworking@*, *Acarrying out his activities or duties@* (art. 2-1). But this leaves the door open to classifying the time that an employee must be at the employer=s disposal as free time! The appearance in our law of such an illusion reveals that time cannot be used as the sole unit of measurement of work and that the boundary between free time and working time is becoming blurred.

1.3.3 Consumption time

Ultimately one of the major features of the model was to characterise free time as consumption time, which constituted a crucial break with earlier capitalistic treatment of non-work. In the latter case, non-working time was considered simply as recovery time, workforce reproduction time. Fordism tries to subject workers= aspirations to enjoy leisure time to its own constraints: non-working time becomes time to be spent freely, rather than merely as reproduction time. This was a *Afirst@*, an innovation that gave workers *Apackages@* of free time: they had weekends off or *Aholidays@* on a regular basis. But this new movement in the history of time cannot be understood without taking account of the new *consumption rule* prompted by Fordist standard and generic products. Aglietta, contrary to mainstream Marxist theory, draws attention to its effects on global regulation[54]. The consumption of standardised

52. With respect to these two conceptions of time, see. E. PANOFSKY *Father Time*, in: *Studies in iconology*, Oxford University Press, 1939, French translation: *Essais d'iconologie*, Paris, Gallimard, 1967, ch. III: *Le Vieillard Temps*, pp. 105 s.

53. Soc. 15 févr. 1995, (Dulac), in: *Droit social*, 1995, 381, obs. J. SAVATIER (night watchmen at a retirement home).

54. M. AGLIETTA, *Régulation et crises du capitalisme. L'expérience des Etats-*

products by the working class became the major activity during the leisure time granted during the New Deal.

According to historian Gary Cross, during that period (the thirties) the objectives of free time were themselves gradually equated to the ability to consume or to dream of a consumer's paradise [...] Free time lost its status as a goal in itself, a result of productivity but freed from iron-clad economism. Instead, it became the road to a kind of mass consumption that would be able to absorb industrialism's unlimited potential[55].

55. G. CROSS, *Time and Money. The Making of Consumer Culture*,

31. London/New York, Routledge, 1993, 77. [Quoted literally in the French text and paraphrased in the English version, because the translator did not

Thus, the distribution of standard goods and services successfully competed with the informal, rural or semi-rural economies around which domestic activity was organised prior to Fordism.

2) Collective discipline

Time serves to set a pace to men=s and women=s work, to set common tempos and schedules. Such schedules and tempos, be they defined by employers or imposed by machines, keep time for workers, much as the conductor or the *baso continuo* does for musicians. This synchronisation of workers= lives mechanically breeds two kinds of solidarity.

2.1 Working time and collective organisation

Standard time as imposed by work leads, first of all, to *solidarity among workers* subject to the same schedules and tempos: working and organisational solidarity, solidarity in combat. Labour law itself establishes the main forms of solidarity among workers in connection with the collective organisation of working time. Working time, understood in the strict sense of time in service, has been used in the negative to define the time of collective independence, whether that concerns the freedom to form trade unions, to be collectively represented in companies or to strike. A universal abstract, A*working time*@ tends generally to mask the fundamental heterogeneity of work performed and the resulting experience with respect to time. Such identity of legal treatment has also contributed to forging solidarity among workers.

2.2 Working time and urban time

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h a v e a c c e s s t o t h e s o u r c e . T . N .] .

The synchronisation of workers= lives leads, furthermore, to a *solidarity between working time and urban time*, the latter (time spent in schooling, commuting, leisure, etc.) being geared to the former. Such solidarity is not ignored by the law, either. The organisation of working time was devised to leave time B the opposite of working time B for social life, at night, on Sunday, during paid holidays, or for education. The collective disciplines deriving from working time are also reflected in the rules governing commuting time, increasingly longer and more dangerous.

But the reduction of working time favoured by the Fordist model has led especially to the standardisation of consumer time. This was indisputably the main innovation of that model. It had to organise a normative context that would allow women to pull themselves away from their kitchens to spend time shopping at fashionable boutiques. Children had to be enticed away from vacant lots and back yards to amusement parks, beaches and Walt Disney films. The move to mass consumption involves a redefinition of lifestyles. This is why free time is only appreciated to the extent that it lends itself to A*over-determination*@ thanks to a production apparatus *conforming* to the rule. But there was an inherent contradiction in that reduction of time devoted to work: freeing time and simultaneously dashing the hopes that had been placed in it, it provided a space for freedom and diversification in individual and community life=s choices.

The Fordist consumption regime is new not only because of its content, but more importantly because of the way it works. It is not a formal, a customary or a contractual rule. It is not imposed by statutory authority, contractual negotiations, community authority or even tradition. It works rather via systematically organised *persuasion*. Consumer space is controlled by new powers that impose themselves via marketing and publicity. As in the Taylor-model workshop, the intention is to intensify flows and standardise action. The mere fact that it is positioned in a time considered to be A*leisure time*@ subjects the operation to other patterns. Psychological suggestion becomes a privileged tool for controlling behaviour: mass mimicry, a legitimate avenue. There is an attempt to co-ordinate the actors in the consumer domain, and thereby to co-ordinate such domain with the production domain.

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Measure of subordination; collective discipline: from these two standpoints, working time is measurable and divisible, abstract time that can be readily quantified. And it relates to equally abstract work, defined as subordination subject to payment, a pre-requisite to worker collective organisations.

The traditional concept of working time arranges the world around two poles. On the one hand, there is the pole of measured time, comprising recognised and paid work, workers, and occupational solidarities; this is male time *par excellence*, to which women must conform if they intend to partake of it on an equal footing[56]. On the other hand, there is unlimited time, female time, a space populated primarily by retired workers, women and children[57], their poorly understood and unpaid work, non-occupational solidarities, rest, consumption... This bipolarity no longer describes today=s world.

B) Fragmentation of Working Time

The new forms of working organisation have had a marked impact on Fordist model balance. An analysis of such changes is requisite to understanding the new concepts of time emerging in labour law.

1) Changes in work organisation

Capitalism had, by and large, forced labour to fit into a formal-hierarchical system of time. But that age-old tendency is showing clear signs of exhaustion, at least in developed countries. New kinds of relationships with time are appearing in the way work is organised on the job as well as in workers= lives. The effect of employment policies on working time contributes even further to these new trends.

1.1 Organisation of work in businesses

This change appears, sporadically, in the manufacturing sector, where new management methods, coming particularly from Japan, modify time relations. It becomes even clearer in the developing tertiary sector. In both cases it is ultimately undermining the model based on homogeneous time.

1.1.1 In the manufacturing sector

In the mass production new institutions are reworking the organisation of labour. The reference here, of course, is to the different variations of A*ohnism*@[58], which departs from the

56. See the earliest provisions allowing women in management positions and positions of responsibility and to work at night: those functions enabled them to participate in male time...

57. And even men, since they have taken to doing domestic chores!

58. B. CORIAT, *Penser à l'envers. Travail et organisation dans l'entreprise*

Taylor principle of analysing time and motion, to rethink the terms of mass production. This *Ajust in time@* model, better adapted to the context of uncertainty that characterises contemporary economies, tends to spread more or less throughout all industrialised countries. The characteristic feature of the model is that production patterns are not established *a priori*, but rather are matched to short-term vicissitudes in demand. This translates, within companies, to a reduction in stocks and multi-skilling among workers: assembly lines can be speedily altered and reconfigured to favour rapid qualitative and quantitative reprogramming of production. Control, in turn, no longer follows the hierarchical and pyramidal structures characteristic of enterprise: intensification of control goes hand-in-hand with *Aflattened@* management structures and the deployment of incentive and profit-sharing mechanisms [59].

59. B. CORIAT, *ibidem*.

It is nonetheless true that this kind of labour organisation does not constitute a break from the objectives of Taylorism (intensifying work) or certain of its features (even if it incorporates some restricted diversification, production is still oriented towards standard products, sold under aggressive marketing methods). From this perspective, those who see some neo-Fordism in the model are not misguided[60]. Nonetheless, this partial change does not leave the principles of the organisation of working time unaltered, given that it involves flexibilisation of schedules and pace, which depend more on effective demand than on *a priori* programming of supply. In such a context, slavish maintenance of a standard schedule becomes an obstacle to cost rationalisation.

1.1.2 In the tertiary sector

Service profitability principles are only partially susceptible to the economies of scale characteristic of industrial products. The creation of added value is contingent upon the quality of the interaction that links the service provider and the beneficiary. The expansion of the service society imposes even greater diversification of time regimes: compulsory services which must be provided around the clock and at-home assistance; various kinds of consultancies; new services associated with communication demands (work in the media, financial and commercial services connected to international networks, in which working times and schedules depend on time zones and financial or commercial exchange business schedules). Tertiarisation of cities as well entails a demand for social entertainment (theatre, museums, social services), imposing new scheduling for the enjoyment of certain services that inevitably involve working time restraints.

In Sweden, for instance, the public sector employed 21% of the working population in 1970, 27% in 1980 and 30% in 1990. In the private sector, service activity has grown even faster, employing 39% of the population in 1992. That same year

60. ST. WOOD, *Le modèle japonais: postfordisme ou japonisation du fordisme?*, in J. P. DURAND (ed.), *Vers un nouveau modèle productif?*, Paris, Syros. (Alternatives économiques), 1993.

industry employed no more than 20% of the population[61].

It is quite obviously in this sector that the deconstruction of the formal-hierarchical approach to time is making the greatest progress. It is being replaced by a contractual approach, in which the customer is included as one of the essential components. Thus, in many European countries (Great Britain, the Netherlands, France), there is a movement to extend store and service hours that involves a marked impact on their employees= living conditions and entails the destruction of the last haven of community time that sets the pace in urban life (namely, Sunday rest).

In several countries (France, Germany, Belgium) employees are known to be strongly in favour of a Sunday rest rule despite the campaigns aimed at encouraging social demand for opening stores on Sunday. For similar reasons, there is strong resistance among employees accustomed to a 5-day week to work on Saturday. By contrast variable schedules (à la carte scheduling) were very successful among workers in the seventies and trade unions were forced to withdraw opposition to the idea. Parental leave is also reasonably popular, as is leave for training, where available. All this leads to a belief that the individualisation of lifestyles and behaviours co-exist, for workers, with the desire to continue to lead a normal social life especially, but not exclusively, as far as family is concerned.

1.2 Organisation of working life

The change in the rules around which work is organised entails the erosion of the employee-employer relationship itself. The archetypal model of A*normal*@ timing of work is being questioned.

Such questioning appears via several channels. It may be an outcome of employment policies that favour part-time work or negotiated reductions in working time (see below ' 1.3.). Or it may be the consequence of social security policies. The setting of retirement age, for instance, is subject to contradictory measures. On the one hand employment policies may lead to reducing the retirement age or resorting to *en masse* early retirement to increase the demand for labour. On the other hand, demographic trends and the lengthening of life expectancy lead to lengthening the amount of time contributions are paid to be able to obtain a full retirement pension. On the one hand labour law favours career breaks and alternating full-time and part-time work and periods of inactivity. On the other, the pension system makes more stringent demands on workers to be eligible for a good pension. All of this leads to individualisation of the retirement age and the forms that retirement leave takes.

Another factor leading to individualisation is the sharp rise in non-standard forms of employment, such as fixed-term contracts or temporary work. Holding several jobs and black economy work become perfectly reasonable strategies for workers, which leads to the development of an informal, i.e.., illegal, sector, where A*second jobs*@ prevail among a population subject to casualised working conditions.

Individualisation is, finally, the outcome of new ways of managing working time. Surveys confirm growing individualisation of working time and a substantial reduction in the proportion of employees who have the same pattern every day or work the same number of days every week.

In France[62], the number of employees working a variable number of days per week grew from 11.1% to 14.7% from 1984 to 1991. But the relative weight of variable schedules due to management demands held steady (24.7% in 1984 and 24.3% in 1991), while the share of free schedules A*chosen*@ by employees increased (à la carte schedules and free schedules, which rose from 16.1% to 23.1% in the same period). In this regard, the diversification of working time is not primarily a result of the new forms of organisation open to collective bargaining. This rise in schedules determined individually involves essentially two categories of occupations: executives and professions of an intellectual nature and company administrative and commercial personnel. By contrast, among manual workers and white-collar employees, it is usually the employer who imposes non-standard schedules. Thus, the proportion of shift workers grew from 25.5% in 1982 to 34.1% in 1990. J. Freyssinet (op. cit. p. 192) observes that A*the forms that have given rise to the greatest controversy (annual hours, weekend shifts, women=s night work) constitute, as a whole, only minor mechanisms for flexibilising working time. The traditional tools (overtime, partial unemployment) still play the main role*@, a comment which should be extended to include part-time work, which has grown substantially since the early years of this decade.

61. SoU 1996: 145, p.576.

62. Cf. J. FREYSSINET, *Le temps de travail en miettes*, Ed. de l=Atelier, 1997.

In Great Britain, the absence of legal restrictions on the organisation of working time has facilitated the diversification of work organisation. Only 10% of the employees in the United Kingdom work 40 hours a week (and only 40% usually work from 36 to 45 hours a week). In a very few cases, highly unusual models have begun to appear, for instance: working nine out of fifteen days; contracts with an annual number of hours, with a higher number per week during periods of greater activity and a small number the rest of the time; work weeks of from 4 to 10 hours.

Thus, the homogeneous time model fostered by labour law no longer suits the new circumstances prevailing in the productive world. This explains the pressure building up to flexibilise working time rules, such as annualisation of the employment contract or even radical measures such as the abolition of the legal work week. This notion is likewise challenged by the new way uncertainty is managed, which calls for a high degree of flexibility on the part of companies... and individuals.

Unless account is taken of this change in the production time system, there is a very serious risk that the effects of flexibilisation and the allegedly *Anecessary@* reduction of working time may be misjudged. Indeed, paradoxically, it would appear that whereas we work less, we are nonetheless overworked. The key to this paradox can be found if account is taken of the fact that the quantitative reduction of working time goes hand-in-hand with a qualitative change. Taylorism segmented tasks, depersonalised work to make employees replaceable. Today, a substantial part of production has been repersonalised by virtue of the overall change in the direction of production towards the tertiary sector, calling for more subjective involvement on the part of the employee. A mere quantitative description of working time disregards these profound qualitative changes, which lead to a new and very complex situation where reduction in time may go along with intensification of service (or with ongoing effective, *Ahidden@* work, such as in the case of executives)[63].

In France workplace inspectors report a growing tendency among companies to demand a degree of after-hour availability of their employees, with no legal recognition of any kind for such overtime. Generally speaking, deregulation (backed by company-wide *Aagreements@*) of the organisation of working time makes it more and more difficult to control and therefore to obtain any practical understanding of actual practices involving after-hour work. Many abuses have been reported in very diverse lines of business (see the case records put together by the workplace inspectors form the Rhône-Alpes Region, *ALa ruée vers l=heure des nouveaux temps modernes@ CFDT B Voix du Rhône* No. 330, March 1997).

This is why labour law can no longer consent to govern working time in terms of a homogenous rule with purportedly mechanical effects.

63. Daniel Mothé has rightly pointed out that the *Adetaylorisation@* of work involves an increase in the *Ainvisible@* part of work in the lives of employees. The latter are subject to increasingly stiff competition among themselves, which in the tertiary sector involves acquiring a command of the *Ainfomation universe@*. Such competition takes places essentially after hours. That is to say, effective working time is less and less a reflection of the official duration of working time in post-industrial society. Cfr. D. MOTHÉ, *Le mythe du temps libéré, Esprit*, août-septembre 1994, 52-63.

1.3 Labour organisation and employment policies

The existence of high rates of long-term unemployment in most European countries have led to regarding the sharing of working time as a possible tool to solve this problem. The various aspects of such an employment policy have been combined in different ways in different countries.

1.3.1 Encouraging part-time work

Comparison of different national codes shows that the encouragement of part-time work may respond to three major motivations: to facilitate the reconciliation between occupational and personal life, to flexibilise employment, to share employment[64]. At the Community level, the social partners have also encouraged part-time work, subjecting it to principles of non-discrimination and encouraging movements to and from full- and part-time arrangements[65]. Such encouragement of part-time work involves not only labour law, as a review of national bodies of law shows.

In Germany, the financial incentive to resort to short-time employment (*Alittle@* part-time work), less than 15 hours per week at a salary of under DM610 (in West Germany) or DM520 (in East Germany), is substantial, since such jobs are not subject to social security contributions. Depending on the estimate, there are between 1.1 and 3.3 million employees in Germany that hold such minor jobs. Adding to that figure the number of people holding such jobs in addition to a main job would account for another 500,000 to 2,000,000 jobs. On 14.12.1995 (C 444/93), Slg. 4744, the Court of the European Communities ruled that such a regulation is not discriminatory on the grounds of sex, even though it mainly involves women, who are thus excluded from the social security system.

64. See: F. FAVENNEC-HÉRY, *Le travail à temps partiel,* Paris, Litec, 1997, p. 23 s.

65. See: *Directive 97/81 of 18 December 1997 concerning the framework-agreement on part-time work*

In the United Kingdom tax law treats husbands and wives as separate units, thereby favouring the model where each spouse has a part-time job. The Social Security system reinforces such incentives. Workers who earn less than a minimum wage (Lower Earning Limit B presently 62 GBP per week) pay no social security contributions, nor do their employers.

In the Netherlands, a bill under consideration provides for giving workers the virtual right to move into part-time work, a right that they can demand of employers within certain limits In France in 1996 part-time work involved nearly 3 million people (as compared to under 2 million in 1982), the vast majority of whom were women. This increase is an outcome, on the one hand (difficult to measure), of financial incentives (reduction of fees) and work-sharing policies. It may be a genuine choice (particularly among public officials), but it is more often tolerated by the parties concerned, unable to find a full-time job. Employees with the lowest level of training and non- or low-skilled jobs are the ones mainly involved. It is centred primarily in the tertiary sector (market and non-market) and affects all age groups, although the brunt of the burden is carried by women over 40 (countering the idea that it would be above all a way of reconciling work and motherhood)[66].

Part-time work began to spread throughout the British economy as early as 25 years ago. In 1980, 21% of all employees (42% of the female labour force) worked part-time. In 1996, 25% of employees worked part-time (44% of whom were women). These proportions have not changed significantly in recent years. The overwhelming majority (nine of ten) of part-time workers hold permanent jobs. Part-time work is highest in the service sector, in particular public services such as health and education, but also in retailing and hotel and catering services. Part-time work rates have tumbled in the manufacturing industry over the last twenty years. Women are more willing to accept part-time work; as a result, there is a growing number of families in which the wife is the sole support, whereas the husband is trapped in unemployment.

Part-time work is less common in the Southern countries, but is on the rise there as well. In Spain, for instance, it has followed an upward trend, reaching 7.5% in 1995 (Source: *L=emploi en Europe*, 1996); this is the same as the rate in Portugal and higher only than the Italian (6.4%) and Greek (4.8%) figures; part-time work accounted for 2.7% of men=s and 16.6% of women=s jobs. From 75 to 80% of part-time workers are women. Among men, part-time work is centred in agriculture, the hotel industry, retailing and education. Part-time work among women is divided between domestic service (a little over 50.5%), business services and recreational, cultural and sports activities (12%), hotel and personal services (11%), education (9%) and other service businesses. As far as age is concerned, the highest rates are found at the two extremes (over 65 and young adults) where they are likewise higher among women than men.

With respect to Italy, the very low quota of part-time is also explained by 1) the greater presence of the self-employment and independent workers (in Italy about 28% of the employed); and 2) the greater presence of small and very small firms (about 90% of firms in Italy employ less than 9 dependent workers). As a small and very small firms (about 90% of firms in Italy employ less than 9 dependent workers). As a consequence of these points, a great amount of flexibility on the labour market is realised, as this >organisational solutions= act as functional equivalent of part-time and other forms of flexible jobs. But we have to stress also that the very low level of part-time in Italy (as in other southern European countries) is also due to 3) the great number of informal and black jobs, which can be alternative to part-time; and 4) a strong increase in new forms of atypical jobs (like the contracts of continuous and continuative collaboration in Italy) which, in some conditions, can be de facto alternative to part-time. Finally, we should also remember that in European countries in which part-time is widely diffused, women participation rates are much higher than in Southern Europe: such a role of the welfare state as employer (part-time employer for women) has to be stressed. In fact there exists a real trade-off between market part-time, as realised in US and UK where women are effectively >working poors= in part-time service jobs, and the central and overall Northern European models of welfare state, in which female part-time is largely realised in the public sector. By this reason, a part-time expansion can have different effects on >work civicness=: if it is pursued following the neo-liberalist model (part-time bad jobs in the services) or the >welfarist model=.

In the Netherlands, where part-time work and new kinds of organisation of the division of work in young families is common, there has been a move in recent generations from the classic model whereby *Afather at work full-time/mother in the kitchen@* to an intermediate model in which *Afather works full-time/mother works part-time@*. This favours combining production and reproduction roles so that both partners often work part-time, usually in the service sector.

In the Dutch model, where part-time work is widespread, it is, contrary to the situation in other countries, primarily voluntary and corresponds to structured models that are sufficiently long-term, stable and well paid to guarantee a reasonable standard of living[67]. This long-term, flexible model of part-time established by law. Such a right has already been recognised under more or less mandatory terms in the laws of other European countries.

The very notion of part-time work embraces a wide range of situations which only have in common their divergence from the *Anormal@* work week. Part-time work is often found to be tolerated rather than chosen, in particular as far as women are concerned, and does not lead to a balanced redistribution of family responsibilities.

66. See: M. MARUANI et C. NICOLE, *Au labeur des dames*, Paris, Syros, 1989.

67. Cf. P.F. VAN DER HEIJDEN, *The flexibilisation of working life in the*

work, which is accepted as well by young male workers, has produced a steep decline in the unemployment rate and explains the great interest that has arisen in the Dutch model.

Trends in recourse to part-time work

	part-time employment % in total employment	
	1973	**1993**
United Kingdom	160	23,3
Germany	101	15,1
France	59	13,7
Italy	64	5,4
Ireland	51	10,8
Spain	B	6,6
Portugal	78	7,4
Greece	B	4,3
Denmark	227	23,3
Netherlands	166	33,4
Sweden	236	24,9
Norway	273	27,1

Source: I.L.O. World employment 1996/1997

1.3.2 Reduction of the legal work week

The idea of reducing unemployment by sharing work is not new and was put forward in the thirties, during the Depression. This may have contributed to the development of part-time employment, but it has also led certain countries to reduce the work week or bring the retirement age forward in order to encourage recruitment.

Germany led this policy of reducing working time. After a massive strike, the metallurgical union (IG Metall) obtained a reduction of the work week to less than 40 hours, initially to 38.5. In return, the union accepted modulating working time in respect of shifts and duration of the work week for certain categories of employees. The reduction of working time remains one of the major targets of German trade unions from the perspective of work sharing. They are willing today to accept a proportional decline in pay in exchange for hiring by employers and maintaining employment levels. The most famous of the agreements of this kind (Bündnis für Arbeit) was reached with Volkswagen AG. It provides for a reduction of the work week from 35 to 28 hours. Other companies have followed suit. Nonetheless, this policy seems to be setting the pace, whereas the modulation of working time continues to spread into collective agreements.

In France the Robien Act of 30 May 1996, provides that a 10% reduction in working time that creates (or saves) 10% of jobs entitles the employer to a 40% rebate in social security contributions the first year and 30% for the following six years. Employers are offered an option between this 10/10/40-30 formula and a reinforced 15/15/50-40 formula. This act owes part of its success (as well as the criticism levelled against it) to the fact that employers gain the right to a rebate for 7 years whereas, in return, they are only committed to maintain the number of employees for 2 years. By the end of 1997, 1,142 agreements had been signed, 2/3 of which were to create (and 1/3 to save) jobs. 37% of the companies involved have reduced the work week while others have linked reduction and flexibilisation of working schedules[68].

It is essentially on the basis of the results of that act that the Government elected in May 1997 has made a commitment to reduce the work week to 35 hours by 1 January 2000 (2002 for companies with less than 20 employees). An act is to be adopted in that effect in 1998. This act will set out in detail the aid that the State will grant companies that apply this measure ahead of the deadline and link the reduction in working time to hiring new employees or safeguarding existing jobs. The implementation of such a reduction is a matter for collective bargaining, which may opt between an effective reduction of the work week and an annual reduction, in the form of additional holidays. The employers= association (CNPF) has voiced its firm opposition in principle to such a measure.

In Sweden the effectiveness of reducing working time in encouraging employment is being discussed. This thesis is defended by the leftist parties (Gudrun Schyman) and the ecologists (Birger Schlaug), whereas the major trade union (LO) defends the idea that reduction of working time should be a long-term objective regardless of employment concerns. The employers= association (SAF: Swedish Employers= Federation), in turn, claims that such a reduction would have a negative impact on the economy and employment.

Recently the Italian Government presented a law proposal to reduce the weekly working hours to 35 hours, which has raised a strong debate between the social partners. At the moment, the solution that is likely to be found will be a trade-off between more flexibility (contracted with the trade-unions) and less working time, with a quota of public funding to encourage firms to such exchange.

Finally, at the Community level, this idea has been backed by a resolution of the Strasbourg Parliament (1996), endorsing the recommendations of the Rocard report: the idea is to use a sliding scale for social security contributions, which would be greatly reduced for the first 32 first hours of work a week and rise sharply beyond that figure.

Where products and services call for high qualifications, labour **B** as a production factor **B** is an essential element in the process of capitalist creation of value and consequently it risks to become difficult to redistribute, as segmented labour market theories make us aware. Thus, failing a redefinition of the prevailing work model, there could be the risk that the measures intended to considerably reduce the work week ultimately encourage holding two jobs (*double-workers*) Nonetheless, even if it is not sure that a weekly working time reduction will generate new employment creation, at the same time, considering the large amount of unemployed people in all Europe, it is also impossible no to take in count such a possibility. For the creation of value **B** useful value **B** is inseparable from the people who possess the appropriate skills.

But whatever the effects on employment, the measures taken to reduce working time or the length of working life (by resorting to early retirement) go hand-in-hand with procedures to diversify their implementation. The French case of a reduction of the legal duration of the work week is a good example. The act will impose a reduction to 35 hours, but since the implementation of that act is to be referred to collective bargaining, the reduction may materialise in a number of different ways (annualising working time, deposits in a time-savings account, etc.) and will not be restricted to a weekly timeframe. Hence, the implementation of the act will contribute to diversifying working schedules even more.

2) The vicissitudes of A*working time*@ in labour law

The changes emerging in labour law are a true reflection of the changes observed in the organisation or work. Subordinate work leaves room for non-subordinate work, which to date had been classified as a A*free*@ time activity. Collective disciplines decline in favour of individualised organisation of working time. Thus, a new conception of working time arises, which is both heterogeneous and individualised.

2.1 Heterogeneous time

The idea that working and free time are diametrically opposed was based on a homogeneous notion of working time, understood to be the time spent in subordination. Once that homogeneity is lost, the boundary between free and working time is seen to be permeable, regardless of the vantage point from which it is observed.

2.1.1 *Free time wedges its way into employees= working time* via two different devices

68. Ministère du travail, Premières synthèses 98/01, n1 3.

On the one hand, there is entitlement to holidays or other absences which provide employees with free time without forfeiting the permanent nature of their (subordinate) employment contracts. Any number of rights to holidays or leaves[69], have arisen in recent years, which have in common the effect that the contract is suspended at the initiative of the employee and for the duration, in certain cases B and this varies B, is likened to working time. Employees can temporarily interrupt the performance of their contracts to engage in other activities, be they private (care and upbringing of children, sabbaticals, etc.), public or general interest (political judiciary, administrative, voluntary, etc.) or even professional (collective representation[70], vocational or union training, founding of a business, participation in trade union jurisdictions or social institutions, etc.).

In Sweden parents are entitled to a 450-day parental leave; they receive a daily stipend of 75% of their mean salary during the first 365 days and a lump sum thereafter. They are eligible for this right until the child=s eighth birthday or the end of its first year of schooling. Parents may, within certain limits, share these rights and use them to work part-time. They are also entitled to leave to care for a sick child up to 60 days per year and per child, during which they likewise receive 75% of their mean salary. That right can be transferred to a third party (a parent, for instance) who receives a stipend based on his or her own income.

In Belgium the act of 22 January 1985 institutes the so-called A*career pause*@. If a worker agrees with his employer to suspend his employment contract, or if he requests such a suspension under the provisions of a collective agreement, he qualifies for a (relatively low) interruption allowance paid by the National Employment Office, subject to certain conditions. Such interruption must last for at least 6 months. A total of 5 years of such absence may be taken throughout the worker=s career. The employer, in return, must accept to recruit one or several fully unemployed worker(s) who are on the dole to replace him.

In the Netherlands bills currently being drafted allow employees to A*buy back*@ part of their yearly leave, so they can use it at their total discretion.

The new regulation of maternity leave in Italy (February 1998), recognises a treatment on an equal basis for men and women. So fathers will be allowed to leave from work to look after children if they ask for that, because mothers cannot do it because the couple choose a more egalitarian division of domestic labour. This equal terms in maternity leave is a real novelty in Italian family law, as they were not recognised to men until now.

On the other hand, the performance of the employment contact itself is no longer necessarily identified with subordinate working time. Employees, first of all, instead of working may be called upon by their employers to take a training course concomitant with or in anticipation of the development of their jobs. Employers may also grant them a good deal of independence in the use of their time in return for the obligation to produce results (management by objective), whereby their situation is likened to that of self-employed workers (constraint does not disappear; it is internalised).

2.1.2 Conversely, *the shadow of paid work is projected on to free time.* This phenomenon also comes about in two ways

The first corresponds to an *extension of the scope of subordination in employees= private lives.* New kinds of telecommuting and the potential inherent in networking are well-known examples of such extension, which reverses nearly all the provisions of labour law (working week, health and safety, child labour, etc.) and inextricably mixes paid working time and free time.

Much the same is true of A*on call*@ practices, which fit very poorly with the traditional definition of working time. How to classify time that employees are not working for their employers, but must be prepared to respond to their call if needed? Such time is neither clearly working time nor clearly free time. It is a third kind of time, an on call time, comparable to the A*on duty*@ time of certain free-lance professionals (doctors, pharmacists, nurses), whose classification and legal regime have yet to be defined in labour law.

The same problem is found, finally, with regard to certain kinds of part-time work. Thus, annualised part-time work (also called intermittent work) may lead to loss of control over the use of their time by workers, who may be called by their employers at any time. Here also, time when the worker is at the employer=s disposal is classified as A*free*@ time. Split-shift working produces similar effects, i.e., the entire day is devoted to work, although only part of it is paid[71].

The *treatment of certain periods of free time as equivalent to working time* is another expression of the same phenomenon, appearing not only as discussed above in connection with employee holidays or leave, but also in activities considered to be socially useful and capable of being performed by non-employees. Three kinds of activities of this nature can be identified, possibly subject to being partially likened to actual working time in labour or social security law:

a) caring activities (care for dependent persons: children, people with disabilities, elderly people);
b) vocational training activities (vocational trainee status) or job hunting (unemployed status); and finally
c) volunteer activities of community interest.

Such equivalence also contributes to making the concept which working time covers even more hazy. More and more heterogeneous, working time is also becoming less and less collective.

69. The list of special holidays becomes longer very year, discouraging any attempt to draw up an invntory. See, for Italy: GINO GIUGNI et al., *Codice di diritto del lavoro*, Bari, Cacucci, 1994, p. 450 s.; for Spain: J.-A. SAGARDOY, J.-L. GIL Y GIL et al., *Prontatuario de derecho del trabajo*, Madrid, Civitas, 21 éd. 1995, p. 340 s.; for France: *Rép. trav. Dalloz*, tôme 1, v° A*Congés*@ par M.-A. BOUSIGES; latest update: time off to care for a sick child (Act of 25 Jul. 1994 *C. trav.* art. L 122-28-8), and leave for international solidarity (Act of 4 Feb.1995, *C. trav.* art. L 225-9 s.).

70. Namely, the technique of A*credit hours*@ for personnel representatives.

71. Cf. F. FAVENNEC-HÉRY, *Le travail à temps partiel*, Paris, Litec 1997, p. 243.

2.2 Individual time

The duration and management of working time has spearheaded the movement towards decentralisation of regulations on working arrangements, which are laid out from the top down, from the State to the individual. From act to industry agreement, from industry agreement to company- or plant-wide accord, from collective agreement to individual contract, the regulation of time is infinitely fragmented (see, in this regard, the following chapter on collective organisation).

In Spain, the Workers= By-laws of 1980 and especially the revised version dating from 1990 have assigned the definition of the essential features of working time arrangements to collective bargaining to the employment contract and even to employers= management power. This has led to the development of any number of flexible forms (annualisation, night work, shifts with no break for meals, etc.) which give rise to working time whose definition varies from one sector to another, from one company to another or even from one employee to another in the same company.

In France, a wide variety of deviations from the legal framework has been open to negotiation. Collective agreements may thus increase or decrease the lawful amount of annual overtime to which employers may resort without authorisation. They may also implement special weekend shifts that elude the Sunday rest rule. They may organise team work, individualised and variable working hours, and night work. They may replace weekly working time rules with multi-weekly arrangements (rotating shifts) or with annual modulation of working time.

In Germany, the collective agreement for the metallurgical sector in Rhineland-Westphalia is a benchmark not only typical of that region and sector, but illustrative of a general trend. The collective agreement provides for four areas of action:

- *First area: total duration of work week*: Beginning on 1 October 1995, the total work week will be 35 hours per week per full-time employee. Many company-level derogations are possible, however. Companies may reach an agreement with their employees about part-time work. Beginning in 1994, the work week may be reduced to 30 hours for a company=s entire staff or certain parts of the company or certain groups of employees under a specific agreement between the management and the Works Council (Betriebsrat), with no need for an individual agreement with the employees concerned. The effect of such company-wide agreements is a cut-back in salary proportional to the new work week (as for part-time work). The collective agreement also allows for lengthening of the work week.
- *Second area: duration of working day and week*: The collective agreement does not restrict the maximum legal 10-hour working day (without breaks) and 60-hour working week. On the contrary, it extends from 6 to 12 months the legal period during which an average 8-hour working day must be reached.
- *Third area: shift patterns*: Metallurgical companies establish them freely in accordance with company and customer needs. Work may be distributed over six working days (Saturday included, with no need to raise salaries). The agreement provides for higher salaries for non-standard working hours, but company accords may derogate from the sums set out. Work on Sunday and holidays is also permitted in general, but subject to premia of from 70%/100% or even 150% for A*highly significant holidays*@.
- *Fourth area: distribution of work over different days of the week during the year*: in addition to the measures discussed above, the agreement authorises balancing out each employee=s actual working time to the time provided in their respective employment contracts by giving them days off. The collective agreement does not provide for a readjustment period in connection with such model, thereby allowing for very flexible long-term labour organisation.

The new principle governing working time is *self-regulation of time*: self-regulation at the industry, company or work site level, by collective labour organisations, and, ultimately, by individuals themselves, now responsible for the organisation of their own time providing they commit themselves to their employer=s objectives. From the perspective of this trend, the surrender of their time ceases to be the primary purpose of employees= obligation, which moves from being means- to being results-based. This perspective is, of course, merely the extremity that law presents today. Variable working hours, on-call hours, yearly modulation of working time, are the most tangible signs of a change that is coming about in response to the evolution of techniques (telecommuting, which shatters working space-time), the increased returns on capital (policy of increasing the service life of equipment) and public demand (demand for permanent availability of public or private services). All of this obviously marks the end for standard time jobs.

Directive 93/104 follows in the same vein, i.e., individualisation of working time. Based on the protection of health and safety at work, its provisions are, with rare exceptions, of an individual nature. And it is presented as a supplementary regulation from which it is nearly always possible to derogate by agreement. It specifies that A*on account of the specific characteristics of the activity concerned the duration of working time, (may be) not measured and/or predetermined or (may be) determined by the workers themselves*@ (art 17-1). It leaves the list of A*activities involving the need for continuity of service or production*@ (art. 17-2-1) open. It admits that most of its provisions may be disregarded A*via collective agreements or agreements concluded between the two sides of industry*@ (art. 17-3). It likewise admits (art. 18-1-b-i) that the worker=s *individual agreement* may derogate from the maximum 48-hour work week.

This development holds the potential to gradually dismantle all the community time patterns that governed life on and off the job (night-time rest, Sunday rest, midday break) and bring about the concomitant collapse of solidarities based on such patterns (trade union, family, neighbourhood).

A*Surveys show that some non-standard schedules (weekends, night shifts, etc.) have a strong impact on social life (isolation; disruption of family life) and on the health of the workers concerned. The latter often conceive of their schedules as a temporary situation and would prefer to return as soon as possible to schedules compatible with a*

›*normal*‹ *social life*.@[72].

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72. See: D. MEURS et P. CHARPENTIER, *Horaires atypiques et vie quotidienne des salariés*, in: *Travail et Emploi*, n° 32, 1987, 47.

Laws that continue to consider working time as an objective reference, as a given in the system of working relations, will be rendered wholly ineffective by this move towards individualisation and heterogeneisation of time. Moreover, a laissez-faire policy may endanger the continuity of the most elementary rules for the protection of workers and contribute to further weaken social bonds. To overcome this dilemma, time must be envisaged not only as working time, as a measure of the exchange of work for a salary, but also as a subjective experience, that is to say, as time in workers= lives.

C) From Working Time to Worker Time

Labour law is not immune from the changes in progress. It must undergo a profound change to continue to play a role as a democratic regulator in social and economic evolution. It is faced with a dual challenge. firstly, it can no longer be confined to time as a measure of the exchange of work for a salary, and must embrace workers= lives as a whole and guarantee the harmony of the various kinds of time comprising them. But such a broadening of perspective calls, secondly, for rethinking the conditions for deliberation and negotiation in which time is the object. In both regards, the treatment afforded women will be a move particularly revealing of the evolution taking place.

1) Harmony among the various kinds of time: the *Ageneral principle of adapting work to people@*

The challenge today is how to make the various aspects of each worker=s life mutually compatible, that is to say, primarily paid work, unpaid work and leisure or rest. This calls for reworking the organisation of paid working time in terms of a comprehensive approach to individual time, that is to say, to revert to a notion set forward in directive 93/104 (article 13) to implement *Athe general principle of adapting work to mankind@*[73]. The consequences deriving from this principle affect two different spheres: for individuals, they involve being masters of their own time; and collectively, they mean the conservation of time devoted to community life.

1.1 The terms of individual control over time

1.1.1 Working time and contract time

This reworking involves, first of all, *including the length of the contract in the reflection on working time*. Workers= time is not only the time spent rendering their services; it is also, firstly, the duration of their contract, which may or may not afford them a certain control over their time (this link between duration of contract and working time is perceived rather hazily in directive 91-383 of 25 June 1991, which authorises (art. 5) Member States to prohibit the use of temporary employees for hazardous work).

From this standpoint, i.e., health and safety, it is commonly agreed[74] that there is a direct connection between insecure employment and work accidents. The poor understanding of hazards, plus the uncertainty about the future that characterises casual employment necessarily reflect back on respect for the law. It is illusory, for instance, to regulate the amount of time that lorry drivers can drive while at the same time deregulating the employment conditions for those same drivers. Community Regulation 3820-85 of 20 Dec. 1985, which requires en route rest times (arts 7 and 8) and proscribes payment methods that compromise road safety (art. 10) is doomed to ineffectiveness if the driver=s job is so insecure that he is obliged to accept performance levels set by his employer or supervisor. Authorising fixed term or *Aself-employment@* (drivers that rent their vehicle) contracts is to be resigned to the fact that accidents are going to occur. On-the-job safety goes hand-in-hand here with job security, which is the sole way to ensure that the worker will be at ease in relation to time.

1.1.2 Non-professional working time

This reworking leads, secondly, to *include non-professional work in the organisation of working time*. This is what the directive on *Ayoung people@* does, for instance, when it defines a daily working time in which paid working time and school attendance time are confounded[75]. In the same vein, directive 96/34 of 3 June 1996 on the European framework agreement on parental leave implements certain of the principles that had been previously set forward in Recommendation 92/241 of 31 March 1992 relating to child care[76]. The

73. *OJEC*, N1 L 307/21 of 13 December 1993. The more restrictive English version evokes *Athe general principle of adapting work to the worker@*... [phrase cited in body of text is a literal translation from the French. T.N.].

74. Including *Directive 91/383 relating to non-standard jobs*, in view of the stated purpose. Testimony, surveys and statistics all agree in this regard, see: *Souffrances et précarité au travail. Paroles de médecins du travail*, ouv. coll., Paris, Syros, 1994, 357 p.; *Le dossier noir du travail précaire*, in: *Santé et Travail*, n1 8/94.

75. *Directive 94/33 du 22 juin 1994*, art. 8.

76. *OJEC* N1 L123/16 of 8/5/92, p. 199, this new kind of provisions should

Aenable women and men to reconcile their

c u p a t i o n a l , f a m i l y a n d u p b r i n g i n g r e s p o n s i b i l i t i e s @ (a r t . 1) ; c r e a t e A s p e c i a l l e a v e e n a b l i n g e n p l o y e d , b o t h n e n a n d w o n e n , w h o s o d e s i r e p r o p e r l y t o d i s c h a r g e t h e i r

r occupational, family and upbringing responsibilities@ (art. 4); Acreate an enviro

rnnent, structure and organisation of work which take into account the needs of a

n @ (art. 5). See similar guidelines in *ILO Recommendation No. 165 regarding equal*

l l working parents and with responsibility for the care and upbringing of children

survey of national law shows very practical consequences that may be drawn from such principles with respect to training or voluntary activities.

opportunities and treatment for workers of both sexes with family responsibilities

The right to *vocational training* entails setting time aside for such training under working time regulations. Several of the fundamental objectives of the common vocational training policy established by Decision 62/266 of 2 April 1963 directly concern the issue of working time[77]. The objective pursued

77. *OJEC* of 20 April 1963, p. 1338, see: Second Priciple, 'a, f, g, which provides Aimplement the conditions that make the right to adequate vocational training effective for all@; Afavour, in the different stages of occupational training

life, duly adapted vocational training and, as appropriate, retraining or readaptation@; or

A offer each and every person, depending on his aspirations, aptitudes,

know-how and work experience and with sufficient permanent means, improved occupa

tional perfornance, access to a higher occupatoinal level or preparation for a ne

therein by the Community was to *Aimplement the conditions that make the right to adequate vocational training effective for all@*; *Afavour, in the different stages of occupational life, duly adapted vocational training and, as appropriate, retraining or readaptation@*; or *Aoffer each and every person, depending on his aspirations, aptitudes, know-how and work experience and with sufficient permanent means, improvement of occupational performance, access to a higher occupational level or preparation for a new activity involving promotion to a higher level@*. Such a common policy on vocational training is today explicitly addressed in the Treaty (art. 127, Maastricht) which enjoins the Community to facilitate the adaptation to industrial change, improve continuing education and favour mobility of trainers and trainees[78].

In addition to parental leave, Directive 96/34 reflects the right of all workers to *Atime off from work on grounds of* force majeure *for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable@*[79].

78. [Quoted literally in the French text and paraphrased in the English version, because the translator did not have access to the source. T.N.]

79. See: clause 3 of the Agreement attached to the directive.

1.1.3 Working time and leisure time

Leisure time was built, under the Fordist model, as time for consumption, imposed by soft techniques such as persuasion and advertising. Free time was thus converted to marketable time and its value became a function of purchasing power. Claus Offe and Rolf H. Heinze developed a theory in this regard of what they call the *Amodernisation trap@*[80]. Such a *Atrap@* could be described as the convergence of three lines of evolution: the lengthening of free time; the growing uncertainty regarding level and continuity of income; and the monetarisation of free time.

Different factors coincide in such monetarisation, foremost among which are:

- changes in family and neighbourhood structures. Thus, for instance, separation and divorce or the leaving young people to their own resources for a long time during their schooling involve mobilisation of substantial monetary resources.
- the substitution of monetary exchange for non-monetary exchange. This substitution derives directly from the Fordist consumption rule. The tendency is particularly strong today in the service sector, as services are no longer rendered in the framework of community solidarity.
- the increase in prices of certain essential welfare services at rates higher than the average inflation figure.
- the general rise in the quantitative and qualitative threshold of what is considered a decent living.

However, for a growing part of the population, income is becoming increasingly precarious. Income levels are subject to change and even continuity is uncertain. This is a direct consequence of the erosion of the Fordist salary-based relationship. But it is likewise the result of the growing instability of family structures, since separation or solitude can involve greater vulnerability to unstable incomes[81]. The outcome is a profound alteration of the relationship to time among the most disadvantaged[82].

80. C. OFFE & R.G. HEINZE, *Beyond Employment. Time, Work and Informal Economy*, Cambridge, Polity Press, 1992, chapter 1&2.

81. See, in this regard, in particular: R. CASTEL, *De l'indigence à l'exclusion. Précarité du travail et vulnérabilité professionnelle*, in J. DONZELOT, *Face à l'exclusion. Le modèle français*, Paris, éditions Esprit, 1991, 137-168.

82. Cf. S. LEIBFRIED et alii, *Zeit der Armut*, Suhrkamp, 1995, English

The outcome of these three tendencies is a decline in the *value* of free time for a substantial part of the population Deprived of a steady income, they are also deprived of the social and cultural context that would allow them to value the growing *volume* of free time available to them. It is not illogical to consider that in certain cases, free time is deemed a constraint, due to a lack of monetary resources, whereas working time, supple and flexible, subjectively Ainvolving@, may be seen as a release from a daily routine otherwise bereft of all meaning.

To fail to take such dialectics into account is to founder on the optimistic and disastrous illusion that the reduction of working time is naturally emancipating. Up to now the belief has been that the struggle against inequality involved addressing the question of work; it is now realised that reducing working time may lead to greater inequalities. The problem posed, in a process of generalised reduction of working time, is the status reserved to A*workers with no personal quality*@. Indeed, it cannot be otherwise unless free time ceases to be valued in terms of monetary resources. This primarily involves incorporating, in social policy, a policy of cultural devices that make a non-market-based valuation of free time accessible to all.

1.2 Conservation of time devoted to community life

1.2.1 Working time and time for private and family life

Gender equality implies equal conditions for individual choice of time for paid work, unpaid work (family duties and training for oneself) and leisure time. That is to say, that such equality must not be separated from the *right to respect for a private and family life*, reflected in the European Convention on Safeguarding Human Rights and Fundamental Freedoms (art. 8-1) which has been incorporated into Community law[83].

83. The normative force of the European Convention on the Safeguard of

Sound foundations for the principle of equality will be built not by refusing on principle to consider the specific private situation of employees, but on the contrary, by adapting, in a non-discriminatory manner, legal categories to such specific situations. Only the conjunction of these two principles (equality and respect for private family life) enables the reworking of the regulation of working time in terms of a broader perspective, embracing family obligations, in order to prevent such reworking from becoming a source of new kinds of discrimination.

Amsterdam Treaty (amending art. F.1 of the Treaty of the European Union).

Time taken out from wage-earning to be spent in training should likewise be conceived as a normal stage in the worker=s career, not as a suspension of his career path. This has very practical consequences from the standpoint of labour law (re-hiring, seniority, remuneration, etc.) and social security (accumulation of pension rights, in particular). This principle of continuity has already been implemented under Directive 96/34 on 3 June 1996 putting the European Agreement on Parental Leave into effect (see clause 2 of the Agreement, '4.s.).

Another example is the specific prohibition of night work for women, which was a discriminatory way of conserving family time. As this prohibition was declared not to conform to Community law under the *Stoeckel* judgement[84], it would be advisable for the issue, in all its breadth, to be taken up again by the Community at that institutional level, on the grounds of *equal rights of men and women to a private and family life*. This right obviously entails restrictions on night work by both sexes. Directive 93/104, in fact, addresses night work from the sole standpoint of health and safety.

This question of the reconciliation between family life and the limitations of night work is but one of many aspects of a problem that is crucial to the future of Western societies. In traditional societies, order and stability were largely dependent on a hierarchical division of tasks between men and women. The industrial society arising in the Nineteenth Century maintained that distribution by instituting a division between masculine, measurable and negotiable time, and feminine time, unlimited and outside the bounds of the market. Our societies, by contrast, claim to be based on the principle of equality between men and women. This is a precious and fragile achievement which poses the question of the organisation of time in radically new terms. It is difficult to imagine measurable and negotiable time invading the entire private sphere, even if some of the tasks performed therein might yet be absorbed by marketable time (such as in A*new beds of employment*@ or a maternal A*salary*@, that is to say, the general assignment of a A*wage*@ to domestic chores). The private and family sphere necessarily involves such inestimable time (inestimable in both senses of the word) allotted for centuries to women. This is the time B and not only working time B that must today be conceived under principles of equality. And this entails establishing rules, for men as well as for women, on compatibility between different sorts of time formerly classified as masculine or feminine and now assigned to specific functions.

1.2.2 Working time and urban time

By encouraging individual control over time, the law contributes to the decline of solidarities that grew out of the collective disciplines inherent in the traditional conception of working time. Such new regulations must not ignore the issue of tempos in collective life, but rather should ensure their existence. Time devoted to social life must not be relegated to merely filling in the intervals between paid work, since such gaps are disappearing. This question involves not only family life, but other kinds of urban socialising (the time for which was defined in terms of collective work-imposed disciplines).

The ways public and private services, retail establishments and all kinds of political, trade union and communal life operate are affected by the problem of compatibility between different sorts of time. Experiments and surveys have been conducted, particularly in Northern Italy (*tempi della cita*), with the intention of ensuring such compatibility by means of regional harmonisation arrangements (time bureaux) that co-operate to adjust the various sorts of time in the Cities[85].

84. *CJCE*, 25 juil. 1991, aff. C-345/89, in: *Droit social*, 1992, 174, obs. M.-A. MOREAU.

85. See in particular the papers by: ULRICH MÜCKENBERGER, *Un temps pour la ville*, in: A. CBADIA (dir.), *Entreprendre la ville. Nouvelles temporalités*

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Nouveaux services, Édition de l'Aube, 1997, pp 160-172;

Working-Time and

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Modernized

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Union

Policy, in:

ETUI and LEDI (ed.), A Time for Working

2) Conditions for discussion and negotiation of time

2.1 Establishment by law of the principles on concordance among different sorts of time

It is no longer possible to envisage the regulation of working time from the sole standpoint of companies or the organisation of paid work. Any regulation or deregulation of the organisation of working time brings into play the very story line, individual and collective, of human life. Now more than ever, deregulation of working time compromises the interests of society at large.

This passes sentence on the temptation to leave the regulation of working time entirely to the regulation of employer time or collective bargaining as known in today's labour law. The decentralisation of the source of law, generally desirable in such an area, will not take hold unless supported by general principles of compatibility among different sorts of time that only the law is in a position to establish. Since the interests of society in general are consequently at stake, law is, in democratic society, the sole legitimate expression of such general interest and the *discussion* inherent in the legislative function should not be confused with the *negotiation* of specific interests. But restoring that discussion function means that law, on the one hand, fixes certain principles on the organisation of time that are not subject to derogation, and on the other outlines the framework for collective bargaining, in which the issue of workers' time may be addressed in all its aspects.

The democratic problem faced under present circumstances is to manage to convert the flexibility of time imposed by the productive world into freedom subject to collective and broadly based management. Collective bargaining is still the necessary vehicle for such a conversion. But it must be profoundly rethought if it is to contribute to compatibility between the different sorts of time in workers' lives. This entails a widening of the scope of negotiation and a concomitant broadening of the circle of negotiators.

time for Living, London 1995; *Democratisation and Time in the cities*, in: *Transfer* vol. 3, nr. 4 (à paraître).

2.2 Widening the scope of negotiation

Such scope must be widened along at least three fronts.

One of the components of the social commitment characteristic of mass production and of its relationship to wages was that management and organisational issues were left to the employer: the *Adeal@* consisted of exchanging bargaining on pay and working hours for virtually full management freedom for company executives. But negotiating working time arrangements means that bargaining also deals with *organisational patterns*. It is only under such conditions that the diversity of individual preferences can be addressed.

In Sweden, a bill on working time currently under discussion would require employers, within the limits allowed by company requirements, to take account of the personal needs and desires of their workers in respect of working hours. The reconciliation of company and worker interest would fall under the scope of legislation relating to company co-management. It might also result in case-by-case arrangements with individual employees.

Free time was never an item on the bargaining agenda. It was governed by collective tempos supposedly established *a priori* in accordance with working time. This is no longer true today. Account must be taken of the schedules prevailing in government, schools, leisure time activities, etc... if account is to be taken of the fact that the value of an hour of free time varies depending on the time of day.

Training time was usually disregarded when calculating production time. It is symptomatic in this regard that training has long been low in trade union priorities[86]. This separation is obsolete today, both from the internal perspective of companies (work involves ongoing development of worker skills) and from the standpoint of workers themselves, required to be more mobile and therefore subject to continuing education. Recent tendencies in collective bargaining in certain European countries seem to indicate a growing awareness of this issue.

2.3 Broadening of the circle of negotiators

The widening of the scope of negotiable issues likewise entails changing the patterns of representation of the interests concerned. The Western European version of the prevailing model was essentially a *Acorporatist democratic@*[87] model: legitimate representation was reserved to and monopolised by a limited number of organisations, which became powers unto themselves. Preferences were assumed to be induced prior to bargaining thanks to internal representative mechanisms in unions or employers: associations. But the growing complexity of situations, along with the desirable broadening of the scope of negotiations, have rendered such a closed system inadequate. Despite their efforts to reform, unions are still associated with a population consisting primarily of stereotype workers adult males with a dependent family, thereby leaving non-workers, non-standard workers and women out of the picture. This is a new social and cultural difficulty that has arisen around representation.

It will not be solved only within traditional trade union circuits: groups that do not follow along the lines of classical Fordist canons should be afforded direct access to the bargaining table. Furthermore, users, public authorities or interest groups outside the working world strictly speaking must also be present if the logic of widening the scope of negotiation is accepted. Such broadening can only be reasonably expected to be effective if it is regionally based and on a scale whose dimensions are human, as the Italian *Atempi dell cita@* experience shows.

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86. B. FRANCQ, *Procéduralisation et formation@*, in: J. DE MUNCK, J. LENOBLE & M. MOLITOR (dir.), *L'avenir de la concertation sociale en Europe*, Vol. II, Louvain-La-Neuve, Centre de philosophie du droit, study subsidised by Commission for the European Communities DG V, March 1995, 54-121.

87. In the sense of the term as used by J.T. WINCKLER, *ACorporatism@*, in:

Archives européennes de sociologie, vol. 17, 1976, n 1, 100-136.

Chapter 4 B Labour and collective organisation

The far-reaching changes witnessed in the way companies organise work right across the European Union have been prompted by the move away from a production-based economy towards an economy where the services sector rules, by technological progress and by market globalisation. These same changes have a crucial impact on the collective organisation of labour relations and on the legal mechanisms governing worker representation, action and collective bargaining. New groups of workers have joined the labour market and there is now a need to examine employment and labour problems as a whole and not just from the traditional standpoint of the subordinated worker. These factors, together with the way the single market will work once the EMU is in place and the euro becomes the common currency, are creating new frameworks for collective representation action. All in all, the social and cultural modifications that have been triggered by these changes require a dynamic response so that collective representation action can be brought into line with this transformation, thereby avoiding any discrepancy between current and future needs of work organisation and the industrial model of labour relations on which the collective organisation of work has been built.

The collective dimension of labour relations has always been closely related to the ways companies organise work. They in fact determine the structural framework of worker organisations on which the legal machinery for action, representation and collective bargaining are built. In pre-industrial organisation of work, which was based on a diversity of trades, action and representation were corporatist; in such a model the price of products rather than wages were at the core of *Acollective bargaining@*. In the industrial model, the craft or trade is no longer at the hub of the organisation of work. Industry co-ordinates tasks that become increasingly specialised to meet the needs of mass production. In this new architecture collective identities no longer turn on the practice of a trade but rather on affiliation with a company or industry (the respective importance of these two levels or collective organisation varies depending on the country). This model has not disappeared but now co-exists with new kinds of organisation of work which change the framework of action, representation and collective bargaining.

As society stands on the threshold of the new millennium, the problems of the collective dimension of labour are crying out for a new approach that takes into account factors involving change and how that change influences the different areas of production and labour relations. The impact of such change is already being felt as it makes a greater mark on the players, the way they are organised and the functions assigned to them, as well as on collective bargaining and worker participation in companies. As far as collective disputes are concerned, the overwhelming impact of unemployment has brought a spectacular decline in strikes in the private sector, whereas it is practice more than the right to strike that is affected by profound changes in the organisation of work (excepting in Great Britain, where the right to strike has been subject to substantial legal constraints).

Secondly, there is a fragmentation of collective bargaining. On the one hand, there is a general move towards decentralisation, to agreements reached at the individual firm level; on the other, new bargaining units are appearing at the sub- and transnational levels. In addition to the diversity of forms, this dispersal adds a degree of legal complexity to the question not

As the most dynamic institution to cope with the diversity of types of work organisation, the participation of different agents and the progressive overlapping of problems (between educational systems, training and labour skills, between working time and social life or between the environment and the problems of health and safety at work, to list but a few) collective bargaining is the most suitable instrument to assimilate and adapt to change as an ongoing process. What is more, there are indications that agreements become particularly crucial within social contradictions during times of change. Here, collective bargaining proves its worth as a valuable tool that can be used to ensure adaptability, provide security in the face of uncertainty and uphold the principle of equal opportunities by integrating the gender dimension.

Together with the process of European integration, unemployment, the heightened importance of free-lance and self-employed workers and the development of subcontracting practices and stable relationships between companies have already triggered transformations that are visible in the institutions of collective work organisation. With the expansion of services, the evolution of technology and the impact of EMU and the single currency, this trend is bound to continue. Collective bargaining must make tackling such realities a priority by enhancing co-ordination between the different agents involved in the production of goods and services and by incorporating the transnational dimension. Moreover, the appearance of new jobs in emerging industries throws up a challenge to the traditional view held of the collective dimension of labour relations.

Information, consultation and worker participation in companies will play a major role in collective labour relations. Community initiatives (some of which have already been approved, others still pending approval) whose aim is to facilitate such participation in European companies will foster the importance of collective bargaining in the quest for adaptability, in the development of company competitiveness and in the consequences their decisions may bring for employment.

A) The Dynamic of Collective Bargaining

Collective bargaining has, in the last two decades, been the area of labour law most affected by legal innovations. Such innovations are of two kinds.

Firstly, the recourse to collective bargaining is generalised. Nowadays it constitutes a mandatory stage in the formulation of law. It empire extends beyond the realm of law on paid work, into the sphere of legally self-employed workers who are nonetheless financially dependent on a client firm. It likewise extends to new functions and objectives, covering more than the distribution of productivity gains corresponding to increases in production and the establishment of working conditions. Wherever collective agreements have a legal base, such changes involve a transformation in the relationship between the law and collective bargaining.

to be found in conventional systems. The latter are presently bereft of clear rules on distribution of competence among the various bargaining levels.

1) Generalisation of the recourse to collective bargaining

1.1 New functions

The basic function of collective bargaining consisted of *improving* the lot of employees.

In France this function is explicitly laid down in the Workers' Code (art. L.132-4) which provides: "*Collective work agreements may include provisions more favourable to employees than the laws and regulations in force. They may not derogate from provisions of a public nature in such laws and regulations*". This provision draws a distinction between absolute public order, which is not subject to agreed derogation, and social public order, which defines minimum protection for employees, subject to improvements by agreement[88]. Jurisprudence has inferred, from such provisions, the existence of a fundamental principle in labour law whereby, in the event of conflicting rules, the one more favourable to employees is the one that must be applied[89]. The situation in Spain is very similar, pursuant to the provisions of article 3.3 of the Workers' By-laws.

The legal architecture enabling bargaining to fulfil this function varies depending on the country: from voluntary application of collective agreements (not subject to enforcement in the United Kingdom) to their direct and compulsory application to employment contracts. mandatory imperative effects of agreements may also be subject to extension or enlargement techniques, which makes it possible to extend the benefits of a given agreement to all workers included under, or even outside, its scope. Despite exceptions (particularly significant in Germany), such techniques, which were challenged some years ago, are nowadays generally accepted in the systems of industrial relations that acknowledge and use them.

Such mechanisms were designed to enable collective agreements to fully comply with their function of improving workers' circumstances. But since the early seventies, many additional functions have been attributed to collective bargaining.

1.1.1 Flexibilisation

In the seventies, the most important change in the functions attributed to collective bargaining was indisputably the appearance, alongside or instead of the traditional function of improving working conditions, of the function of adapting such conditions to the needs of company competitiveness and flexibility. From the legal standpoint, collective bargaining appears, then, as an *alternative* to application of the law. This alternative exists in so far as the law explicitly authorises the conclusion of agreements derogating from its provisions (technique called *derogatory accords*). It is also to be found in *auxiliary laws*, which are only applied failing a common law collective agreement, or in *provision laws* which do not establish a rule to be derogated from, but open up an option whose implementation calls for a collective agreement. The same kind of relationship has developed, moreover, between industry and company-wide agreements, whereby the implementation of framework agreements negotiated at the industry level depends largely on bargaining at the individual company level.

With respect to Italy, such *accords dérogatoires* take place much later, namely in the 1980s and later on. Nowadays, in Italy, social parts are experimenting the so called *contratti d'area*, that is a sort of collective agreement among trade-unions, firms syndicates and the public powers, to improve productive and employment conditions in specific under-developed or socially deprived areas, mostly in Southern Italy. Such *contratti d'area* usually guarantee an exchange between lower labour costs, public spending (as investments or training policies), private productive investments and fiscal benefits for firms who accept to settle in these areas.

It is still under discussion if these agreements can lower the minimum contractual wages, but anyway, de facto wages in these areas are already lower than in other industrialised regions.

The relations between law and collective bargaining are very complex and heterogeneous. Such relations depend on the respective roles that national legal systems attribute to the State and law, on the one hand, and to the social partners and collective bargaining on the other. Such relations may either be defined in terms of equality (conventional systems of organisation) or of hierarchy, to ensure that the law prevails over collective bargaining (legal systems involving State intervention).

The general tendency is for the law to be devoid of substantive provisions and to be supplemented by procedural rules designed to guarantee the right to collective bargaining. Depending on the case, collective agreements replace, prolong, develop or implement legislation. In all systems of labour relations, there is a perceptible move towards greater autonomy for the social partners and companies with respect to public authority.

But such a move towards negotiated flexibilisation is subject to the general outline of the law which ensures three essential functions:

1) the establishment of principles and the overall objectives of social policy;
2) the establishment of the necessary conditions to ensure a balance between the parties to negotiations (representativeness; new kinds of representation in small companies);
3) encouragement of bargaining to favour its extension to areas reluctant to undertake dialogue. This would be the case of the proposed French legislation on the reduction of the work week to 35 hours.

88. Conseil d'Etat, Avis du 22 mars 1973, in: *Droit Social*, 1973, 514.

89. Conseil d'Etat, 8 juil. 1994, *RJS* 12/94, n° 1386; Soc. 17 juil. 1996, in: *Droit Social*, 1996, 1053; the Constitutional Council decided, in turn, that "*the principle whereby a collective work agreement may contain provisions more favourable to workers than the laws and regulations constitutes a fundamental principle of labour law*" (C. consti, 25 juil. 1989, *Rec.* p. 60, *Droit social*, 1989, 627).

The role of public authorities is likewise crucial in collective bargaining systems that apply *ex post* extension of collective agreements (such as in France, Holland and Germany, although infrequent in the latter country). Finally, in most European countries, the State has also intervened in bargaining on wages to curb inflation. It continues to do so, although less directly (except where the State is itself an employer, i.e., of public sector workers).

1.1.2 Company management tool

Since the eighties, collective bargaining has become, in addition, an essential factor in the organisation of work. In the Scandinavian countries, where this trend is particularly noticeable, collective bargaining is instrumental for co-operation in the change and organisation of work. New kinds of social dialogue are thus introduced which address not only working conditions, but the organisation of work. The object of negotiation shifts, then, from the worker to work.

Certain aspects of the organisation of work are naturally and necessarily collective: occupational categories, working hours, organisation of very differentiated, specialised and at the same time autonomous jobs. This collective dimension of the organisation of work finds in collective bargaining a particularly well adapted management tool. But this leads to new uses of collective bargaining. The uniformity of tra ditional collectively agreed regulations tends to give way to heterogeneity.

Moreover, collective bargaining becomes, at the company level, a ground for employers to exercise their management power. This is especially true of particularly traumatic decisions, such as dismissals or business restructuring. Selection criteria and the order of dismissals, social plans, compensation and measures for (internal or external) reclassification of dismissed workers have become important issues for collective bargaining.

1.1.3 Implementation of legal regulations

Other laws have vested collective agreements with the implementation of their regulatory provisions. Under this device, the legislator imposes a rule or principle, but delegates to the social partners the task of defining the specific ways in which it is to be applied. The law often provides palliative measures for where there are no social partners, such as auxiliary decrees or alternative procedures to implement the rights it institutes (e.g., electoral agreements). It is a well-known fact that this practice has been widely used in Community law (see, recently, the provisions for the implementation of the directive on the representation of workers in transnational companies)[90].

1.1.4 Legislative function

This regulatory function should not be confused with participation B nowadays well delimited B in the formulation of laws, a practice which has prospered since the early seventies in the framework of *Anegotiated laws@*. Important as it may be from the sociological standpoint, this legislative function of collective national cross-occupational bargaining was formally enshrined in the Maastricht Social Agreement (art. 3), whose provisions on that point are reflected in the Amsterdam Treaty (new art. 118A).

1.2 New objects

The recent changes in collective bargaining affect not only its functions but also its purpose. *ARich@* collective bargaining addressed *Apoor@* objects. Less generous, today=s collective bargaining has a more comprehensive material content. On the one hand, the approach to the traditional objects is new (with, for instance, individualisation of wages, and their contingency upon productive objectives and employment) and on the other, negotiation deals with new issues, previously unknown or disregarded (essentially labour- and social protection-related matters).

Employment policy today plays an important role in collective bargaining, through agreements with differing degrees of legal effectiveness, that contain management commitments to create jobs or maintain existing jobs. Any number of other objects are now discussed in collective bargaining: worker training and occupational qualifications (initial and ongoing to enable them to adapt to technological change and the uncertainties surrounding the future of their careers); reduction/reorganisation (or *Amodulation@*) of working hours; the organisation of worker representation at the company or group level; on-the-job health, social protection and supplementary pension plans (including early retirement) and their difficult financial situation; measures to combat discrimination, particularly on the grounds of sex in a context of growing numbers of female workers.

The inclusion of such issues in the scope of collective bargaining entails addressing them in a different manner, making them the object of collective exchange: wage reductions in exchange for hiring; wage and working hour reductions in exchange for temporary hiring of steady employment; adaptation of working schedules to company needs and creation of *Atime-saving accounts@*; interconnection between guaranteeing the jobs of employees in training and early retirement for older workers; creation of a *Asecurity fund@* to facilitate reclassification, etc.

1.3 New subjects: self-employed workers

Collective bargaining and agreement techniques tend to extend beyond paid employment, serving to define the collective status of legally self-employed workers who are nonetheless financially dependent on a business partner. Legislation acknowledging the status of para-subordinate workers (Italy) or quasi-employees (Germany) provides that such workers are to benefit from collective bargaining rights. And such bargaining law has, in turn, been a powerful development tool for these workers= collective statutes (see Chapter 1 above). Even beyond such specific statutes, there is, in certain countries a tendency to resort to collective bargaining to regulate certain aspects of legally self-employed workers= work.

90. See: A. LYON-CAEN, *Le rôle des partenaires sociaux dans la mise en œuvre du droit communautaire*, in: *Droit social*, 1997, 68.

In France, for instance, a collective agreement was concluded in April 1996 between the Federation of Insurance Companies and the unions of general insurance agents[91]. Such agents, who provide commercial and consultant services, are bound to insurance companies under commission contracts. They are self-employed, but they are financially dependent upon their principals. This agreement defines the conditions for conclusion, amendment and termination of commission contracts and contains provisions relating to remuneration, training and social protection of general agents.

In the area of health services, French social security laws make broad use of the technique of collective agreements between social security pay-offices and doctors= unions to regulate the working conditions of free-lance doctors. These medical agreements address such diverse issues as the service price list, the framework for doctors= incomes, medical training, etc. The importance of such medical agreements has been enhanced by the Juppé reform.

As independent workers, in Italy, are a very large group, their organisations use to play a crucial role in the economic and political national life. In particular, the >Confcommercio= which represents shop-owners, has acquired a growing political relevance, which has now substituted the one played by the >Coldiretti= (a farmer organisation) in the 1950s and 1960s.

Finally, some independent workers in the agricultural sector (small farmers and stockbreeders) are organised in *Aautonomous@* or de-facto syndicates, which have (still recently) mobilised the category for specific, corporative, claims.

In Italy the social partners have entered into negotiations on non-salaried forms of employment (self-employed, quasi-self-employed), with a view to affording appropriate security to workers involved in these new forms of employment. If the negotiations are successful, the government will take into account the outcome of the agreement for the preparation of a bill to be tabled in Parliament on the *AStatus of new forms of work@*.

This all-round enlargement of the scope of application of collective agreements is indicative of the profound change in the system of sources of law. The agreement between the subjects of law tends to become a condition requisite to the legitimacy of the rules that govern them. Henceforth the authority of law is not contingent only upon the will of the State: the will of the persons for whom the law is intended vie with it for that Reference position. In the same vein, at the company level, managerial power will never legitimately be law unless backed by the will of the persons who submit to it. The pursuit of conventional legitimacy thus inevitably leads to the growth of the influence of collective bargaining. But such growth necessarily involves diversification of collective bargaining law and practice.

2) The splintering of collective bargaining

Until the eighties, most collective bargaining systems had a centre of gravity, which in continental Europe was, more often than not, national industry-wide bargaining (such as in Germany, France, the Netherlands, Sweden or Italy), or company-wide bargaining under the British model. In all of these systems, bargaining admittedly took place at various levels, but the consistency among them depended on the identification of a prevalent level of bargaining. This consistency has been lacking since bargaining has become more widespread. The most visible effect of such generalisation is the weakening of the national framework in collective bargaining practice. Decentralisation of bargaining, on the one hand, shifts the centre towards the company level. And on the other, new bargaining units arise which entail recentralisation in ways irrelevant to the national framework.

2.1 The move towards decentralisation: from industry to company

The bargaining centre is shifting from the general/national industry level (which continues to prevail in many countries, in terms of number of workers involved) towards individual firms.

Although to a variable extent depending on the country, the company is, for different reasons, a *Asensitive space@* for collective bargaining. The steep rise in participatory management and negotiation of the organisation of work enhances the importance of company-wide agreements and the role of institutions that represent personnel at that level. At the same time, the tendency to reduce the size of companies and the relative increase in the number of workers at the service of such companies pose new problems for rules of representation and collective bargaining designed for large companies. This leads to the enactment of provisions intended to make the right to representation and bargaining effective in small companies. All of this combined brings collective bargaining at the company level into a new light as regards the

91. Cf. J. BARTHÉLÉMY, *Une convention collective de travailleurs indépendants?*, in: *Droit Social* 1997, 40.

identity of the negotiators and the issues or objects negotiated and bargaining procedures. The rapid growth of company-level bargaining raises, moreover, other problems associated with the relationships among the various levels of bargaining.

2.1.1 New forms of bargaining

The collective bargaining *negotiators* at the company level are usually union delegations in the company (bargaining systems monopolised by trade unions). However, bargaining for certain new kinds of company agreements is entrusted to elected representatives in the firm (works councils or committees); this expansion of the duties of elected institutions to include bargaining may clash with powers vested in unions.

Such company agreements are usually characterised by the In small enterprises, the implementation of collective bargaining is hindered by the lack of institutions representing personnel. Formulas involving vesting external union representatives with bargaining powers (delegations; area joint committees, etc.) meet with considerable resistance, not to say outright opposition from management, even though they may represent a good combination of many of the advantages of both centralisation and decentralisation. This solution has nonetheless been adopted in the domain of prevention of work hazards (especially in construction).

Another possibility being experimented with today in France consists of authorising trade unions to issue a bargaining mandate to the employees of a company.

The real change which is undergoing in Italy, since 1992 (with the short parenthesis of the conservative Berlusconi's government) is the making of new system of co-ordinated industrial relations.

Through such ›*concertazione*‹ trade unions are now fully involved in the making of the governmental economic policies, and by this way Italy is becoming a complete Co-ordinated Market Economy, like the central and northern European ones.

A national cross-occupational agreement on contracting policy dated 31 October 1995 (signed by CNPF, CGPME, CFDT, CFTC and CGC; rejected by CGT) was concluded to that effect. This agreement, whose terms were reflected in the act of 12 November 1996, opens up two new possibilities for collective bargaining in companies where there are no union representatives. The first is to submit the agreements reached with staff-elected representatives to validation by an industry-wide joint committees, which would ensure their subsequent application. The second possibility is to negotiate collective agreements with company employees especially mandated for that purpose by a representative union organisation. The implementation of such new possibilities is referred to industry bargaining.

This act was judged to be constitutional by the Constitutional Council, which refused on that occasion to recognise the existence of trade union monopoly of bargaining[92]. Trade unions (and doctrine [93]) disagree strongly in their appraisal of this major innovation. CGT and FO have a hostile opinion of what they consider to be a serious derogation from trade union rights and plead for abolition of the threshold number of employees to designate union delegates, whereas the unions signing the agreement see it as a lever for the collective organisation of small companies.

In general, efforts are being made in various European countries to provide a suitable legal bargaining framework in SMEs.

2.1.2 New problems associated with inter-agreement relationships

The relationship between industry-wide and company-wide collective agreements varies depending on the country. The principles applied to prevent or resolve conflicting provisions differ (hierarchy of agreements or legal priority of industry-wide agreements over company-wide agreements in Italy and Germany; recourse to the most favourable rule principle in France; application of the agreement adopted at the earlier date in Spain, etc.). Industry-wide agreements, however, often define the scope of agreements at the company level. Whatever form it takes, this relationship is governed by relatively clear rules. The results are predictable labour costs, a certain degree of standardisation of wages and a framework for competition among the companies in the industry in question.

Nonetheless, the rise in collective bargaining at the company level is hardly compatible with the maintenance of strict enforcement of agreements at the industry level. Such enforcement, if construed too stringently, may prevent diversification of the right to reach agreements, necessary for the interests of companies, and thereby have a negative impact on employment. But seen from another perspective, the autonomy which company-wide bargaining is allowed should not encourage unfair competition or anti-union practices. Most national legislations have endeavoured to strike a fair balance between these two demands.

Generally speaking, the intention is to safeguard the function fulfilled by industry-wide agreements of standardising conditions to ensure fair competition. But an analysis of present developments shows, in most countries, a tendency for company-wide agreements to evade industry-wide discipline. These centrifugal forces appear in several manners:

- softening of the compulsory nature of the provisions of industry-wide agreements, which take the form of simple

informal nature of *bargaining procedures*. Their functions are many and varied: restructuring, social protection or participation, implementation of auxiliary laws or provisions or framework agreements concluded at the industrial industry level, etc. Certain national legislations require agreements concluded by elected representatives in the firm to be submitted for approval by industry joint committees on which the unions have a seat. Their effectiveness, as atypical collective agreements, varies, but they are generally acknowledged to have imperative effects. Such agreements are a powerful tool for rendering company policy more independent, not only with respect to higher-ranking collective by-laws (laws and industry-wide covenants), but also with respect to individual employment contracts.

92. C. consti D 96-383 du 6 novembre 1996, in: *Droit social* 1997, 31.
93. See: G. LYON-CAEN's crit. comm, *La Constitution française et la négociation collective*, in: *Dr. ouv.* décembre 1996, 479.

recommendations;

- entitlement to derogation ("escape" or "opt-out clauses") from general rules established by the industry agreement, so it is limited to the definition of minimum guarantees or basic principles.

In Germany, for instance, first in the East and now in the West, so-called escape clauses (*Öffnungsklauseln*) have been introduced in certain collective agreements which enable management to lower salaries by a certain percentage, with the works council's consent, if the company is in financial straits. The unions try to reserve the right to veto, but they are under growing pressure to give their consent to such arrangements. This pressure is brought to bear from different sides, partly by management, but partly also by certain political forces that threaten to make such escape clauses mandatory. Under management pressure, such escape clauses are becoming more and more common in industry agreements, while no new balance has been struck between unions and industry "*In Spain, the Workers By-laws provides that collective agreements reached at levels higher than the individual company must establish 'the terms and procedures for non-application' of their salary schedules to companies falling under their scope of application 'whose financial stability may be damaged as a result of application thereof' (arts 85.3 c) and 82.3). these are the so-called 'salary opt-out clauses'. If the collective agreement governing a particular industry does not include such clauses, a company may also opt out of the schedule through operation of an agreement between the company itself and the workers' representatives" either union representatives or electec by workers" 'when warranted by the company's financial situation'. If no agreement can be reached, the differences are to be settled by an industry-wide collective agreement joint committee, which, if there is no agreement at the company level, is also empowered to establish the new salary terms that will prevail in the company that has opted out of the industry-wide agreement*".

The decentralisation observed in the relationship between the law and collective agreements (in particular with the recourse to auxiliary or provision laws) reappears, then, in the relationship between industry- and company-wide agreements.

In any case the importance of this move towards decentralisation varies depending on the country: in some, indeed, the bargaining system continues to operate essentially at the industry level, even where such industry-wide bargaining deals more often with framework agreements.

In the Netherlands, for instance, empirical observation shows that there is no real decline in industry-wide bargaining, but rather that it engages in the development of the technique of framework agreements whose provisions are required for bargaining at the company level. At that level, on the worker side, works councils often bargain on the basis of their own particular criteria, but within the framework of the industry-wide agreement. Large companies such as Philips, Hoogovens, IBM, KPN, Heineken and others have their own collective work agreements at the company level. But that is not the general rule. Other large companies such as ABN-AMRO (banking industry), ING (banking/insurance industry), large automobile manufacturers (DAT and Scania) work under industry-wide arrangements.

agreements on the one hand and works councils and company-wide agreements, on the other.

The collective agreement for construction recently concluded in East Germany allows, subject to works council consent, establishing wages 10% lower than the minimum wage in the industry. Such derogation must be warranted by the intention to save jobs. The local representatives of parties to the industry agreement must be informed of the conclusion of such company-wide derogation agreements. The company agreement is valid if the local representatives lodge no written, justified objection thereto within 8 days. Such objection may only be formulated for reasons of violation of the purposes laid down for the escape clause, i.e., to save jobs. After such an objection is lodged, the agreement is not valid unless the works council ratifies the decision by at least a three-quarters majority, or two-thirds majority in the event of works councils with only three members.

2.2 Recentralisation: appearance of new bargaining units

Decentralisation of collective bargaining towards the company level, considered alone, reveals only part of a much more complex picture. First of all because bargaining at the company level often remains within the framework established at the industry level (whose content is thus changed: see '2.1 above). Secondly because new bargaining levels emerge which extend beyond the company level but which are not covered by the national framework either. The most senior of such new levels is indisputably the group of companies, but account must also be taken of the new regions whose boundaries are defined by company networks, as well as of Union-level bargaining.

2.2.1 Transnational companies and groups of companies

Multinational companies and groups of companies are acquiring growing importance and collective bargaining conducted within such structures will also become more and more important. Admittedly after arduous discussion, Directive 94/45/CE did not attribute bargaining powers to the European works councils that are to be established in EU-wide companies or groups of companies. Nonetheless, it is hard to avoid thinking that the effective functioning of such institutions for participation (information and consultation) will eventually include bargaining practices. Collective bargaining in groups, regardless of their regional dimensions, admittedly defies the logic of industry-based bargaining, where the companies comprising the group conduct different lines of business. Conducting such negotiation poses serious problems with regard to its relationship to industry-level bargaining.

But collective bargaining in groups of companies is already envisaged in Community law on the establishment of a council or procedure for information and consultation. This is not a true European level bargaining process, but transnational bargaining to which the laws of one of the EU member countries apply: the country where such Community companies and groups of companies have their headquarters. Nonetheless, if, once such bargaining is concluded, the repre-

sentative institutions created conclude collective agreements applicable to the group as whole, this will pose the problem of the relationship of such transnational agreements to the national agreements to which the group companies are already subject.

2.2.2 Regional and networked companies

The renewal of bargaining on an sub-national regional basis is likewise reported in certain countries. This tendency is obviously stronger in highly decentralised States. Regional policy makers and social partners open up their regions to social and economic promotion, including employment policies and industrial relations in the package. This may give rise to collective bargaining involving management and labour. Under its most highly developed form (regional cross-occupational agreements), such bargaining also poses a problem of its relationship to nation-wide agreements (industry or cross-occupational agreements).

To the extent that companies establish long-term co-operation for the manufacture of a product or provision of a service and are linked to one another via long-lasting contractual relations (sub-contracts, interim contracts, franchises or awards, etc.), this network is the sole relevant bargaining unit in a certain number of domains. Collective bargaining in such domains is indeed the only device able to harmonise certain working conditions and guarantee decision-making with the management who is in fact responsible for such conditions. The erstwhile classic question of identification of groups of companies gives way, then, to the even more formidable issue of identification of networks of companies. Solving this problem will entail determining the relationships and entrepreneurial responsibilities existing between legally independent but financially dependent companies that co-operate regularly in the provision of products and services.

The notion of networks of companies is already envisaged in certain national legislations in the form of a number of mechanisms for territorial representation, agreement or bargaining. Such is the case of *workplace delegates*; possible consultation, during negotiation at the company level, with union delegates of *third party firms* working on the premises or workplace and under the management of the company in question; occupational or cross-occupational joint committees that may act as common collective bargaining bodies for several companies in the same local area or department. At the Community level, Directive 92/57 of 24 June 1992 compels all companies working in the same building site or involved in the same civil engineering project to co-ordinate all measures relating to worker health and safety. Such co-ordination entails, most importantly, the possible creation of an inter-company collegiate body whose membership includes employees working on the site, in an advisory capacity, and the extension of certain provisions of the labour law to self-employed workers.

The identification of such networks is indeed necessary in order to guarantee respect for certain rights of workers employed by networked companies. It enables making the suite of companies concerned jointly responsible or imposing co-ordination among them (regarding salaries, on-the-job safety and health and social protection). Such identification is likewise necessary to strike a balance in the relations among the various companies in the network; it is particularly important to prevent firms in a predominant position from abusing it by imposing abusive exonerations of liability. Bargaining within networks is not restricted to the establishment of relations with paid workers, but may extend to agreements between client firms and their sub-contractors. This may involve a whole chain of subcontracting down to the level of self-employed workers. Conducting such bargaining will perhaps also encounter the problem of the relationship to industry-wide agreements. But it has arisen in response to a need already identified by companies, as evidenced by a certain number of experiences undertaken at their initiative:

The practice has given rise to other kinds of social consensus within company networks, in particular sub-contracting networks (conclusion of sub-contracting charters, which are not legally binding). Social clauses could also be introduced in the contract by and between the major company and its sub-contractors, guaranteeing that the latter's employees are duly qualified[94]. This kind of initiative might also be implemented through company-wide (but not labour) collective agreements concluded between the main company on the one hand and its sub-contractors (or self-employed workers) as a single group on the other. There are already examples of collective agreements of this nature (see above ' 1.3).

Collective representation and bargaining at the regional level tend, then, to develop, as readily in the context of networks of financially stable companies as in the framework of cross-occupational bargaining instituted at the provincial or local level. This affords further confirmation of our initial hypothesis about the influence that the organisational structure of public (State, Regions, European Union) or private (companies, groups, networks...) powers has on the framework of collective labour relations

2.2.3 Bargaining at the Community level

Community bargaining practices B more often a question of social consensus than actual collective bargaining B are indi-

Such tendencies may encourage competition among regions. They call, then, for mechanisms intended to prevent dumping, mechanisms such as the kind specified under Directive 96/71/EC of 16 December 1996 relating to the posting of workers in the framework of provision of services.

But there is another dimension to such new regional bargaining units which may be linked or otherwise to political and administrative regionalisation. The reference here is to contractual connections that may appear in the framework of networks of companies. The establishment of companies at the regional level (in terms of substructures, employment and production relations in their territory) is a very important factor in the organisation of work, which may give rise to new regional collective bargaining units. The regions whose boundaries are thus drawn may or may not coincide with the ones instituted by public authorities; they may be sub- or transnational.

94. In 1899 the Millerand decree had already provided that companies tendering for public works must respect the rules on salary and working conditions deriving from local usage in force as verified by joint committees or labour relations magistrates. The purpose of that rule was to subject companies bidding on the same works to respect the same working regulations; it lies at the root of the development of industry-wide bargaining in France; cf. M-L MORIN, as above.

cative of the problems affecting the organisation and effective functioning of labour and management at the European level, namely the regulation of their representativeness, the clarification of bargaining procedures and the effectiveness of the agreements reached. One of the foremost manifestations of such Community level bargaining is the agreements concluded between the CES, UNICE and CEEP relating to parental leave and part-time work. Limited though they are, such experiences provide substance for cross-occupational Community The idea has been put forward that sectors of general economic interest, in the meaning laid down in article 90 of the Treaty of Rome, may be a suitable area for European industry-wide bargaining[95]. To the extent that it is admitted that the bargaining whose development is foreseen in the provisions of the Maastricht Social Agreement as included in the Treaty of Amsterdam.

What is now lacking is the essential question of industry-wide European collective bargaining. The issue of the effectiveness of agreements ensuing from such bargaining and its relationships with the other numerous levels of bargaining must also be addressed.

95. *Le travail et l'opposition public/privé*, in: Revue internationale du travail

, n 1 6 , p p . 6 6 3 - 6 7 4 (p u b l i s h e d i n t r i - l i n g u a l v e r s i o n , F r e n c h , E n g l i s h : *R e g a r d s c r o i s é s s u r l e t r a v a i l e t s o n d e v e n i r* , 1 9 9 6 , v o l . 1 3 5

economic nature of such services means the right negotiate their delivery, their legal organisation should be patterned along the lines of contractual relations. But this does not mean, however, an alignment with common labour law. It has already been admitted that the imperatives of general interest may be a hindrance to free competition[96]. As far as labour is concerned, servicing a general interest involves respect for the professional rules that respond to demands characteristic of that service. Such rules ensure a balance between the particular constraints that may affect workers in these services and their compensation in terms of employment status. The definition of such professional rules is a matter that would be particularly appropriate for industry-wide bargaining at the European level. This would contribute both to the dynamism of social dialogue and to the assertion of general Community interest that extends beyond the national level, even though to date, economic services of general interest have paradoxically been referred back to that level.

96. See in this regard: *CJCE* jurisprudence and in particular the Corbeau ruling

B) The Question of Collective Representation

The issue of worker and management representations is one of the most difficult questions posed to labour law. For reasons discussed in the introduction to this chapter, such representation is closely linked to forms of organisation and collective bargaining, which in turn depend on the way work is organised. This is a given, common to trade unions and employers= associations alike.

History has also showed the variety of forms that such representative organisations can take: purely contractual private agents; political subjects subordinate to or independent of political parties; counter-powers within the company, etc. This evolution has culminated in the dual configuration of trade unions, which in addition to their private-law nature perform political and institutional functions.

Further to such general considerations, the most distinguishing feature of the system of collective representation in Europe is its extreme diversity. It is not the intention, here, to describe such diversity or even to conduct a comparative analysis [97], but rather to measure the transformations and the conservative forces within the system, in order to identify the direction in which it is liable to evolve.

1) Transformations in the system of representation

The forces bringing about the change affecting collective representation today explain the forms that such change has adopted.

1.1 The forces of change

1.1.1 New forms of organisation of work

The representatives defending labour=s and management=s social and financial interests, their profiles and traditional functions, have been hard hit by the crisis of the Fordist system and its impact on work arrangements and the labour relations established around them.

Today company changes are producing a wide variety of kinds of firms, which define a similar number of new areas of labour relations (business concentrations and groupings, networks of firms that make use of outsourcing and the establishment of stable relationships of co-operation, A*dependent*@ firms, very small firms and virtual firms). The frag-

97. See in this regard: European Commission, *Employee Representatives in Europe and their economic Prerogatives*, *Social Europe*, Supplement 3/96, 171 p.

mentation of collective bargaining described above (section A) obviously calls the established structures of union representation into question. Whether it involves decentralisation of bargaining towards the individual company level, or recentralisation via new bargaining units (groups, networks, regions, Europe), taken as a whole the process contributes to weakening industry-wide representation at the national level.

Moreover, trade unions= homogeneous human and social base B wage-earning, industrial, male workers with a typical open-ended, full-time employment contract B has become fragmented and diversified, as the community of interests represented has splintered. The growing diversification of employees and their interests, employment instability, the discontinuity of careers and the expansion of sub-contracting practices, decentralisation or delocalisation of production, are factors that further weaken traditional union representation. The representation function has grown more complex, making it necessary to resort to representativeness techniques.

1.1.2 Unemployment

Mass unemployment has also contributed to the deterioration of union representation capacity and its declining influence. First of all, the fear of unemployment is a powerful union demobilisation factor. The vast numbers of unemployed workers dissuade those who do have a job from actively participating in protest movements.

Moreover, unemployment results in the appearance of new organisations that compete with trade unions and call their representation monopoly into question (non-governmental organisations, associations whose purpose is to defend the disadvantaged and the unemployed, charities...). All unions admittedly claim to represent the interests of the jobless. But as their position in companies is already weak, unions are in fact completely absorbed by the defence of the interests of those who (still) have a job. Hence the appearance, in certain countries such as France in December 1997, of protest action driven by organisations of unemployed workers outside the trade union movement or even openly opposed to it. The question of recognition of representatives of their own for the unemployed has already been posed at the Community level. Hence the report of the A*Committee of Experts*@ (March 1996), provided for in the Commission=s Second Social Action Plan (April 1995), proposed, in the framework of the promotion of the integration of social policies in the Union, to include explicit recognition in the treaty of collective actors playing a role in civil society and in particular solidarity institutions that combat exclusion and poverty and which represent the unemployed and excluded[98]. This said, while the unions= contribution to the maintenance of overall social balance and the achievement of social cohesion is still decisive, their appropriate organisation and effective functioning are still a priority at issue for the European Union as well as for its Member States.

1.1.3 Management=s ideological initiative

98. [Phrase quoted literally in the French text and paraphrased in the English version, because the translator did not have access to the source. T.N.]

Since the eighties, and in all Member States, management recovered the ideological initiative, subordinating workers= rights to economic constraints, demanding greater *Aflexibility@* in labour relations (use of insecure employment, job changes, dismissals), and marginalising traditional union initiative in the process of regulation of working conditions. This ideological offensive has brought certain unions to abandon a culture of conflict. Playing on management=s field, labour is taking a conciliatory or co-operative approach in its action, in keeping with the preferences of participatory management. Another aspect of management initiative consists of in fact marginalising the forms of representation instituted by labour law, to the benefit of a management style that favours immediate, direct and ongoing contact with workers.

In short, in post-industrial societies, the transformations taking place in labour and capital as well as in their respective organisations give way to a new relation of forces. Such changes have sociological, economic and cultural dimensions that are independent of Labour Law. These are to be found in all European countries, but under very different forms.

1.2 Forms of change

1.2.1 The weakening of trade unions

The explanation for the weakening of collective representation structures observed in several countries is to be found in the new social and economic context described above. Such weakening leads in particular to a quantitative decline in membership. Whereas this is primarily true of employee trade unions, employers= associations are likewise affected, though to a lesser extent. The incentive to joining an employers= association is likewise small: the fear of strikes or the desire to standardise competitive conditions are no longer important considerations with respect to membership, which remains nonetheless a way of participating in the management of employers= common interests (especially in the field of training) or to influence bargaining on agreements that may be extended to the company in question.

France is one of the countries of Europe with the largest union disaffection rates. In August 1995 the journal *ALiaisons sociales@* reported that France was the industrialised country with the smallest percentage of unionised workers, with a rate of 9%. The same journal also published a survey conducted by CFDT according to which one Frenchman in ten had *Alittle confidence@* or *Ano confidence at all@* in the three major union confederations (CGT, CFDT, FO). Technological change and the introduction of flexibility of sorts in labour relations have contributed to weaken unionism. On 31 December 1989, 50.7% of the companies concerned had union delegates. French unions were originally established in the secondary or manufacturing sector. In recent years there has been a relatively clear transfer of the work force from the secondary to the tertiary sector, where union influence is weaker and therefore harder to exert. In 1962, the tertiary sector accounted for 45.4% of all jobs, whereas in 1990 it accounted for 65.6%. Trade union involvement is particularly weak in the domain of business services. Nonetheless, the representative union organisations taken together obtain around 65.6% of the votes cast in elections for works councils. But the number of independent representatives elected is growing.

In the United Kingdom, the union membership rate has likewise dropped (55% in 1980; 39% in 1989; 31% in 1996). This rate is, however, only slightly higher among men than women; it has also declined among manual labourers and in the secondary sector, to the point that the rate is the same for them as for non-manual and service industry workers. The union membership rate continues to be much higher in the public than in the private sector, but the importance of the former has decreased with privatisation and compulsory subjection to competition (whereby public sector employers are obliged to allow private sector companies to make an offer to acquire the right to deliver specific services). Traditional union strongholds (coal mining, processing industry and employment in the public sector) have declined and the rise in part-time, temporary and female work has undermined the traditional union rank and file (male labour with open-ended, full-time contracts). In any case, that collapse has been mitigated by a growth in union membership among women workers. State support of collective representation has likewise collapsed, under union law reforms undertaken by conservative Governments in the framework of their policy of deregulation and individualisation.

The organisation rate in Sweden has been outstanding high since the 1950ths, due partly to the centralised bargain system between the central social partners on the private sector, mainly LO and SAF. Later on the public sector was included in this centralised bargaining system. The system aimed to include all wage earners and *both* the employers and employees organisations aimed to organise al workers and employers and include them in to the centralised negotiating system. As a result the orgaisation rate became outstanding high in Sweden. For example, around 90 percent of work force in the private sector are organised and this figure has been stable over time.

In Germany, membership of associations is tending to slide among SMEs, in a move to thereby evade industry-wide agreements. If a company withdraws from the employers= association, the agreement continues to apply to the existing employment contracts, but management ceases to be bound by new collective agreements. This possibility is used more and more frequently by employers. But the mere threat of disaffiliation leads unions to make more and more concessions. The present problem facing German unions is, then, less the loss of their own members than declining membership of employers= associations. It should be added that unions may demand the conclusion of collective agreements directly with employers who are not members of employers= associations, by an adherence agreement or under a specific company-wide agreement. To exert pressure in defence of such demands, they may also strike, but only the employees of the company concerned may be involved. In practice, however, such strikes for concluding company-wide agreements are not called except in large companies with a strong union organisation. The SMEs withdrawing from employers= associations or who never join will more than likely be spared union action and sheltered from collective agreements. This works much better when in such cases works councils replace the unions as bargaining agents.

In any case, it should be stressed that the drop in union membership is not a universal phenomenon. It has not occurred in the Netherlands, Sweden or Italy.

In the Netherlands, membership of the large union confederations did indeed fall in the eighties, but the number, which is rising slowly at this time, comes to an average 25% of the labour force.

Likewise in Italy increases in unemployment and precarious employment have not had the unsettling effect that they might have on union membership. The explanation lies mainly in the particular kind of unemployment afflicting Italy (typically involving young adults and women in Southern Italy, who live with their families), which helps attenuate the explosive effects that this phenomenon has on society.

1.2.2 Movements towards union unification or splitting

Collective representation is still confronted by the pluralism-unity dilemma. The growing heterogeneity of working situations is obviously a factor that strengthens pluralism and may give way to union division. In contrast the pursuit of a balance of power between management and labour is an argument for unity. Both movements can be observed in Europe.

In certain countries, there has been a dramatic regrouping of union forces.

This is the case of the Netherlands, which has witnessed substantial merging of organisations, more among management than labour.

There are now three employers= confederations in the Netherlands: a) VNO-NCW (major firms in industry, trade and services), b) MKB (small and medium-sized enterprises) and c) LTO Nederland (agriculture and horticulture). VNO and NCW merged in early March 1995 to form the Netherlands Confederation of Industries and Employers. VNO was itself the outcome, in 1986, of a merger between two other employers= associations. NCW was the Dutch Christian Employers= Federation, formed in 1970 as the result of a merger between Catholic and Protestant organisations. The new confederation for small and medium-sized enterprises, MKB Nederland, was likewise formed in 1995, from a merger involving the former Dutch Royal Federation of Small Enterprises and the Dutch Christian Federation of Small Enterprises. Likewise in 1995 LTO Nederland (Dutch Confederation of Farmers and Truck Farmers) formed a new confederation by merging a Catholic federation of farmers, the Dutch Royal Agriculture Committee with the Christian Federation of Farmers. The newly formed LTO has a membership accounting for around 80% of all Dutch farmers.

As far as labour is concerned, major mergers took place towards the end of the seventies and early eighties, the outcome of which was the Dutch Federation of Unions (FNV). Here as well the merger involved the General Federation of Unions and the Catholic Federation of Unions. The eighteen unions affiliated with FNV have a combined membership of around 1,300,000. In January 1998, five of these 18 member unions merged to form a new union: FNV Bondgenoten. With In Germany, in this regard, metallurgical management tends to conclude collective agreements with the small Christian metallurgical union instead of with the large metallurgical industry-wide union. This practice breaks with the custom consisting of treating the large unions, members of the German this merger, FNV now comprises two large unions, one for the public sector and one for the private sector (food, services, banking, insurance, manufacturing and transport).

In Belgium, there is no observable institutional *Amerging@* of trade unions at the sectoral or national level, although the *Acommon front@* tactic, which is relatively frequently used, rallies unions around sets of specific demands.

In the United Kingdom, a series of important mergers led to the creation of much stronger unions. For instance

- the merger of three public sector unions (NALGO, NUPE and COHSE) to form UNISON in 1993, today the largest union in Great Britain (current membership: 1,400,000).
- the merger of two primarily manual workers= unions covering most skilled workers in the manufacturing industry (AEU and EETPU) to form AEEU in 1992 (current membership: 0.8 million).
- the merger of two primarily non-manual workers= unions (ASTMS and TASS) to form MSF in 1988 (current membership: around 0.5 million). MSF is presently considering further mergers with other office employees= unions.

In Spain, since 1987, the two majority unions, UGT and CCOO, are engaged in a unification process, not at the organisational level, but rather in terms of joint action. The industrial federations comprising these two unions, in turn, have undergone a series of mergers.

In Germany we see a strong tendency to mergers, too. A merger between the IG Chemie (chemistry) and IG Bergbau (mining) has already taken place. The small IG Textil und Bekleidung (textile and clothing) fled into the arms of the strong IG Metall. In the service sector (public and private) a merger of 6 unions is discussed.

In other countries, in contrast, the tendency has been to diversify or even split, more in the trade union sphere than among employers= associations.

In France, for instance, opposition to the overly *Aparticipatory@* line of certain large confederations (CFDT; FEN in national education) has finally given way to union division (leading most notably to the creation of the SUD union after demerge with CFDT) and therefore to even greater fragmentation of labour representation in a country already characterised by the weakness of its unions.

In Belgium it should be noted that there is some debate about trade unions= representation of executives. While traditional unions have made huge efforts to integrate executives and their specific demands in their ranks, autonomous executive unions are emerging, and present separate lists of candidates in labour elections.

Finally, there is a tendency in some countries for employers= associations to favour bargaining with small minority unions to more readily obtain satisfaction when negotiating collective agreements.

Union of Trade Unions (DGB) as *Aunitary@* unions, arrangements under which the smaller unions were only given the option of adhering to the agreements negotiated by their large counterparts. If management tries in the future to systematically pit the small unions against the larger ones, a

problem will arise respecting the co-existence of several collective agreements with different unions in one and the same company. It is too early to know whether this tendency will take hold or whether the concessions made by large unions will suffice for management to forgo this practice.

1.2.3 The rise of company-wide representative institutions

The decentralisation of collective bargaining to the company level and the appearance of new also company (group, network)-based bargaining units, obviously enhance the role of worker representation at such levels. The worker representative institutions elected within firms (works councils or co-operation committees) are actually the only forms of collective representation that are in a position to compete with union representation. These works committees or councils have become well established in dualist systems of representation, the majority in European countries, with a tendency in some cases towards the strengthening of their powers of participation and control (information and consultation) and towards the attribution of new (bargaining) powers (although in certain countries, such as the Netherlands, their capacity to bind the individual worker by the agreements they enter into is questioned).

The different dualist systems of representation in individual firms establish the relations between these elective representative institutions and the trade unions. Such relations may be based on the separation of each institution=s areas of competence or on the presence of unions in the institutions representing company employees (directly ensured by awarding unions seats therein or indirectly via rules governing the organisation of company elections). But this division of roles in collective representation is often belied by actual practice, which tends to favour elective institutions. This trend is likewise encouraged by legal provisions on information, consultation and bargaining, which have consistently strengthened the roles of such elective institutions.

The German example is most indicative of such trends. At the company level, works councils (Betribsrat) are management=s partners. They are elected by all employees regardless of their union affiliation. Works councils are independent of unions but bound to them by the fact that around 75% of the members of works councils are unionised.

Company-wide agreements between employers and works councils are applied like collective agreements, directly and mandatorily to employment contracts. They may also deal with the same items (delivery, content and termination of employment contract, company issues or organisation, joint institutions). The solution to this competitive situation is provided by the act on labour organisation in companies (Betriebsverfassungsgesetz). This act specifies, generally speaking, that company-wide agreements are not lawful in areas for which the respective collective agreement contains provisions. But as seen above, collective agreements may contain escape clauses which allow for additional or different provisions in company-wide agreements. Management does all it possibly can to enhance the autonomy of the Betriebsrat with respect to unions in the bargaining process. But they meet with the resistance of the latter.

In the establishment of social plans, in contrast, the role of works councils is much more important, because the principle of the priority of industry-wide collective agreements does not exist in that sphere. In companies with a works council, there can be no collective layoffs without a social plan. If the management and the works council are unable to reach agreement, the social plan is established by a joint conciliation body under a neutral chair. To date, such social plans versed essentially on severance indemnities. But recently, the tendency is to develop actual employment plans, which naturally contributes to an enhancement of the role of the Betriebsrat vis à vis the unions.

In France, the suite of reforms implemented beginning with the Auroux acts have favoured company-wide representation. Works council powers continue to grow. The encouragement of company-wide bargaining enhances the role of the company union delegates and, in their absence, the role of the committees or delegates elected by the personnel. As indicated above, the act of 12 November 1996 opens up the possibility of giving a collective bargaining mandate to elected representatives or company members mandated by the union. The agreements thus concluded must subsequently be validated by a joint committee.

The concern for favouring company-wide representation and bargaining has led certain employers to make an even more radical proposal: a A*collective company-wide contract*@. Negotiated with the elected representatives or union delegates, such collective contracts could derogate from all the provisions of the workers= code and industry-wide agreements, subject only to the A*intangible grounds*@ of fundamental social rights. This proposal, put forward by the group A*Entreprise et progrès*@[99] was echoed in a review recently

99. Cf.: *Inventer de nouvelles relations dans l=entreprise: Le contrat collectif d=entreprise*, in: Entreprise et Progrès

published under the aegis of the Ministry of Industry[100].

100. *Mutations industrielles et relations de travail*, Étude publiée par la Direction générale des stratégies industrielles, see: *Lia isons sociales*, 1997, V, n 1 47/97.

In view of such evolution the notion that the unions today have, in law or in fact, a monopoly of collective representation of European workers must be dismissed. In France the Constitutional Council has decided, with respect to unions, that even though they have a natural tendency to ensure the defence of worker rights and interests, they do not hold a monopoly over representation of employees with respect to collective bargaining: *employees designated by election or holding a mandate ensuring their representativeness may also participate in the collective determination of working conditions, providing that neither the purpose nor the effect of their action is to obstruct the action of representative union organisations*[101]. The Spanish Constitutional Court, reasoning along similar lines, sustains that the Spanish Constitution provides for broad acknowledgement of the holders of collective labour rights, *excluding any enshrinement of union monopoly*, whereby the right to collective bargaining is vested in any sort of labour or management representative. But it adds that "this does not mean that there is any constitutional imprecision nor is any equivalence drawn among all subjects susceptible of performing union functions". On the contrary, the Spanish Constitution "constitutionalises the trade union", but not other kinds of representation, such as works councils, which are figures created by the legislator (Sentence 118/1983 of 13 December, followed by subsequent sentences).

In the same vein, the importance of Directive 94/45/EC, which establishes the dual systems of representation (union/elective) of some member States at the Community level, has perhaps not been sufficiently stressed. The core option of EU social legislative policy is the consolidation of these participatory values in relation to the new forms of organisation of work and management demands for flexibility as well as worker safety. This is made abundantly clear in the Commission's recent Green Paper on co-operation for new kinds of organisation of work[102]. The Davignon proposal on worker involvement in European corporations likewise follows along these lines[103].

2) Conservative forces within the system of representation

The changes analysed above are not only taking place with varying degrees of intensity in the different European countries, above all they are acting on strongly conservative social structures. A rigorous analysis of European societies precludes predicting the disappearance straightway of the Fordist model and its distinctive features, nor that of industrial labour or of the typical worker. On the contrary, the diversity and co-existence of models or systems of organisation of production and of work are strengths in present-day European societies. These societies, which are in a permanent state of transition, are also witnessing the resurgence and renewal of pre-Fordist forms of labour (piece work, group contracts, home working and telecommuting, assignments of workers, etc.). The change-conservation relationship is therefore essential to a proper understanding of these transformations.

The evolution under way should not, then, be under- or overestimated. Generally speaking, it would be dangerous to conceal the deterioration caused in unionism by time, changes in the organisation of work and routine and lack of adaptation. Unions must adapt their organisation, that is to say, their structures, and their action to the heterogeneity of the working world. But such necessary adaptation should not imply neglecting the forces that tend to conserve the system of collective representation. The stability of union law, the need for union representation and the lack of any alternative to such representation are all factors that make adaptation more likely than a revolution in the forms of collective worker representation.

2.1 Stability of union law

The various systems of collective worker representation, despite their extreme diversity in European countries, have not, generally speaking, undergone truly fundamental changes in countries where such systems have a legal basis. It is significant that only in Sweden in the seventies or England in the eighties, i.e., two countries where labour law was of a primarily conventional nature, that union law has been subject to major about-faces, with the State regaining control of the organisation of the labour market.

In Sweden Primer Minister Olaf Palme declared that one of the main tasks of the seventies was to prevent technical developments from occasioning unreasonable consequences[104].

101. C. consti D 96-383 du 6 novembre 1996, *Droit social*. 1997, 31.

102. [Title quoted literally in the French text and paraphrased in the English version, because the translator did not have access to the source. T.N.].

103. Commission européenne, *European Systems of Worker Involvement*, DG V, 1997, 11 p. + annexes.

104. [Phrase quoted literally in the French text and paraphrased in the English version, because the translator did not have access to the source. T.N.].

The changes taking place in stock companies, labour representation on the board of directors and economic democracy, another very important issue, were the subject of discussion. The initiatives taken by Parliament and the Prime Minister marked the beginning of labour market legislation which was approved in the seventies and which replaced the Saltsjöbaden convention and co-operation policies that had prevailed in the labour market policy of the three preceding decades. The LO president, Arne Geijer, participated in the parliamentary debate and submitted a motion to Parliament in 1971 in which he proposed an overhaul of labour legislation. That proposal gave way to the creation of a labour legislation committee and the Governmental bill of 1976 which culminated in the introduction of the act on the bases for co-determination. A series of other acts on the labour market was adopted during the period running from the 1970 parliamentary debates through the introduction of the act on the bases for co-determination (MBL). The first of the series addressed the issue of labour representation on company boards of directors and gave rise to the act of 1971 on representation on the board of directors. The act on the position of union representatives in companies came into force in 1974. This shift from a non-state intervention tradition where the social partners was holding the responsability for forming a negotiation system (The *ASaltsjöbadspolitics@*), to the state-intervention model introduced in the seventies, did however not aim to give the state the responsability for the working conditions in the companies. The laws that were introduced were frame laws formulated with the assumption that the social partners were to follw them up with negotiated collective agreements. However, those negotiations between the social partners did not occur as expected, due to the harder and more antagonistic relations which appeared between the social partners from the mid seventies.

Ms Thatcher=s British Administration introduced legal changes intended to reduce labour=s power relative to that management of these reforms made solidarity strikes illegal, enabling employers to dismiss strikers on a selective basis (under the previous legislation, during disputes, management was only allowed, legally, to dismiss all the workers involved or none; they could not selectively fire workers); the definition of the notion of labour dispute, and thereby the due extension of the right to strike, was restricted; union immunity to civil process for losses incurred in the event of illegal strikes was withdrawn; balloting prior to striking was required by law (with specified time for reflection). Such reforms weakened labour with respect to management (although the requirement to hold a vote prior to strikes could theoretically be considered as a factor tending to reinforce union legitimacy). At the same time, the government marginalised the role of the Trade Union Congress (TUC) B a body engaging in the co-ordination and representation of the union movement nation-wide B and of the unions in general, by reducing consultation of such bodies and their participation in quasi-governmental organisations, while continuing to allow employers= associations to participate. The main formal expression of social consensus was the National Economic Development Council (NEDC), whose membership included labour, management and government. The NEDC=s main role was to produce national and sectoral economic development plans. Throughout the eighties, the NEDC was marginalised (funding was reduced and its proposals largely ignored) and finally dissolved. Inversely, management participation in quasi-autonomous non-governmental organisations was encouraged, particularly in the Training and Enterprise Councils (local, quasi-autonomous non-governmental training bodies), whose boards of directors had to have a minimum level of management representation. Union representation on such bodies is much less significant and non-requisite.

In other countries the union role in the organisation of the labour market has not been questioned and new laws have even extended certain of their prerogatives. This relative preservation of systems of collective representation does not mean that new forms of work and employment, characterised by the decline in the manufacturing industry and the rise of services, the impact of information technology, the spread of temporary and insecure work (in particular among young adults), subsidised jobs, self-employment and unemployment, has no effect on the social partners in their essential function of representing social and economic interests or in their traditional behaviour and methods.

But such changes, while considerable and calling for structural and functional adaptations, do not imply the existence of an actual crisis, of the social partners themselves, their representative role or of their instruments for collective action and in particular, among the latter, of collective bargaining systems. Only the British system constitutes an exception to this rule, in which the A*Conservative revolution*@ of the eighties and nineties clearly strove to move towards total individualisation of labour relations and the eradication of traditional union representation and its replacement by a more conciliatory, less confrontational approach, backed by greater involvement of union members in decision making within the union.

In pluralist union systems, the fragmentation and diversification of the community of social and economic interests represented have led to extending the use of representativeness techniques, which afford unions a legal basis for their capacity to represent their constituencies. Such techniques serve to identify the partners, measure their representative capacity, ensure the legitimacy of the most representative organisations and guarantee the application of their decisions to all workers (members and non-members). Such techniques not only ensure their legitimacy in the sphere of collective bargaining, but also lay the grounds for their participation in public institutions with responsibilities in economic and social affairs as well, naturally, as in the institutions managing Social Security systems or arrangements.

Legal presumptions of representativeness continue to meet with objections because they afford weakly supported unions a formal legitimacy and a series of legal powers to which they would not be entitled on the grounds of their membership base alone. Nonetheless, in dualist systems, where elections are held for representative institutions within companies, the popularity of such unions among workers is readily gauged. Besides, presumptions of representativeness generally go hand-in-hand with (legal or jurisprudential) corrective measures intended to guarantee pluralism through the operation of the principles of majority and proportional representation.

However, not all European models are equally successful in reconciling the demands for balanced representation between employers and employees with the imperatives of labour or management pluralism.

2.2 The need for representative unions

It has often been noted that management interests are poorly served by an excessive weakening of union representation; companies that have long-term success in the market are rarely those that have based their strategy on the destruction of all their workers= collective representation. This explains certain management initiatives intended to counter deunionisation.

In France, new collective agreements are aimed at encouraging union action in companies. Known as union rights, or A*Axa*@ accords (first company to sign one of this kind), they provide for management subsidies for union activity and endeavour to improve personnel career opportunities and training. These agreements show a common determination on the part of certain management and labour leaders to counter deunionisation and strengthen union representation in companies. Despite the strong criticism levelled against this kind of agreements[105], they constitute part of the strategies of certain unions[106] and have been endorsed at the cross-occupational level by the Agreement of 31 October 1995 on contractual policy, which encourages their general application.

105. Cf.: G. ADAM: *Les syndicats sous perfusion*, in: *Droit social* 1990, 833.
106. See: l'article de N. NOTAT, secrétaire générale de la CFDT in *Droit social*

This framework agreement calls for bargaining on *Aaffirmative action@* to counter union discrimination at the company level.

The present role of management organisations and unions does not differ, essentially, from their historic role. Employers: associations and trade unions contribute, now as in the past, to the maintenance of the major social balances and the achievement of consensus and social cohesion, with greater or lesser management powers depending on the country. The States, in turn, require the assistance of the social partners to ensure social cohesion. They depend on them especially for the formulation and implementation of employment policies and law. The acknowledgement of the increasing importance, in most European countries, of collective agreements as sources of labour law and collective bargaining as a way of preventing and governing disputes, adds to the need institutions representing management and labour.

Likewise the evolution of Community law, which stresses social dialogue and collective bargaining as the preferred way of building the social Europe, makes the existence of strong and representative union organisations indispensable. The question of representativeness must, then, be posed at that level. The Treaty (art. 118B) refers to *Amanagement and labour@* but does not define them. The issue of cross-occupational or sectoral bargaining has not been broached to date except in a Commission communication (14 Dec. 1993 on the on implementation of the protocol on social policy) which carries no legal weight. CES membership does not include all the unions recognised to be representative nation-wide (e.g., the CGT, still the most representative union in France, is not a member); on the management side, small and medium-sized enterprises would like to voice their own opinions.

In its Communication of 1993 on the implementation of the Social Protocol, the Commissin included a list of 28 organizations of social partners who may be validly consulted at the Community level, a list based on the criteria of representativeness defined in that communication. As regards representatveness, this is examined in accordance with the criteria of the 1993 Communication and confirmed after examination by the Council.

According to the Commission, the representativeness of the signatories of an agreement is determined in the light of the nature and purpose of the subject-matter of that agreement, while the list established in the Communication serves to limit the number of social partners who may be validly consulted by the Commission and may be potential participants in the negotiation. Moreover, the number of participants in itself is not the decisive element for determining representativeness; other factors must be taken into account such as the negotiating mandate at the national and international level, or the cual afiliation of certain national organizations to European organizations.

The Commission has recently been led to define its position in the context of an appeal for the annulment of the first directive (on parental leave) adopted to implement the first agreement reached by the social partners based on the Agreement on Social Policy. The issue is therefore an important one because it questions the Agreement on Social Policy. *This position is an outcome of an analysis of the system established by the Agreement on social policy.* This system distinguishes three major stages: the consultation of the social partners, the possible negotiation among the social partners and the implementation of the agreement concluded with the social partners. Consultation has two phases and permits the social partners to express their views; it is compulsory where the Commission is contemplating decisions on social matters. The negotiation must be carried out with due respect for the freedom of the social partners. The third stage (implementation of the agreement) implies the control by the Commission of the legality of the decision and of due respect for the principle of subsidiarity and proportionality, the examination of the representativeness of the parties signing the agreement; while the possibility that the Commission may not request the Council to implement the agreement is not ruled out.

The European Union cannot reasonably elude a genuine debate on representativeness. The self-recognition mechanism can only work in systems of industrial relations where collective agreements are acknowledged no legal force (such as in Great Britain). But this is not the case of legal order in the EU, which, on the contrary, acknowledged collective agreements a place of privilege amongst the sources of law. It is moreover, because bargaining bears normative effects opposable to all others that the European Commission is now the guarantor of balanced representation of the parties to such bargaining[107]. In so far as the social partners are involved in the discussion or negotiation of lawfully enforceable provisions, the representativeness is a question of general interest and one which public authorities cannot ignore. This obviously implies that the European Union should be vested with competence in the field of trade union law to the extend required to ensure due operation of the system of consultation and dialogue set out in the Maastricht Agreeement on Social Policy. But in any case, such representativeness should be in keeping with the principle of concordance broadly recognised in national law: that is to say, it should be assessed against the backdrop of the level of representation concerned. This means that it does not suffice for an organisation to be

107. See: art. 3 of the *Agreement on Social Policy*, reflected in art. 118 A of the

deemed representative at the national level is not enough for it to be vested, *ipso jure*, with Europe-wide representation.

2.3 The lack of alternatives to union representation

Mass unemployment and the appearance of new forms of organisation of work and employment obviously undermine the traditional bases of unionism and industry. And there may have been advocates of the idea that unions were institutions fallen into disuse, doomed to be replaced by new forms of collective representation better suited than they to express the diversity of interests in play in the working world (non-governmental organisations, feminist and ecological movements, unions of unemployed, volunteer organisations, chari- We should remind, anyway that in Italy are present very powerful autonomous syndicates, especially in specific sectors – like railways, airlines or education – which are able to mobilise their whole category in specific or even corporatist struggles.

In France, the appearance of *co-ordinations* during the strike movements in the late eighties (particularly in the public sector) may have been assessed by some authors to represent emerging alternative forms of representation, more inclined to defend the (often corporatist) demands of their members than to fit into an overall labour strategy. But such initiatives had very little future and the December 1995 strikes showed a return to the fore of the large confederations in dispute management. Opposition to the overly *participatory* line of certain large confederations (CFDT; FEN in national education) has ultimately given way to union division (leading most notably to the creation of the SUD union after division from CFDT) and therefore to even greater fragmentation of union representation, but not to the appearance of alternatives to such representation. The movements of the unemployed in the winter of 97/98 have re-opened discussion of the difficulty encountered by unions in representing the interests of the unemployed. But the associations of unemployed today seem to be no more in a position to be a lasting force able to challenge union representation than the *co-ordinations* were in the eighties. Such associations play more of a *goading* role, to oblige the unions to include the defence of the jobless in their strategy.

Certain unions have endeavoured to broaden their scope and extend their representation to atypical forms of recruitment, to the self-employed – although, in certain countries, self-employed workers join employers' associations – and to the unemployed. Social reality is certainly rich and complex and accommodates other organisations engaging in the defence of interest which are not, however, involved in labour relations and are *less representative*, in terms of membership, than trade unions and employers' associations. In other words, these other organisations and associations play no role in obtaining a consensus between labour and management, even though they have increased the pressure brought to bear on States' political activity (enabling the latter to favour dialogue with these new interlocutors). Trade unions and employers' associations continue to occupy a key place in the formulation of labour regulations and to contribute to social consensus in the broadest sense of the term.

The management association movement, in turn, continues to play a decisive role in the representation and management of employers' *common interests*. The appearance and development of new relations between companies and small companies leads, certainly, to some exodus from or desertion of employers' associations. But to date no organisational formulas (management clubs or reflection or opinion trusts, no matter how influential, Chambers, etc.) have appeared in any country that constitute a true alternative to employers' organisations. Management unions, like labour unions, moreover, are strengthened by labour law, which vests certain of their decisions with regulatory force vis à vis non-member companies (in particular, techniques for extending and enlarging on collective agreements) and attributes to them a wide variety of representative functions in the public sphere.

In short, current transformations of collective relations show both the continuity and stability of collective subjects and the need to adapt their structures and activities to new demands, diverse occupational situations and unemployment.

3) Prospects for evolution in the system of collective representation

In concluding this analysis, the idea that a true revolution in the forms of collective representation is possible or desirable must be dismissed. In contrast, two models for adapting the systems of collective representation emerge in view of the new forms of organisation of work. The first, which prevails in France or Germany, is a shift of representative power towards employee-elected appointees in companies; the second, which prevails in the Netherlands (and may also develop in the United Kingdom), is the merging or regrouping of labour and management forces. Such regrouping allows for centralised bargaining of covenants on security/flexibility, which are then fine-tuned at the company level. But neither of these models can actually work alone. Regrouped union forces need officials in companies to implement the guidelines laid down at the highest level. And inversely, representation at the company level should be able to rely on co-ordination bodies at higher levels for support. It seems, then, that each representation system has to combine the various aspects of the two models, in varying degrees. The British system has for a long time relied on union officials drawn from among the workers in a company, negotiating with management at company level, but able to draw on the resources of the wider union regionally and nationally for information, training representation in more complex negotiations or disputes and legal advice.

An attempt may be made to chart the possible directions of the

evolution of the system of collective representation on the basis of such established facts. Such reflection turns, first and foremost, on the representative organisations themselves; a number of them have, moreover, already undertaken intense reflection about the adaptation of their organisational structure and their activities to new social and economic circumstances [108]. The contribution made by *experts* to this reflection is necessarily limited since they are lacking in legitimacy as well as in the necessary practical experience. The most they can do is suggest possible evolution scenarios, to pose questions whose answers elude them. Such questions, which derive directly from the changes observed in collective bargaining, can be essentially summarised as follows: represent what? represent why? represent how?

3.1 Represent whom? The subjects of representation

Primarily, the reply to this first question is the same as at the dawn of industrial society. Trade unions or worker appointees are in charge of representing labour interests, whereas the employers' associations are in charge of representing management interests.

108. See for instance: *Centrale de l'industrie du métal de Belgique-FGTB*, in: *Un syndicat pour le 21e siècle*, Bruxelles, 1997, 83 p.

On the basis of this reminder, certain indications at times suggested with regard to the future of unionism can be ruled out straightaway. First of all, the idea that the interests of both parties will spontaneously converge, making it possible to forgo collective representation law and abide by law on individual labour relations; the dynamism of collective bargaining stands as evidence to the contrary. Second, the idea that trade unions should cease to represent labour interests *per se*, and turn themselves into agencies offering their members commercial services or defending their interests as tenants, citizens or consumers. Admittedly, certain aspects of collective bargaining (for instance, as regards working hours, see Chapter 3 above) should be extended to represent interests other than those of labour and management; but that need rules out confusing such interests purely and simply with those of employers or employees.

The real options, then, lie elsewhere. They result from the diversification of kinds of employment and kinds of companies, diversification that makes the identification of *Alabour interests@* or *Amanagement interests@* much more complex. In this context the real question is whether or not trade unions will be able to continue to represent the interests of all workers and employers= associations those of all management.

On the labour side, change may be envisaged to take two directions. First, it may focus on the hard core of the working world, that is to say, the representation of the interests of the most highly skilled workers in the highest performing companies. Several signs of change in this regard may be observed; most trade unions seem to meet with real difficulties in their attempt to represent the specific interests of people with insecure jobs, women, young adults or the unemployed or those of employees of sub-contractor companies or quasi-self-employed workers. A parallel might be drawn, then, between companies focusing on their core business and unionism focusing on its main workers who constitute the stable core of workers in such companies. The rise of company-wide representative institutions is a step in this direction, as is the decentralisation of collective bargaining to the individual company level. The second possible development would be, on the contrary, for unions to embrace the diversification of employment arrangements and include workers who are presently more or less excluded from collective action into mainstream collective representation.

On the management side, the question posed is whether or not the rise of dependent companies, essentially in the framework of sub-contracts or provision of services, will call for specific forms of representation. As pointed out above, there are already cases of collective agreements between client companies and sub-contractors. Increases in the number of such experiences would obviously be a move towards new forms of diversification of management representation.

3.2 Represent why? The functions of representation

This second question ties in directly with the change observed in the domain of collective bargaining.

Such bargaining is no longer restricted to the definition of the terms of the exchange of labour for wages, but participates first of all, through varied and complex procedures, in the Due to the imitative effect stressed at the beginning of this definition and implementation of law. Trade unions and employers= organisations are, then, vested with a mission of general interest, which in some ways contradicts their primary task of defending the particular interests of labour or management. Here as well several scenarios may be envisaged. Certain trade unions or employers= organisations may wish to return to the mere defence of their members= interests and refer the question of reconciling such interests with those of society at large to policy makers; others, on the contrary, may be tempted to position themselves on broader political ground and claim the pre-eminence of collective bargaining over political discussion in all matters related, closely or otherwise, to labour or social protection issues. Between these two attitudes, there is a narrow path that would consist of saying that trade unions and management organisations should defend, at the same time, the particular interests of their principals and seek to reconcile such particular interests with those of society at large.

A similar question is posed with respect to employee representation at the company level, whether it be union or elective representation. The rise of company-level collective bargaining leads labour representatives to participate in the definition of the company=s interests at any given time, and very likely to influence certain management choices. Such choices may affect workers outside the company or affect secure workers and employees with insecure jobs differently. For instance, a company may seek to negotiate an agreement increasing recourse to overtime instead of hiring new staff, or to negotiate a social plan that saves jobs in the company to the detriment of employment in sub-contractor firms, or even decide to relocate the business, creating jobs in one place by eliminating them in another. In all these cases the question posed is whether or not the function of collective labour representation is to represent the interests of workers in general or only those employed by the company where the bargaining takes place, or even those of steady workers in such a company to the detriment of those who hold insecure jobs. One of the historic functions of European trade unions has been to prevent competition among companies in a given industry from leading to lower salaries (this is the primary justification for industry-wide bargaining). Where that function has been best fulfilled (in Germany, for instance), it has had the beneficial effect of directing competition among companies towards questions of quality and competitiveness and away from the impoverishment of workers. But the industry-wide framework in which that unifying function entrusted to unions was set has been weakened by new kinds of company organisation and in particular by sub-contracting, which evades industry-wide agreement discipline. Companies can, then, play one industry against another, to lower labour costs.

In such a context, the option open to the unions is either to transform into company-wide unionism or to continue to extend their scope beyond the company level in the exercise of their representative mission. But choosing the second avenue leads to another question: union organisation and operation.

3.3 Represent how? Organisation of representation

chapter, union organisation was copied from management. The

move from trade unionism to industry-wide unionism represented an important turning point in the history of unionism, which followed the lines of Fordist organisation, i.e., on the basis of lines of business or industries, whose boundaries, moreover, differed substantially from one European country to the next. In Europe, trade unions, like employers= organisations, were primarily organised in the framework of occupational industries where the essential features of collective bargaining developed. This marginalised not only trade-based unions, but regional forms of representation as well (the *Aemployment services@*) that played an important role in early unionism. It was, then, industry federation which constituted and continues to constitute the backbone of unionism, in which cross-occupational groupings take the form of unions of federations (confederations).

Despite such similarity, there is a huge organisational difference between labour and management representation. On the management side the true power is at the bottom, held by member companies which, in possession of the real economic power, conceive of collective representation along the lines of the mandate model in civil law: the representative is, then, actually a proxy unable to exceed the bounds of the power with which he is vested. On the labour side, the *Abottom@* has no power of its own or decision-making autonomy economically speaking, except in the form of *Awildcat strikes@*, whose lawfulness is not, moreover, always recognised everywhere. It is the representative, then, more than the principals, who actually holds the power in the organisation.

The industry is still the main organisational framework for collective representation. But this framework is threatened by the splintering of collective bargaining proceedings observed elsewhere (see above ' A-2). Firstly, decentralisation from the industry to the individual company shifts the centre of gravity of collective representation towards the latter: employee-elected institutions or company union delegates gain, obviously, in autonomy vis-à-vis industry-wide federations. Secondly, the development of emerging bargaining units, be they regional, group, network or even Community level, inherently calls into question the role of industry-wide federations in the union organisation.

The present situation is one in which, by sub-contracting or forming subsidiaries, companies may evade industry-wide frameworks and diversify their opponents and their collective agreements in one way or another, obviously favouring the formulas involving the least demanding terms. Trade unions, by contrast, continue to be bound to the industry framework and cannot embrace capital=s new organisational structures. The occupational industry is, then, like an iron cage in which labour representation is locked, but whose door is open for management. In order to open the door for unions as well, the development of relevant bargaining units at the group, network, company or regional level must be encouraged. The conclusion, on an experimental basis and taking all due legal precautions, of agreements at such different levels, allowing them to derogate from industry agreements, is one possible avenue. This would obviously favour a kind of organisation of representation that would extend beyond affiliation to either an industry or a company. The sole alternative to such a development seems to be a gradual impoverishment of industry-wide union representation to the exclusive benefit of representative institutions in companies, be they union or otherwise.

Such a development would not mean the disappearance, but rather the transformation of the role of centralised union authorities. Instead of acting as decision centres, they would be responsible for co-ordinating demands, action and bargaining conducted in companies or emerging bargaining units (network, group, region).

Our study confirms the necessity of this development. Although national and European Organisations representing the interests of workers and employers remain indispensable, agreements between these organisations will not be sufficient to ensure an appropriate balance between managment and labour interests. It is also necessary to deal by European law with the issue of company-level employee representation on two different levels: firstly, by formulating general conditions for companies in the Member State and secondly by further directives for companies operating across the borders. The directive on European Works Council as well as the national laws implementing this directive prove that the idea of an European social dialogue can be transferred from the central to the company level. This directive has also helped to solve problems concerning employee involvement in the European Company, so long in the making. We welcome this development, because it allows for a combination of the European idea, the idea of a social dialogue at the company level, and the necessity of national consideration.

Chapter 5 B Labour and public authorities: the State=s role

Introduction

In Western tradition, there is no durable social order without laws and institutions with which society can identify. The invention of the State in the Middle Ages and then of the Welfare State one century ago, have given the West an institutional horizon to which to refer. It is that horizon that is lacking today, and it is too early to know whether we are witnessing a transition to a new kind of State or if the latter is destined to give way to other References on which social bonds are based.

With the Nation-State model prevailing (at least nominally) throughout the world, the framework of such States provided the setting to build what might be called the citizens= social State. The foundations for all three mainstays of that edifice B labour law, social security and public services B are national institutions. It is obvious, though, that the State=s fundamental role in this regard is being questioned today by the dual forces of internationalisation and regionalisation. This weakened capacity of national institutions to ensure a decent standard of living for their peoples is evidenced by the host of new pockets of unemployed or working poor. And it is accompanied by rising poverty, violence and despair, visible everywhere and especially in the very heart of the market economy, i.e., large urban centres in the wealthiest countries.

The A*social question*@ is thus making a comeback under new patterns that have yet to be legally formulated, because A*social*@ is a theoretically flimsy notion, which serves no purpose unless as a fallacious antonym to A*economic*@. Any contract and in particular any employment contract, is, indivisibly, an economic and a social bond. And contracts have no legal sense unless referred to the State, guarantor of their legality and binding force.

The Law and the State are not disconnected from economic forces or social life. They affect and are affected by them. Laws that do not take account of economic and social circumstances are unenforceable. Reciprocally, in today=s world, the State establishes a legal framework without which no economic or social order could exist. In all countries, the interaction between the State, the economy and society are complex and reflect history and cultural traditions as well as traditional political divisions. The legitimacy of the State rests on different grounds from one country to the next, grounds which determine the different economic and social expectations arising around it. This cultural and historic diversity renders developing a single European framework for regulating the labour market particularly difficult. The scope of the institutional framework for the labour market should be based on the dynamic of the interaction between State, economy and society and take account of the diversity of legal cultures.

There is universal acceptance in Europe that the modern State has some fundamental responsibilities from which it derives its basic legitimacy. These are the promotion of law and order, personal safety and the safeguarding of goods, the protection of property, the support of individual and collective freedom, the maintenance of an appropriate economic and monetary framework. It is also widely (but not perhaps universally) accepted that the State has a responsibility to promote social cohesion, and to ensure the welfare of its people. However, these individual and group aspirations have become more diverse, and that has presented new challenges to governments, and also produced some rethinking about what is the appropriate role for the State.

Some mention must be made of the bounds of the contrast often existing between two broad ways of viewing the role of the State: the authority-based or minimum State (l'État-Gendarme in French) and the protective or provider State (l'État-Providence). All European Union Member States in practice display elements of both, which do not necessarily conflict with one another, and strive to guarantee their citizens both freedom and security. Thus, in most countries, the State derives its authority from its ability to protect the weakest members of society. Part of today=s problems ensue from the waning of State authority due to its failure to afford such protection.

The way freedom and security are reconciled varies widely from one country to the next[109].

109. See: B. BERCUSSON, U. MÜCKENBERGER et A. SUPIOT, *Diversité culturelle et droit du travail en Europe*, in: Co

Great Britain is where the social State has proved to be most worthy of the name in the sense that, in the Beveridge tradition, the State was directly involved in implementing a certain number of fundamental social rights (and this is still true today in the realm of health care), whereas the other public groupings developed what might be called *Amunicipal socialism@*. In the area of labour law, however, the prevailing system was what Otto Kahn Freund characterised as *Avoluntarist@* and *Aabstentionist@*, i.e., based on collective bargaining bereft of any direct legal enforcement. The alliance between the Government and management over the last 20 years has entailed an undermining of the collective bargaining system and more generally a questioning of the social State model.

vergences des modèles sociaux européens, Paris, Ministère du travail, coll. Travail-Emploi, 1992, p. 319 s.

In Germany on the contrary, after the collapse in 1945, the State has played only a minor role in the market-based economic and social system built on a co-operative ideal known as *AMitbestimmung@*. The major labour market responsibilities are entrusted to organised crafts and, until very recently, the State=s attempts to impose its own solutions have been doomed to failure. German economists have also theorised about this market-based social economy (a theory called ordoliberalism, which analyses economic relations in the light of local institutional orders and the global order in which they take place). The importance of the State=s role in this *ARhineland model@* should not, however, be underestimated. Numerous laws regulate the labour market: as regards layoffs (Kündigungsschutzgestez), maintenance of salary in the event of illness (Entgeltfortzahlungsgesetz), job creation (Beschäftigungsförderungsgesetz), or organisation of work in companies (Betriebserfassungsgesetz). Although there is no State-wide minimum wage, such regulation has an indirect effect on salaries. Since the most important working conditions are regulated by law, trade unions are free to concentrate all their efforts on wage increases and reduction of working hours. Furthermore, salary levels are kept high by the level and duration of unemployment benefits.

The French model is different from both. Theories on the role of the State were thoroughly revamped at the beginning of this century by Council of State jurisprudence and the work of legal writers such as Duguit or Hauriou, who inverted the perspective of the minimum State. Whereas the latter is held as a power which individuals must serve, the social State, in contrast, is conceived to be a force at the service of individuals (and hence the predominant place reserved to *Apublic service@* in that design). In the sphere of labour relations, the State intervenes to impose *Asocial law and order@* which re-establishes the balance between the parties to employment contracts or collective agreements. Under such a design, the State appears first and foremost as the guarantor of respect for the principle of equality among its citizens.

The point at issue in the political and legal debate is not the Nineteenth Century concern over the choice between intervention and laissez-faire, but rather the State=s ability to continue to ensure social cohesion in today=s world. Broaching that question entails understanding the changes affecting the role of the State today (A) before embarking on projections on how that role is likely to evolve in the years to come (B).

A) The State=s changing role

1) The factors of change

It is not a question here of undertaking an exhaustive analysis of the factors involved in the changing role of the State in Europe. Only two will be addressed, in view of their relevance to labour law and social security.

1.1 Individualisation

What all EU countries appear to have in common at the present time is a general retreat of the State at national level. The speed at which this retreat is taking place varies depending on the country, but there are no exceptions to the general shift of responsibilities from the State to the individual, the enterprise or mutual organisations. Part of this movement has been due to the re-emergence of the idea that individuals have responsibilities as well as rights.

Part of the reason for this shift has been an increasing desire on the part of citizens to take greater control over their own lives. Some of the most important social developments of the last generation, such as the rise of the women's movement, have been based on the ideals of freedom of choice and opportunity for all. Moreover, the aspirations and expectations of citizens and consumers have diversified considerably. This has been abetted by changes in production technology which have made small batch production and frequent changes in specifications much more feasible.

The days when you could have any colour car as long as it was black are long gone. The motorist of today is expected to choose not only the engine size of his car, but the colour, the colour of the seats, whether or not it has air conditioning or a sun roof, the type of brakes and the exact model of hi-fi system. The car will then probably be built to order by the factory and delivered within three weeks.
Taking the same tack as they do as consumers, citizens are no longer satisfied with a State and public services that do not take account of their individual needs and aspirations.

More generally, there has been increasing recognition that the ability of the State to control events, as opposed to influencing them, is more limited than the founders of the post-war States believed. Thus, until the 1970s States believed that they had both the ability and the responsibility to support demand in the economy. The view now is that since the State cannot stabilise domestic markets, it should aim to ensure that the economy has the ability to respond to structural or circumstantial changes (by ensuring, for instance, access to education and training and promoting competition).

In the labour field most people would agree that it should also act to prevent discrimination, and promote health and safety at work. Going beyond that, the debate about the role of the State is more open (see below).

1.2 European integration[110]

110. On the impact of European integration on national labour law, see the

ence by P. HANAU. *Die Einwikung des europäischen auf das nationale Arbeiutsrecht* **B**

Ein Erfahrungsbericht aus Deutschland, in: *Festskrift till Stig Strömholm*, Iust

The European Union is witnessing two major trends that should bring about radical changes. On the one hand, the advance towards Economic and Monetary Union (EMU), the central pillar of the Maastricht Treaty, and on the other the enlargement planned to take place in the third phase of EMU. These two trends should be kept in check in the context of pre-adherence strategy to ensure that enlargement does not lead to the parcelling of Europe. The control of these developments, the management of the unpredictable, the maintenance of a dynamics of integration, presuppose in addition the tackling of a true institutional reform at Union level.

Regarding the running of labour markets, the Treaty of Amsterdam, has paved the way for new actions that have already been politically translated into the *Aguidelines on employment@* adopted by the Council meeting in Luxembourg on 15 December 1997.

This new strategy for employment rests on four pillars, namely:

- Employability, which accords priority to investment in human resources, the improvement of skills and professional qualifications in the struggle against unemployment, in particular among young people. Quantified targets have been set, equivalent to the criteria of economic convergence.
- The entrepreneurial spirit, centred on the need to foster the spirit of initiative and thecreation of business undertakings by appropriate social, fiscal and administrative measures.

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- Adaptability, which involves adjusting the institutional and legal framework to the organization of work and the new forms of employment. The social partners at the national or Community levels are invited to play a major role in the establishment of such a framework and to participate actively in its implementation. The European Commission has often underlined that this approach represents a break with the old debate on regulation/deregulation, in so far as it seeks to reconcile flexibility and security of labour. This is a global approach which is designed for the long term.
- Equality of opportunities, which should be embodied in each of the above-mentioned pillars. The correction of inequalities, and in particular the reduction in the unemployment rate of women in relation to men, is not only a question of social justice; it also answers an economic need, bearing in mind the anticipated reduction in the active population in the coming years, which should, on the other hand, favour the entry of a growing number of women into the labour markets.

All the member States have implemented these guidelines in National Action Plans for Employment which they submitted to the European Commission on 15 April 1998, and of which certain elements have been included in this report. In May 1998 the Commission issued a communication containing a preliminary assessment of the results. A programme of social convergence has already been set up: economic integration and social integration are linked by the Treaty of Amsterdam.

The transition to EMU, which represents the crowning achievement of the single market, is a powerful vehicle of integration. It is a major step, some even see it as the prelude to a political integration, a leap in the direction of political Union. The single currency certainly commits the future of Europe and the future of its citizens. The latter must be in a position to appreciate the potentials and consequences of this fundamental choice in favour of the Euro: this transparency is necessary in order to foster a direct relationship between the European Union and ordinary citizens, to dispel the mixture of fear and enthusiasm currently felt by public opinion. This involves the risk that citizens, workers in particular, may begin to feel that the European Union is little more than an economic and monetary machine, governed by capitalist logic intent upon destroying national schemes for social cohesion. Social issues, particularly employment and social rights, should occupy a central place in the Union.

Of the outstanding issues, matters concerning the social consequences of the single currency and in particular employment are priorities today. There is no consensus among economists about the impact of monetary union in this regard. On the one hand, the implementation of the Euro may provide for a stable environment in which macro-economic shocks can be handled more appropriately and speculation of the kind affecting the Asian currencies during the crisis in late 1997 can be avoided. Such a stable economic environment would enable healthier growth, allowing investment development to focus on new productive capacities and thus encourage the creation of jobs. But on the other hand the single currency involves the risk of greater competition on the basis of reduced labour and tax costs. That risk is all the greater because the price transparency ensuing from the single currency will facilitate comparison. Such practices may lead to a questioning of social cohesion and undermine the dynamic of European integration. This risk ensues, in particular, from the fact that after monetary union Member States will no longer be able to use devaluation as a way of making necessary adjustments; moreover, neither are their workers as mobile as in the United States nor is the Community budget at all the same as a single nation's Federal budget; there is some danger, then, that flexibility, primarily at the expense of wages, will become the only adjustment factor. In this context, in which collective bargaining has an important role to play, trade unions may be placed under a good deal of pressure.

In view of such questions and uncertainties, the group feels that the European Commission should undertake a study without delay to evaluate the social impact of the single currency on collective agreements, in particular on wage bargaining.

The Euro should also bring about an acceleration in movements of capital within the single market, the first signs of which are now visible. In the capital markets a traditionally Anglo-Saxon shareholder culture is beginning to take root on the European scale. Companies are becoming more and more sensitive to the needs of shareholders and increasing interest is being accorded to the financial participation of workers in firms. By eliminating the risks of investment within the Union, the transition to the single currency favours transnational investments and the acceleration of capital movements which will no longer depend on the disparities between monetary policies but will be concerned exclusively with the search for efficiency within the Euro zone. It is likely that pension and insurance funds will increasingly make use of the new possibilities which the single market affords them to invest in the capital of foreign companies, as American pension funds already do. These developments, which are already observable, would require to be studied more thoroughly in so far as they are likely to give rise to takeovers of companies and may have an impact on employment

The creation of the Euro should ultimately facilitate the recognition of a legal status for European-wide companies, organisations that are essential to the effective operation of a pan-European market. Given such legal standing, companies estabished in more than one Member State will be able to conduct their business throughout the Community in the framework of a single European firm governed by a single body of rules under the supervision of a single head office, with no need to set up a complex network of subsidiaries subject to different national laws. Europe-wide companies will encourage further restructuring whose possible consequences on employment should be foreseen. More generally, Europe-wide company status cannot ignore workers' situation. For this reason, the proposal to regulate them goes hand-in-hand with a proposal for a directive on organsing worker information, consultation and/or participation in European companies and acknowledgement of their place and role in such companies. All kinds of cross-border restructuring (mergers, joint ventures, take-overs, company groups) that may affect employment call for a legal framework that must take account of workers' interests. This implies that laws governing collective labour relations must be swiftly adapted to capital's new geographic structures..

This discussion of European companies illustrates how social, economic and monetary aspects are closely related and need to be treated as a whole. Any economic decision made at the European level should be contingent upon preliminary proceedings intended to hold the social consequences of that decision at bay. This is all the more necessary since the Member States taken individually are still themselves unable to provide national solutions to problems arising from decisions taken at the European level that have a transnational impact. It is inconceivable, for instance, to proceed to libera lise services in a particular sector without a prior analysis of the impact of that decision on employment or workers' rights in the Union and without an associated and suitable social policy, wherever warranted. The European level is often the most appropriate place to solve questions requiring transnational social treatment, such as the directive on A*European Work Councils*@, A*posting of workers*@, the draft directives on transnational mergers (10th directive) or the creation of a legal status for Europe-wide companies.

Certain economic decisions made at the Community level may have social consequences in only one Member State; this is the case, for instance, of Commission decisions regarding State subsidies. The Group feels that the social partners should be more directly involved in the procedures leading to such decisions where they may have an impact on employment. The rationale for trying workers' representatives in the Court of Justice of the European Communities if they challenge a Commission decision relating to competition should be the subject of an in-depth review.

The tasks incumbent upon Community institutions must be defined within the bounds imposed by the principle of subsidiarity. This leads to the general issue of subsidiarity. Although the traditional way of viewing subsidiarity is within a pyramidal, hierarchical system, the emergence of the Community level should not be analysed in this way, because the sovereignty of Member States is not, in principle, subject to the authority of the EU. Subsidiarity calls for the distribution of sources of law at the most appropriate level. That is to say, it involves a constant discussion of which level is the most appropriate. Wherever such level is not the Union, subsidiarity involves diversification and differentiation of legal rules. This is equally true of so-called A*vertical*@ subsidiarity (between the Union and its Member States) and so-called A*horizontal*@ subsidiarity, between the law and collective agreements[111]. This means, in practice, that collective bargaining becomes a legal power. In certain cases, the results will be better, but in others they will inevitably be worse. No consensus has yet been reached on this issue and there is a dearth of analysis on the inherent risks in this kind of transfer of responsibilities towards the private sector.

The key question in the labour field is whether in future the social partners are likely to be able to take over the role which the State has traditionally occupied in many countries in the field of labour market regulation. How far is the State necessary to act as intermediary between the social partners, or between companies and the market?

2) Protection of social rights

2.1 Universal social rights

2.1.1 Equality among citizens

One of the widely accepted functions of the State is to enforce the principle of equality among citizens and, most particularly, to combat discrimination at work. In France, Italy and Spain there is a general legal prohibition against discrimination on a wide range of grounds. In France, for example, this includes place of origin, lifestyle, political opinions, and family situation. In Spain it includes A*opinion or any other personal or social condition or circumstance*@. Otherwise, all EU countries have legislation to make it unlawful to discriminate against women (and generally against men as well). These laws extend to discrimination on the grounds of marital status, except in the UK where discrimination is prohibited against married people, but not against those who are single, widowed or divorced. In general gender discrimination laws have been transposed from Article 119 of the Treaty of Rome, and are therefore reasonably uniform.

In Belgium, the act of 4 August 1978, which transposes the European directive of 9 February 1976, guarantees equal treatment for men and women with respect to access to employment and training, working conditions and dismissal. It should be noted that the act entitles anyone so wronged to institute proceedings, *including workers= representative organisations.* Moreover, it is important to note that it attributes injunction powers to the judge: the judge may enjoin the employer to put an end to such a discriminatory situation under penalty of penal sanctions.

There is specific legislation preventing discrimination on the grounds of race or ethnic origin in Sweden, the Netherlands, the UK and Germany. Legislation covering other forms of discrimination is rarer. Sweden, the Netherlands and Germany cover religion. Germany and France cover age (the latter in advertisements). Sweden, Germany, France, Spain and the UK cover disability.

In most countries there remains a gap between the legal prohibition of discrimination, and the actual outcomes for traditionally disadvantaged groups. Legal proof of discrimination tends to be difficult.

2.1.2 Access to public services

Ensuring all citizens have equal access to a certain number of what are considered to be essential services enhances individuals= rights, while making them more universal. While found under different formulas in the various countries[112], it is

111. Cf.: B. BERCUSSON, *European Labour Law*, London, Butterworths, 1996, p. 555 s.

112. See: Y. MOREAU, *Entreprise de service public européennes et relations sociales*, Paris,

ASPE, 1996, 222 p.; Centre Européen des Entreprises à Participation publique, *Europe, concurrence et service public*, Paris, Masson-A. Colin, 1995; L. CARTELLIER, J

in France that public service theory has been most fully developed. Its connections with employment are as strong as they are misunderstood: labour market configuration varies depending on whether vocational training, for instance, is considered primarily to be a matter covered by public service, i.e., the State, as in France, or a matter for private enterprise, as in Germany, or the market as in the UK. Considering vocational training to be a right or otherwise is tantamount to promoting or otherwise the principle of equal opportunities on the labour market (it all depends on the specific content attached to the acknowledgement of such a right). Likewise, whether or not energy, health care, transportation or child care are considered as collective benefits or otherwise has a profound impact on the shape of the labour market and workers' lot.

. FOURNIER' L. MONNIER, *Critique de la raison communautaire. Utilité publique et construction européenne*, Paris, Economica, 1996.

It is the content of the very concept of public service that differs from one country to the next. Thus, for instance, access to the health care system is regarded as a public service in the United Kingdom or Italy, but as social insurance in France or Germany. There is, indeed, no such thing as natural public service, since service can barely be conceived unless rendered via funding that is subject to market logic. Public service is always an institutional construct that rests on the choice of which services are to be permanently and equally accessible to all. Such choices may depend on technical considerations (territorial registration of technical networks, for instance, but the argument is equally valid for motorways, railways or electric power lines) or economic factors (reduction of transaction costs; prohibition of *de facto* monopolies), but it is always ultimately a choice of values that identify the State and contribute to the definition of citizenship. Such choices inevitably entail offsetting the costs involved in the universality, continuity and equality of the service rendered and thus restricting competition. They likewise entail redistributive effects which ought to be assessed to obtain an accurate view of their social significance. But where such choices lack universal support, they will obviously be vulnerable to the opening up of an international marketplace.

It may have been expected that the notion A*service of general economic interest*@ set out in article 90 of the Treaty of Rome would have been the place to attempt to define what a general Community interest might be, which would, in return, have contributed to consolidating the European Union. But an organic (deriving from the legal nature of the service provider) rather than a material (deriving from the nature of the service rendered) criterion prevailed in the definition of such services, even though article 90 has become a repository of national renderings of general interest, rather than the venue for a dynamic reflection on the notion of European general interest.

There have also been differences in approach to the provision of welfare services: direct provision by the State (*Etat gérant*) or services provided by private or mutual bodies, subject to the rules set by the State to guarantee all citizens equal access to such services (*Etat garant*). In France, Germany and Belgium there is a long tradition of the State setting standards for, supporting and guaranteeing a welfare system based on mutual organisations, joint institutions in which the social partners are involved or locally based democratic controls.

In France, many public services are not managed directly by the State and its officials, but by public companies whose personnel is in an intermediate situation: parties to private law employment contracts, their collective by-laws are nonetheless defined by governmental regulations (whereby the name A*entreprises à statut*@) rather than by collective agreements.

In all European countries, there is a shift on the part of the State away from organising economic services of general interest. Beginning in England, this movement has gradually reached the continent, where it has taken on a diversity of forms. The general tendency has been to exclude services of general economic interest from the public sector and entrust autonomous legal entities, which may be public or private, with their management. The purpose everywhere has been to design legal structures adapted to the opening up to competitive conditions and therefore to internationalisation and decentralisation, as well as to the establishment of contractual relationships with users, today more often considered to be customers.

In the case of postal services, for instance, a recent survey (Torlenado, 1995) shows that of 15 companies in the countries studied, 7 were still considered to have public administration status in 1990, whereas none were so considered in 1996. Examples of public sector autonomous entity management: the switch in 1988 of Sweden=s *Statens Jarnvagar* (railways) or, in 1986, the Italian *Ferrovie dello Stato* or even German postal services (1994) to public sector companies. In the case of transfer to private entities, privatisation may involve legal status only (commercial company whose sole shareholder is the State: see the creation in 1994 of the *Deutsche Bundesbahn AG*, a stock company wholly owned by the State in Germany, or the *Vatenfall* in Sweden in the electricity industry, since 1992) or be economic in nature (privatisation of capital: see, for instance, in Great Britain, the electricity industry since 1990, telecommunications since 1984). An extreme case is the split of British railways in 1994 into 25 Train Operating Units headed by the British Railways Board. Decentralisation dates from quite some time ago in certain sectors, such as electricity in Germany, which is related to the federal nature of State structures.

But this movement has not resulted in total privatisation anywhere, which would mean, purely and simply, bringing services of general interest into line with commercial law. Even where such reforms have been carried out most strictly, such as in Great Britain, the State has never withdrawn from the scene altogether and continues to be the ultimate guarantor of the provision of services of general interest[113]. This is the reason for the establishment of A*regulatory*@ authorities in charge of overseeing such provision. Cases in point are, for instance, the *Eisenhbahnbundesamt* in the recent reform of German railways or the British Rail Regulatory, or the *Svendska Kraftn* / *t* established under the reform of the electricity industry in Sweden or Great Britain's Office of the Electricity Regulator in this same industry.

The prevailing trend, more than privatisation, has been towards greater autonomy: services of general economic interest win their independence from public powers with no intermingling with services provided by private powers.

113. Cf. *Work and the public/private dichotomy*, in: *International Labour*

Review, 1996/6, p. 653 s.

Such a trend is not unlike the outsourcing practised by private sector companies. However, there are several models of outsourcing, depending on whether the sub-contractor is considered as a partner bound to the principal by a long-term co-operation agreement or as a completely independent and One of the most noteworthy aspects of this trend from the legal standpoint is the establishment of contractual relations between the State, public service providers or the beneficiaries of such services. The move made is from a regulatory and hierarchical system to a contractual and egalitarian one, with all the concomitant effects such evolution brings, especially in terms of diversification and heterogeneisation of legal situations.

This leads some authors to consider the State as an equal party to contracts, with no more rights than the other parties to the contract in question. This analysis is acceptable as long as the State acts in defence of its own interests as a moral person (to administer its own estate, for instance). By contrast, when it acts in representation of general interests, it may not be placed on exactly the same level as the private interests with which it negotiates, unless it disappears as a State. This is the core difficulty in contracting public services: having to maintain a hierarchy between public and private interests, in a legal framework that treats all interests equally. In this perspective, the establishment of contract relationships should be conceived as a means for defining the general interest rather than as merely a means of accommodating the general to private interests.

2.1.3 Fundamental social rights

The Treaty of Amsterdam, which will come into force in 1999, improves the existing provisions relating to fundamental rights. Among the improvements mention should be made of the new article L, which attributes competent jurisdiction to the Court of Justice in cases of violation of fundamental rights, within the framework of the first pillar; article 13 on the prohibition of discriminations, the Community-wide regulation of a certain number of questions previously included in the third pillar (immigration, visas, rights of asylum, refugees' rights), the enlargement of Community competence in relation to equality of opportunities between men and women (article 14). It is also worth noting the reference to the *Social Charter* of the Council of Europe and to the *Community Charter of Fundamental Social Rights of Workers*, the principles of which are to guide Community social policy (article 136), as well as the inclusion of a new Chapter on employment and the incorporation of the Social Protocol in the Treaty. Finally, reinforcement of equality of treatment and pursuit of a high level of employment are also among the principal objectives of the European Union.

The group takes note of the creation by the Commission of a High Level Group of Experts charged with examining the situation of fundamental social rights under the new *Treaty of Amsterdam* and tabling recommendation for action at the Community level.

In this context, and since that new Group of Experts on fundamental social rights will submit its final report in December 1998, the Group feels that there is no need to undertake an exhaustive analysis of fundamental social rights issues at the Community level in the present report.

liable supplier. The development of outsourcing for State services has not yet settled down into either of these patterns. However, certain negative experiences with privatisation reveal the risks of an approach based exclusively on customer/supplier dynamics.

Nonetheless, our Group feels that, in this context, several subjects should be advanced; namely:

- Reinforcement of the right to free movement (including the free movement of workers) and the extension of that right to non-Community nationals legally established in the European Union. Special attention should be lent to the situation of non-Community workers. Essentially, fundamental rights are not based on nationality. Furthermore, social rights associated with work are not based on nationality, but on legally performed work. The many problems arising around the issue of non-Community workers could not be studied at any length by the Group and it would be advisable for a specific, in-depth review to be conducted in this regard[114].

114. A review that mibht be effected on the basis of the (1997) report of the High

imone Veil and the interesting initiatives envisaged or already implemented by th

e Commission in this regard. Generally speaking, there is scant worker mobility w

within the Union and the European Commission recently adopted an action plan (Comm

ission Notice of 12.11.1997 (CCM (97)586) to improve perspectives and encourage th

- Solution for the contradiction between the social partners' right to conclude collective agreements at the Community level (article 139) and the prohibition to legislate matters relating to trade union rights by virtue of article 137(6)[115].
- The need to establish, by the appropriate means, a European framework for information and consultation in companies operating on the single market.
- The need for recognition in the treaty of the role assigned to non-governmental organisations in the formulation and implementation of Community social policy.
- The pursuit of action taken at the Community level to combat discrimination, especially on the grounds of race.
- The implementation of the fundamental principle of adapting work to the worker, in particular in the context of working time[116]

In this context of fundamental social rights, the group studied the potentialities of the notion of European social citizenship. The ambiguities in the concept *Acitizenship@* should be stressed, as the meaning of the term varies depending on national legal cultures.

In the United Kingdom, citizenship would seem firstly to refer to the individualís rights with respect to the community, which may encroach upon his autonomy (State, trade unions, monopolists companies, Europe...); which means, for instance, that the citizen should not be subject to a given service provider but must be able to exercise his right to choose. Today, such an approach tends to confound citizensí rights with consumersí rights. The strength in this approach, however, is that it is not linked to the consideration of a given State or nation; it claims to be as universal as the market to which it is referred.

In France, on the contrary, citizenship refers firstly to equal participation in public affairs. The definition is primarily political, with very little economic or social content. It is closely related to the Republic and the concept that one may have of it. To the extent that the Republic is acknowledged to have public service missions, citizenship leads to the demand for equal and effective provision of such services to all, and to refraining from challenging the monopoly thus exercised by the State or public companies.

115. See in this regard the discussion in chapter 4 on the problems of trade union representativeness at the Community level

116. See Chapter 4.

In Germany, there are reasons to believe that the success of the notion of social citizenship among certain authors is not unrelated to the community culture that characterises that country. Citizenship tends to be translated as community membership, rather than to constitute an egalitarian reference to the Republic or a defence of individual rights as opposed to group forces.

The meaning of citizenship depends necessarily, therefore, on the definition of State in each countryt, which differs even today. The difficulties to which this may lead in defining true European citizenship are readily envisaged, with each country tending to extend its own notion to the Community as a whole. In this context, the notion of social citizenship does not seem to be immediately operational at the Community level. This should not, however, mask the actual legal potential of the concept. Social citizenship is the individual equivalent to social cohesion. It entails recognising each person's equal capacity to take full and active part in the social and economic life of his/her respective communities, a capacity based on rights guaranteed by the State. And it reflects individual participation in the life of institutions, including, as appropriate, participation in decision-making. At the Community level, the specific social content is still limited (equal treatment in comparison to nationals)[117], but it may become a melting pot for a common notion of European Union social responsibilities.

2.2 Social security

In all the countries of the Union, social security systems are ultimately covered by the State. But there are important differences as to whether the State itself handles social security (as a public service) or if limits its role to establishing a regulatory framework for a social security system managed by the social partners and according to the financing systems.

In the UK, the role of the State as direct provider of the key elements of the social State is nearly as well-developed as it is in Scandinavia. The Beveridge tradition has meant that health care, social insurance, social protection and care services are all currently still direct State responsibilities, although in recent years there has been a move to sub-contracting of care services for the elderly in particular. The British National Health Service has become Europe's largest employer.

In the field of social security, the French and Belgian position has been to attempt to combine the Beveridge model with a *Asocial democracy@* ideal. Instead of it being the State that directly administers social security, that mission has been entrusted to the representatives of the insured. The roots of the originality of the concept lie in particular in historic traditions and the vitality of the Proudhonian, mutualist or Catholic Socialist experience, which mistrusts State intervention in social matters. Even more characteristically, the unemployment insurance system has never been in the hands of the State, but rather is based on a cross-occupational collective agreement; the State only intervenes subsidiarily, in the event of failure of the conventional system. Likewise characteristically, the *Juppé* social security reform (1995) upholds that autonomous tradition, attempting merely to reconcile it with budgetary discipline. Such reconciliation is no longer sought by authoritarian action (under principles of legal protection), but rather by conventional techniques.

Social insurance systems are often based on the *AFordist@* model of working life, i.e., in which workers were male, they were employees, they worked full-time and they supported families. In that model, not all of them reached retirement age, but those who did had a life expectancy of only a few years (typically three to five years after retirement). The amount paid in retirement pensions was very small compared to the income of employed workers.

Those who did not work as employees fell into three groups: the wealthy, who could be expected to take care of themselves; dependants of workers, who would be covered by the worker's insurance, and the farmers and small business and professional classes (shopkeepers, lawyers, doctors etc.), who were regarded as people who had responsibility for themselves, and who were not subject to the decisions of employers. In insurance terms, they meant in any case a higher risk of fraud in that they could make themselves unemployed or regard themselves as sick, or make their own choices about when they retired. This is one of the reasons that early social insurance schemes excluded them from their scope of application.

Today, however, the relationship between social insurance and employment is substantially less direct. Patterns of work have become more diverse. With the development of female work and retirement pensions, fewer adults are wholly dependent on other adults. Unemployment has become structural and more long-term, and is concentrated among particular groups in the population: the young, the over 50s, immigrants and the unskilled. Many of these groups have not fully established their rights under social insurance rules, because they become unemployed early in their entry into the labour market, or suffer repeated unemployment which does not allow them to develop sufficient credits. Another essential factor of imbalance in social insurance systems is that life expectancy after retirement has gone up from three to five years to twenty-five to thirty years. This means that pension schemes are confronted with payment levels that were never envisaged when they were first established.

117. It should nonetheless be stressed that labour law directives adopted at the Community level (working time arrangements, protection of young people on the job, part-time work, parental leave, worker transfers,e tc.) are applied indistinctly, whether the workers involved are Community nationals or otherwise.

The composition of the self-employed has also changed. No longer is self-employment mainly the preserve of the traditional professionals and the small business proprietor. Many skilled manual workers (such as plumbers or carpenters) are self-employed. The same is true of people who have relatively scarce skills and can therefore free themselves from dependency on a single employer (systems analysts or industrial designers for example). In addition there is the emergence of the new self-employed over the last twenty years: shoe repair people, sandwich delivery services, shirt ironing services etc. These people have little or no financial capital tied up in their businesses, so unlike the traditional self-employed, they have no business to sell to finance their retirement. They are selling their labour in the same way that employees do. The only difference is that they sell it to a variety of different employers. These people too need the standard social insurance protection, and they do not always get it. In Italy, for example, the self-employed enjoy very few social insurance rights.

The different branches of social security are evolving along different patterns in Europe today. On the one hand, family allowances and health coverage acquire universality and are thereby no longer associated with employment. The move in the retirement pension system, on the other hand, is in the opposite direction, with increased reliance on contribution funding reinforcing the link with employment. The former fills in certain gaps in the social protection afforded *Anon-standard@* employees. The latter, however, lowers the likelihood that such *Anon-standard@* employees will be able to benefit from a full pension.

The desire to adapt the social protection system to new kinds of employment has led to the development of social *Aminima@* that act as safety nets for people with such jobs.

This is the case, for instance, of State pension allowances in the Netherlands, Income Support in the UK or a minimum old age benefit in France. In Germany and Spain there is increasing reliance on a system of complementary benefit, i.e. not based on contributions. In Belgium there is a process of reform under way which is attempting to shift some of the costs from employer contributions to general taxation. In Sweden the unemployment insurance system is independent and run by the trade unions.

The recent evolution of the Spanish social security system is characterised by 1) reinforcement of contribution-funding, restricting access to contribution-funded benefits; 2) the relative growth of benefits with universal coverage, with a concomitant *Aassistantialisation@* of the system; 3) the separation of the sources of financing for contribution-funded benefits (social security fees) and non-contribution-funded assistance (State contributions), an operation to which the unions have given their consent but which poses essential questions with respect to the future of the system and its financial viability.

In contrast, mandatory social security tends to play a lesser role among people with good jobs, who are encouraged to insure certain social risks on the private market.

Thus, in the Netherlands health insurance is divided between private insurance for those whose incomes are above a certain threshold and mandatory insurance for employees and system beneficiaries with income below a certain sum. In Netherlands and Sweden employers take responsibility for an income security based on 80% of a middle income for a worker. In Sweden employers take responsibility for this payment under the first 2 weeks of the sick leave, and after this period the sick leave payment is done by the state insurance system. (*Försäkringskassan*) (in the UK, employers are only responsible for the first six weeks).

In the UK, a majority of the current working generation will derive their main income after retirement from their secondary pensions, not from their State pension. The shift towards secondary pensions is also taking place in France and Germany and in Spain.

The pension issue is a matter of concern in all European countries. Governments are changing the terms of State pension schemes, so that the basis on which people made decisions about planning for their retirement will have been proved to be erroneous. These changes relate both to the age at which pensions are paid (many are being raised) and to the rate at which they are paid relative to earnings.

There are new suggestions in the UK that State pensions should be subject to an income test, although there are as yet no formal proposals to this effect. Relations with private provision institutions (either through invested savings schemes or through employer pensions) is based on a contract rather than on th discretion of the State, which may change with changes of government. People may expect legal guarantees to be sounder in such cases. But scandals such as the Maxwell affair may ruin that trust if the State fails to establish a legal framework to protect the interests of those taking out retirement plans.

If these tendencies become more widespread, a new kind of social law will make its appearance, instituting minimum solidarity between two distinctly different categories of workers, on the basis of their respective status: on the one hand, workers in a position of strength, whose social protection will be increasingly based on private insurance; and on the other the weak, whose status will be independent of their contracts. The essential characteristic of such law covering the weak is that their social protection is not linked to their employment contract but rather results from minimum solidarity measures, organised essentially at the national level (hence the present blossoming of minimum social coverage). The employment contract would be gradually emptied of its protective content, to become a *Abare contract@*, while social protection would no longer be geared to the employment contract but would derive, rather, from minimum social guarantees financed by the State[118].

118. Cf.: A. SUPIOT, *L=avenir d=un vieux couple: travail et sécurité sociale*, in:

Subjecting family allowances to income tests, a measure recently adopted in France, is a good example of such evolution. The centre of gravity of social security shifts: it is no longer a matter of compensating everyone for the costs of having children, but exclusively of bolstering the incomes of the poorest families.

The logic behind the British family credit is similar, since payment of that benefit, reserved to self-employed workers or employees with at least one dependent child, is subject to income levels. The difference is that the family credit is likewise subject to minimum employment conditions and plays a role in *workfare*, to supplement low salaries.

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While there is no change in vocabulary (solidarity is still the term used), the State's role changes radically. Instead of basing solidarity on the possibility of *risk*, where everyone is expected to give (contributions) and receive (benefits), it reverts to public charity, i.e., solidarity based on *need*, where the better off give but receive nothing in return whereas the poor receive but are not expected to give. The welfare State, where everyone's link with the social security system is bilateral (everyone is both debtor and creditor of everyone else's security) gives way to an assistance Sate, where the bond is unilateral (some citizens are social security debtors, while others are system creditors). This shift, which is already visible in the course charted for health insurance in the Netherlands, family allowances in France or the retirement system in the United Kingdom, is the result of the aim to constrain social spending, concentrating such spending on the most disadvantaged, while the middle and upper classes are referred to savings or private insurance for protection against risks. The danger of such a trend is, obviously, that it leads to the institution of a dual society, where the notion of social citizenship will no longer have the same meaning for all.

3) Organisation of the labour market

There are important differences in the way the social State has developed in the various European countries. In particular, in the United Kingdom and the Nordic countries, the question of the regulation of working relations has not been considered to come under the direct responsibility of the State, whereas in most of the other countries, it has been considered as a primary function.

3.1 Diversity of conceptions of the State's role

No two European countries view the State's role in labour relations in the same way. Nonetheless, three overall models of intervention can be distinguished.

In the A*continental*@ model, the State acts as tutor to the weaker party in labour relations. The purpose of its intervention is to mitigate the inequality between the parties to the employment contract by vesting workers or their representatives with minimum rights from which employment contracts or collective agreements can not derogate.

The Spanish constitution of 1978 defines the Spanish State as a A*Social and democratic State subject to the rule of law*@ (art. 1). According to the Constitutional Court (Rulings 3, 8, 14, 63 and 75/1983 of 25 January, 18 and 28 February, 20 July and 3 August, among many others), that expression means that the State is the guarantor of the respect for the principle of social equality and of the correction of inequalities. A*The legislator, when regulating labour relations, must necessarily consider categories and not particular individuals and, aware of the social and economic inequality of workers with respect to employers, attempt to reduce it by establishing adequate measures to ensure equality. The specific nature of labour law derives therefrom, by virtue of which law, thanks to the transformation of indeterminate rules that are indisputably bound to the principles of freedom and equality of the parties on which contract law is based, it stands as a way to compensate and equalise by, partially at least, correcting essential inequalities*@ (Ruling 3/1983, legal grounds, 3). This doctrine is echoed in Ruling 14/1983, also referred above, legal grounds, 3.

In France, given a background of weak collective bargaining, which has led to a risk of unequal relationships between employer and employee, the State acts to underpin those relationships and to set limits to the terms to which the parties to the employment contract can agree. Such intervention is warranted by the fact that employees effectively give up some of their civil rights when they enter into an employment contract. Furthermore, because of the weakness of collective bargaining in many parts of the economy, the law seeks to establish a standard A*social public order*@.

In Belgium and the Netherlands, (replacement of former paragraph) civil society is highly prone to self-organisation. The State is not perceived as an A*external*@ force as it is in France, but accompanies social groups, relaying with rather than directing them In Belgium in particular, trade unions are closely linked to political, cultural and social associations around which Belgian society is organised, and express themselves politically through parties that often head the executive in governmental coalitions. This means that there is a close connection between labour market institutions and other political and cultural institutions.

In Germany labour law has its origins in the Bismarckian social State, but it is now mainly part of the wider legal framework. The post-war philosophy of ensuring checks and balances and the development of consensus has led to the prime importance in labour law given to collective agreements. The concept of the social market economy is important in making the connection between the economic sphere and the social State.

In Italy the picture is mixed. There is a tradition of a minimum State, leading to little regulation in many areas, but with strong and detailed regulations in others. The social State is not very well developed except in the field of pensions, where it is unusually generous, but only for employees. The self-employed remain excluded. There remain many sectors where collective bargaining is undeveloped, and where enforcement of regulations is not strong, alongside Fordist industries and the public sector, both with strong collective bargaining and observance of regulations.

In the British model, on the contrary, the State only intervenes to place industrial relations outside the scope of common law and to thereby guarantee the possibility of making autonomous arrangements with respect to such relations, primarily based on collective agreements which have no legal force. This so-called A*voluntarist and abstentionist*@ system has nonetheless evolved enormously in the last 40 years, first of all with the enactment of continental-type laws under Labour Administrations, and then under Thatcherist policies of weakening union power and the individualisation of labour relations and finally by the impact of Community law which requires the transposition of certain European directives as acts. Nonetheless, there is a persistent tendency to consider that social protection should be wholly separate from labour law where voluntarist tradition with minimum State intervention continues to prevail.

The Scandinavian model also differs from the others. As in the continental model, the State acknowledges its responsibility to establish a general framework for organising the labour

market. Specifically, it establishes a legal framework for collective agreements. But, in contrast, as in the British model, it tends to refer the question of individual labour relations to the social partners. The Nordic philosophy is that the State
More generally, however, there are examples of some of the developments in the social State being reflected in labour market regulations. For example, there has been a shift away from State monopoly in the provision of employment placement services, with the development of private placement agencies. This has happened in Germany, the Netherlands and Sweden. In Italy job placement services remain a State monopoly, but the service places less than 5 per cent of new recruits.

These tendencies reflect both the wider changes in the role of the State, but also the shift towards a demand for greater freedom of choice in all aspects of life.

3.2 The State and collective bargaining

Collective bargaining has already been addressed in chapter 4 on the collective organisation of work. The discussion here will be limited to certain observations on the State's role in this regard.

The shift in the centre of gravity of labour law from the legal realm to collective bargaining is a feature common to all European countries. This has two general consequences. Firstly, there is growing recognition that collective agreements freely entered into by both parties may be more beneficial than the regulatory framework. The traditions in Germany and Sweden in particular give a primary role to collective bargaining and limit the amount of State intervention into the terms of those agreements. But more generally, it is increasingly common for regulations (at EU level as well as national level) to contain derogations for collective agreements. This means that the State transfers certain responsibilities heretofore acknowledged to be its own to the social partners.

The State's role is likewise evident in the technique of extending collective agreements, a practice which is quite widespread in Europe (as in Belgium, the Netherlands, Germany and France). In Spain extension of other kind is legally possible, but is not used, since collective agreements are generally effective, *ex lege*. Generally one of the parties (sometimes both or all) to the agreement has to request its extension. In the Netherlands the extension can only take place if a majority of the workers in the industry is already covered by the agreement. The State seeks to avoid undercutting or social dumping. If all those in an industry are bound by the same agreement, then it is not possible for one company to take market share from another based on their inferior treatment of their workers. They have to be more innovative or more productive to achieve that.

In the UK and Sweden there is no extension of collective bargaining to those who are not party to it. Collective bargains are valid only in those workplaces where the employer was directly involved in the agreement, either on an individual company basis, or as part of an employers' association. In Sweden most workplaces are covered by national collective bargaining arrangements, but in some companies there are supplementary local agreements. In the UK most bargaining is at company level.

should take responsibility for labour market policy and unemployment insurance, but what happens at the workplace is a matter for employers and employees to determine.

In Belgium there was a long history of national collective bargaining which covered a wider range of issues than employer/employee relationships. In effect the State endorsed and implemented the decisions reached by the social partners. However, the budgetary crisis in the early 1980s meant that the State for the first time imposed limits on negotiators, and in practice this resulted in the State taking and imposing key decisions in a way which had not happened before.
More generally, there are some concerns that the institutions of collective bargaining are not necessarily as well developed in all countries as they need to be in order to deliver the increasing weight of responsibility placed on them. There are clear differences between countries about how well-established collective bargaining is in different sectors. There is also a debate about the status of collective bargaining agreements which are in effect regulations. In particular, if they are regulations, are they subject to cancellation or amendment by the courts or by legislative process?

3.3 The State and collective representation

3.3.1 The institution of representative rights

Collective rights have traditionally been important in the field of labour law, which has tended to provide protection to all workers, or to groups of workers. In Italy, and Belgium this remains firmly the case. However, in France and Germany there is growing emphasis on the rights of workers as individuals. In France individual freedoms and trade union pluralism have contributed to the general weakness of both trade unions and collective bargaining. In Germany the deregulation of labour law has been concentrated in the sphere of collective rights, thus changing the balance between the individual and the collective. This has had the effect of strengthening works councils at the expense of trade unions.

In the UK and in Spain, in contrast, the shift has been in the other direction. The traditional emphasis has been on individual rights, but increasingly the law is defining collective rights. In the Netherlands the legal framework contains a mixture of individual and collective rights. In Sweden rights are given to the individual, but the enforcement of those rights is difficult unless it is done collectively. But the individual does not have the right to remove himself from a collective agreement which covers him, which provides a balance in the other direction. The overall pattern is convergence, with most systems now being based on a mixture of individual and collective rights.

As regards the legal treatment of trade unions, there is no clear single trend. In some countries (for example the Netherlands and Sweden) they are treated the same way as other voluntary associations. In others (for example Italy, Spain and Germany) unions meeting specified criteria (national unions in the case of Italy) have special privileges. In Belgium trade unions, in contrast to employers' organisations, refused to apply for legal personality under the terms established in the act of 1898 on professional associations. This refusal is justified on several grounds: the list of members must be public knowledge; civil liability suits may be brought against the association; there is

an obligation to submit yearly financial statements to a ratification committee and so on. For similar reasons, the unions refused to become not-for-profit organisations (act of 1921). Nonetheless, despite the fact that they have no legal personality or the rights associated therewith, workers= representative organisations are recognised by the legislator to have some specific capacities to submit legal action and to sue in civil action. Legal doctrine readily refers in such cases to A*restricted legal personality*@. In the UK trade unions have both special privileges and special obligations.

3.3.2 The institution of consultation with the social partners

In some countries institutions reconciling and counselling the social partners play a major political role (JDM):

This is perhaps at its most developed in Belgium. The Conseil National du Travail formulates A*all expert opinions or proposals regarding general problems of a social nature involving employers and workers*@ (Act of 29 May 1952). These recommendations are addressed to the ministers or Parliament at Council own initiative or at the behest of the latter. In practice, such recommendations play an extremely important role. Certain laws provide that no executive measures can be taken without hearing the Council; certain (exceptional) executive measures cannot be taken without its consent (Act of 16 March 1971), i.e., its unanimous consent (act on employment contracts of 3 July 1978). In certain fields, the government may only act at the proposal of the Council. The Council, in short, may express its opinion on conflicts regarding competence arising between joint committees. The social partners also participate in the Central Council for the Economy.

In the Netherlands the long tradition of consensus building is reflected in the National Social and Economic Council which is the main national advisory body, and the Labour Foundation, which is a private institution in which the major federations of trade unions and employers work together, The Foundation discusses issues of major economic importance with the government. For example, it concluded a landmark agreement in April 1996 on flexibility and security. It also produces guidance for collective labour negotiations. Similar institutions exist in Sweden.

In Spain there is a national Economic and Social Council with similar bodies at the autonomous regional level as part of the wider social dialogue. In Italy the National Council for Economy and Work is an institution for the consultation and involvement of the social partners in social and economic issues. Its real influence and importance is, however, limited. The same may be said of France=s Economic and Social Council.

In the UK the only national consultative body, the National Economic Development Council was abolished by the Conservative Administration, and there is no sign of any desire on the part of the Labour Administration to revive it. However, the social partners continue to be actively involved in the Health and Safety Commission, which is responsible for all matters of health and safety at work.

In Sweden there is a National Board for Occupational Safety and Health which involves the social partners.

In Italy the National Council for Economy and Work is an institution for the consultation and involvement of the social partners in social and economic issues. Its real influence and importance is, however, limited.

3.3.3 Institutions for the resolution of collective disputes

This is an area in which, generally speaking, the development of Fordism has mean a shift away from the use of the courts and towards systems of collective reconciliation and arbitration conducted by the social partners. This tendency is the outcome of the growing emphasis on collaboration and co-operation in labour relations, which has led to shunning legal action; it must nonetheless be noted that there is a trend in Europe today to question such A*avoidance of the courts*@. Recourse to the judiciary can be seen in collective disputes (in Belgium particularly) and the judge is positioned as final guarantor of compliance with labour law in contexts in which the position of workers= representatives is gradually weakening (in France especially). Certain legislative innovations (for instance, the French law on collective dismissal, the so-called A*Aubry Act*@) tend to enhance potential judicial control of the collective bargaining process within companies. This tendency can be seen, moreover, as an expression of a general evolution of the judge=s role in Western societies, which in the long run may entail a profound change in the regulatory model.

A*In Spain, regional and nation-wide cross-occupational agreements have gradually assumed conciliation, mediation and arbitration responsibilities through the creation of joint committees and voluntary arbitration bodies and procedures. Increasingly State regulations recognise the out-of-court settlement of labour disputes, although the constitutional right to use the courts still exists for individual and collective disputes, although such right may be voluntarily restricted or waived in the terms indicated*@.

In the UK there is a State agency charged with responsibility for conciliation between the parties to industrial disputes with a view to their resolution. Since collective agreements are not legally binding, so they have to be either resolved by conciliation or by private arbitration. In Belgium the law places reconciliation bodies at the avail of the social partners (essentially the joint committees); specialised public officials, under the aegis of the Ministry of Employment and Labour, play the role of A*social conciliators*@ In Italy too there are institutions for local dispute resolution, but with ultimate recourse to the courts. There are institutions at the local and regional levels for resolving disputes, although the parties concerned always have the right to take their disputes to court. In Sweden the Labour Court exists to settle legal disputes and access to it is restricted to the parties to collective bargaining. There is also an examination of the possibility of establishing an arbitration commission to deal with pay disputes.

In Germany there is a system of labour courts whose competence extends only to the resolution of disputes between employers and employees, and not to collective disputes. There are no State institutions for conciliation. In the Netherlands private sector disputes may be resolved through the courts, while public sector disputes are resolved by conciliation and (exceptionally) arbitration. In France, courts of law

are competent in collective suites (for instance, on the interpretation of collective agreements), but not to resolve collective disputes (conflict of interests). The latter fall under the scope of optional conciliation, mediation and arbitration procedures, which are in practice barely used; it is the labour administration that often plays an unofficial role in the resolution of disputes.

3.4 The State as employer

One of the areas of greatest change in all European countries in recent years has been the change in the relationship between the State and those who work for it. Generally speaking, in Europe, public officials had no formal contract of employment and their legal situation was unilaterally decided by the State. In return they had job security and benevolent by-laws, in particular with respect to retirement. Their salaries were nonetheless lower than in the private sector in exchange for these privileges. Public sector organisations were large and hierarchical and left little room for individual initiative or responsibility. Often, public servants had no right to strike and rarely had collective bargaining rights. That model corresponded to a public service ideal, which implied loyalty and availability on the part of officials. Practice was more or less removed from that ideal, depending on the country and the administration involved.

Likewise, the scope of application of that model varies substantially from one country to the next: a given activity may fall under the competence of public service in certain countries and labour law in others. Frequently, as in the Netherlands and France, public service includes employees of regional and municipal governments. In France it includes the postal service, hospitals and public education. In Spain some of these groups are State employees, and others are not. In Germany it also traditionally included State industries, including the railways. The general tendency in Europe has been to shift certain sectors formerly subject to public service to the sphere of labour law. It is now rare for employees of State enterprises to be treated as State employees, and where they are, this category of workers is being phased out. The definition of what constitutes a State employee has been progressively narrowed in many countries to focus on central government functions, or by the introduction or expansion of State employment on a temporary basis, as seen in the Netherlands, Spain and Belgium. In certain countries such as Italy, recent reforms have made all State officials, in principle, subject to labour law, although maintaining certain derogatory provisions (for instance, as regards the establishment of remuneration or codes of ethics).

The privatisation of certain public services has contributed to such narrowing of the scope of public officialdom. In some instances (for example in telecommunications) the standard model has been the transfer of State functions into a new private company. There has also been a shift towards business units, either within public authorities, so that one part of the organisation contracts with another part, or via contracts with private or voluntary providers. Sometimes this has led to State employees becoming employees of the new contractors (in line with the *Transfers of Undertakings* Directive). In others it has led employees to seek recognition that they are taking real personal responsibility and real risks, and that therefore they should be treated more like private sector employees, particularly in terms of pay.

However, it is important to note that the shift towards treating public sector service providers as business units has meant that the State has broken the terms of that implicit contract based on mutual trust. There has been a move away from public and political accountability towards business efficiency. However, it is not yet clear whether this move has produced better services. There are risks that the shift to a contract-based culture, even between different parts of the public service, may in certain cases lead, on the contrary, to a failure to deliver common public service objectives (continuity, equal access at the lowest cost).

There is growing concern that a new class of disadvantaged State employees is developing. In the case of Italy and Sweden, for example, this is because State workers have lost their privileges, but have seen no resulting compensation by way of higher salaries because of budgetary pressures. This impoverishment of public service is also an outcome of the employment policies which have brought about increasing numbers of special contracts for the unemployed in government, universities, local groups or hospitals, i.e., *Alittle@* and poorly paid jobs, subject to precarious conditions of employment. There has been growing casualisation of some State services, particularly hospitals. But in most countries there is a growing number of people who are working in State institutions on special employment or training schemes. These people, who work alongside State workers, often have neither State employee nor private employee rights.

Increasingly those who remain covered by the definition of State employees are likely to be treated as though they are part of the wider public sector. So, for example in Italy, Sweden and the UK all State employees now have standard employment contracts which allow for dismissal. In Italy, the previous situation where State employees could retire after 15 years' service for women or 19 for men has been reformed, and by 2008 the normal working life for State employees will be 40 years. In the Netherlands special arrangements for State employees are progressively being dismantled under a process of normalising labour relations in the public sector.

This turbulence in the employment relationship of State employees reflects the changes in the way in which public services are provided, but in most countries this is still going through a learning process and has not yet settled down into new stable patterns of proven effectiveness.

It is difficult to ascertain the respective advantages and drawbacks of public service and labour law to ensure the public the best possible service. The question, indeed, cannot be answered simply. If, for instance, research institute employees are State employees with tenure, they may be less likely to develop new ideas than if they were confronted with new people and new ideas every few years. By contrast, experts subject to market pressures and the fear of dismissal may avoid undertaking risky work when the outcome is not ensured. Another example, in the transport industry: if highly protective by-laws enable officials to strike readily, the demand for continued service is not met and the legitimacy of their by-laws declines in the eyes of the public. In contrast, if privatisation leads the workers in this industry to precarious forms of employment, for which they are poorly trained and poorly paid, transport safety may be at stake. This is why

posing labour law against public service in abstract terms leads to a false debate. The real problem, in both cases, is to define the occupational statutes of public officials, a suite of indivisible rights and responsibilities. In their pathological forms, however, public service and labour law may both ultimately dissociate rights and responsibilities: public service may vest certain workers with specific rights while demanding no responsibilities in return and labour law may burden workers with specific responsibilities but fail to set them off with the rights that enable them to assume such responsibilities.

B) Evolution of the State=s Role B Projections

1) The legacy of the Welfare State

Essentially, we are the heirs of the A*Welfare State*@, born of the industrial revolution. Set against both the A*gendarme (or minimum) State*@, conceived to be a mere arbiter, but taking no direct part, in social relations, and the Leviathan State, which attempts to assimilate all of society, the Welfare State becomes actively involved in social issues over which it admits it has no monopoly. But the visible strain under which it is labouring serves as a reminder of the present-day validity of the two fundamental questions that led to its birth.

The first is an outcome of the fact that in a society whose material survival is based on commercial exchange, rights and lifestyles are *indivdualised* at the same time as its members become more and more *interdependent*. This paradox, identified early on by Durkheim, is growing deeper and deeper before our very eyes. Individualistation is apparent in the slackening ties in all aspects of collective life, from the family to the trade union or the company (which tends to be thought of today as a mere network of contracts), whereas interdependence is the result of increasing specialisation, enhanced by technical development and internationalisation of trade. How can such individualisation and interdependence be reconciled?

The second question arose with the institution of the labour market, where labour is treated as a marketable asset. However, such assets do not exist unless educated and trained throughout human lifetime. Indivisible as human capital is from people, it hinges entirely on people=s education, life and reproduction. This bond is reinforced by technical progress, which heightens the demand for skilled labour, the kind of exclusively human work that no machine can perform, because the performance of any skilled work, even if hired for a specified time, entails vocational training acquired in the long term. How can the discontinuous nature of paid work market be reconciled with the continuous nature of human life?

Countering the totalitarian experiences that marked this century, the Welfare State was the democratic answer to those two questions; by reconciling freedom and security, it afforded the old royal States a new-found legitimacy. Its two sides, while often envisaged separately, are structurally related.

The first is the notion of public service, under which the State no longer stands as a power superior to, but rather becomes a servant of civil society, creator of a social bond that ensures continual and equal access to essential services (education, Under the traditional conception, the State is entrusted with transportation, communication, power, hospitals and more generally all kinds of services that are necessarily associated with territorial continuity). Under such an approach public service enhances the rights of individuals while making them universal. Although found under many different forms and in all countries, it is in France that public service developments have been most notable.

The second side of the Welfare State was the notion of employment, understood from the individual standpoint.. Employment designates not only an object of exchange, but professional statutes, that is to say, a system of rules imposed above and beyond the will of the parties to the relations so governed. Employment as a status necessarily associated with an employment contract is a German invention. Systematised by German legal writers beginning in the late Nineteenth Century, it spread throughout Europe, taking root under different forms in different countries. In all European nations, the State has played an instrumental role in the development of employment (by directly protecting labour relations, such as in the Latin model, guaranteeing collective independence in industrial relations, such as in the English model, by providing a legal framework for a social market economy such as in the Rhineland model or by formulating conventional labour law, such as in the Nordic model, etc.). Under all these various systems, employment contracts have been made subject to statutes to protect workers against the risks of loss of earning power. Employment, in that sense, is the child of both labour law and social security. Through social security, employment enrols its title-holder in a system of financial solidarity to confront such risks.

Over time, protection against some of such risks has shifted to the other side of the Welfare State, with such risks being assumed under the framework of public service. This is especially true in the case of the invention, English on this occasion, of the national health service, which affords universal social protection against the risk of disease. Adopted in a number of European countries (Nordic countries, Italy) and transposed in others at the cost of distorting occupational systems, such national health protection illustrates the dynamic of how certain rights deriving from employment have gradually come to be considered citizens= rights.

The Welfare State, which made it possible to master the dual phenomenon of individualisation and social interdependence, has at the same time fuelled the development of these two phenomena. Inclusion in broad and anonymous universal systems frees individuals from their family or economic environment: wives with a job or the elderly with retirement pensions are not dependent on their husbands or their children. From being an answer to the above issues, the Welfare State has gradually become part of the problem.

2) The State and A*globalisation*@

2.1 Instrumentalisation of the State

In modern societies, the State is the long-term guarantor. Both neo-liberal and neo-corporatist analyses tend to misunderstand that unique place that the State occupies, as both envisage the State as an instrument rather than as a guarantor of social and economic relations.

manifesting and implementing the general interest. The law

that articulates such general interest is enforced among groups and individuals and establishes the limits within which they may make their own rules (i.e., define their own contractual law). Two levels of written law are thus distinguished and put forward very hierarchically: one level represents the general will, as expressed via laws and regulations; and the other represents the will of parties, of private persons, as expressed in contracts. The first level is incumbent upon public law; it is the sphere of things resolute and unilateral. The second level is incumbent upon private law; it is the sphere of things negotiated and bilateral.

The Welfare State brought these two levels closer into line. The expression of general will no longer appears as an *a priori* fact imposed on individuals, but as the result of the consideration of the diversity of private interests. Acknowledging the limits of its cognitive capacity (which is what distinguishes it from the totalitarian State), the Welfare State seeks to express the diversity of interests running across society either by involving the representatives of such interests in the formulation of laws and regulations, or by vesting them with the task of defining the general interest. Such evolution, which may be thought to be A*neo-corporatist*@, leads to merging negotiation and deliberation, and to affording agreements a kind of legitimacy that is at least equal to that afforded the law. In neo-corporatism, the general interest shifts away from the notion of A*otherness*@ and must compromise with the various specific interests, while the latter, on the contrary, gain access to legislative or regulatory functions.

Neo-liberal renewal and deregulation theories also result in the questioning of the hierarchy of interests underlying the classic theory of the State. As a point of departure, such theories consider law as one of several forms of regulation, which must respect (or better, express) the dictates of supply and demand, as set out in standard economics. Economic globalisation leads to lending such dictates a universal value on which to build a A*business empire*@, imposed on all nation-States, which only express local solidarities, tolerated only to the extent that they do not obstruct the free movement of goods and capital. From this perspective, the true general interest lies in universal respect of the laws of supply and demand, whereas States embody only specific national interests; such interests must bow to the higher demands of free trade.

Such theories have a substantial impact in today=s world. This is demonstrated, firstly, by the establishment of multinational institutions based on the partial relinquishment of State sovereignty, of which the European Union is the most highly developed example. But such multinational entities are, in turn, today subject to the kind of constraints that they bring to bear on their Member States: in particular, the A*regional*@ interests they represent must bow to the imperatives of A*world-wide*@ institutions, founded under intemational conventions (such as the World Trade Organisation).

Neo-corporatism and neo-liberalism have, in practice, joined forces to strip the State of certain of its sovereign attributes, to shift the hierarchy of public and private interests and blur the distinction between deliberated law and negotiated agreement. In each of these ideologies the State is perceived to be a tool of a level of rationality that projects beyond it: namely society or the economy. The tendency is to regard it as just another of several A*actors*@, not in a position to lay claim to special treatment under common law.

2.2 The State as long-term guarantor

The visible weakening of the State in modern day Europe is fraught with injustice, risks and uncertainties.

Injustice because it is unacceptable for broad sectors of the population in rich societies to be consigned to poverty or social annihilation. This opinion, expressed long ago by Beveridge, is equally valid today; the development of a kind of social Darwinism that would insidiously lead to believing that the victims of the A*economic war*@ deserve their lot, that they have made no contribution to society and that the only concern should be to keep them entertained and prevent them from starving or freezing, is simply intolerable.

Risks because if, under the pressure of corporatism or world-wide markets, States prove to be incapable of ensuring their citizens a decent living and no other institution rises to take their place, what may be expected is a speedy unravelling of the social fabric which will rapidly translate into flaming (nationalist, regionalist, fundamentalist, racist or xenophobic) hubs of identity, of which today=s world is rife with examples.

Uncertainties, finally, because the issue posed is to know if, and how, States will be able to reassert their role as long-term guarantors. Firstly, it is not at all certain that the State, which is not an eternal or a universal legal category, but rather a relatively recent product of Western history , is going to still be capable of a metamorphosis of the sort that gave rise to the Welfare State. An hypothesis has been put forward, backed by a rigorous historical analysis, whereby our societies are heading towards unknown forms of re-feudalisation[119].

119. P. LEGENDRE, *Remarques sur la reféodalisation de la France,* in:

Judging by the present European legal framework, States no longer hold a monopoly over the definition of the general interest; they must take account, on the one hand, of Community authority and, on the other, of the social partners which regard themselves, for different reasons, as being entitled to establish law.

A prospective reflection on the reassessment of the State's role could be addressed from two standpoints, one procedural and the other substantial.

2.2.1 Procedural approach

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A procedural approach is inevitable once it is admitted, on the one hand, that the State continues to be the long-term guarantor of the general interest and, on the other, that in complex societies, it does not have the means, on its own, to define what that general interest comprises. That dilemma arises each and every time non-quantifiable common goods must be safeguarded, goods which by definition elude the price-based co-ordination conducted by markets. Such is the case, for instance, of nature, education or health, the potential for creativity among the unemployed, in short, the non-marketable aspects of individual and collective well-being. Purely administrative and regulatory techniques have long found it difficult, and sometimes impossible, to conserve such non-marketable assets. Neo-corporatist solutions, which consisted of making the definition of common good an object of negotiation with intermediary groups, lead to a deadlock; because the general interest cannot be the product of trade-offs between representatives of specific interests. The most powerful and best organised groups tend to impose their own notion of common good, that is to say, to make their own interests prevail.

The exhaustion of neo-corporatist arrangements as described above sheds light on something which, much too quickly, has been called the State's retreat. That shift is, in fact, ambivalent. Wherever the State withdraws from bargaining with intermediaries, renounces its role as co-manager of social affairs, in some cases at least it is to reassert and better fulfil its mission as guarantor of the general interest. The various tentative efforts to reorganise public services illustrate such an attempt to reach beyond the neo-corporatist model. The State has rarely confined itself to surrendering the management of such and such a service to private powers. It has done so establishing a legal framework intended to guarantee respect for the general interest in the provision of such services and creating *ad hoc* institutions (so-called regulatory agencies) reputed to be independent both of itself and the service providers.

This also entails a re-evaluation of the State's role and a reassertion of the prevalence of law over agreements. It is the law that establishes the system's key objectives. But that prevalence is at the expense of the State's withdrawal, to a certain extent, from the implementation of such objectives, because implementation falls entirely within the bounds of the logic of agreement. Agreements are no longer merely a way of governing the relations between parties, nor as an alternative form of regulation, but as a legal tool for joining parties in the pursuit of public service objectives established by law. In this task of meeting the general interest through intermediary individuals and groups, the expertise afforded by independent agencies constitutes an objective standard, a common language for the State and private parties. Such a common language is in fact indispensable once the State, on the one hand, asserts its role as guarantor of the general interest (breaking away from neo-corporatist practice) while on the other hand admitting its inability to satisfy such general interest alone.

The new feature, with is also the weak point, of this emerging model, is the role assigned to expertise. These so-called regulatory Agencies (Ethics Committees, High Councils, Independent Authorities, etc.) run two risks which have not in practice been fully eliminated. The first is that the science underlying expert opinion can never be anything else but the reworking of one ideology or another; the second is to keep such Agencies from becoming a forum for trade-offs among the lobbies which will be indirectly represented by the experts comprising their membership.

2.2.2 Substantial approach

States, and the European Union as well, cannot confine themselves to organising rules of procedure to allow the involvement of intermediary individuals and groups in the definition and implementation of the general interests with which they are entrusted. It is likewise incumbent upon them to establish the underlying principles that should guide such definitions and guarantee individuals and groups their fundamental social rights.

It is under that premise that the Community Charter of the Fundamental Social Rights of Workers was adopted. More recently, the Treaty of Amsterdam has reaffirmed the fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as resulting from the Member States' common constitutional traditions, as general principles of Community law[120].

120. [Phrase quoted literally in the French text and paraphrased in the English version, because the translator did not have access

A decisive step will thus be taken towards the *Aconstitutionalisation@* of fundamental social rights at the EU level. The need for such constitutionalisation has been discussed in several prior papers[121], and it was not felt useful to our group

121. See, in particular: M. RODRIGUEZ-PIÑERO and M.E. CASAS, *In support of a European Social Constitution*, in *European Co*

ess to the source. T. N.].

nnunity Labour Law: Principles and Perspectives. Liber amicorum Lord Wedderburn

to address this point in the framework of the present report.

On the contrary, it was felt that the notion of European citizenship included in the Maastricht Treaty could be a useful framework for implementation, at the individual level, of the social rights so proclaimed. In the terms of article 8E of the EC Treaty itself, citizenship in the European Union proves to be an evolutionary notion, which can be extended to include new rights (or duties) that reach beyond the restrictive provisions adopted at Maastricht[122]. There is no guarantee that it will ever be possible to develop its political side very far, due to the pressure brought to bear by the reassertion of national

122. Articles 8A (feedom of movement), 8B (voting rights and elegibility for local and European elections), 8C (right to diplomatic protection) and 8D (right of petition).

of Charlton, Clarendon Press, Oxford, 1996, p. 23s.

sovereignties[123]. Its *social*, which would better be termed *social and economic*, aspect, however, (generalisation of free movement and residence, initially granted to workers alone) is very much in the mainstream of Community dynamics. It constitutes fertile grounds to develop Union citizenship, in terms of social citizenship.

Like political citizenship, social citizenship can be defined as equality of rights and responsibilities; what distinguishes them is merely the nature of the rights and responsibilities: political in one case and social and economic in the other.

Equal access to high quality services of general interest (not conceived in terms of universal minima) would be certainly involved in social citizenship so defined. The determination of such services is a matter for political deliberation, but must definitely include health and safety, education and training and essential fluids (air, energy). The legal status (private or public) of the service providers is immaterial provided they are subject to a common legal framework that guarantees the quality of the services rendered and equal access thereto by all citizens. Such demands for service continuity, equality and quality warrant certain limitations to free competition pursuant to article 90 of the Treaty, as interpreted by the Court of Justice[124].

123. Cf.: Commission européenne, *Deuxième rapport sur la citoyenneté de l'Union*, 1997.

124. *CJCE*, 19 mai 1993, aff. C-320/91 (Corbeau).

Acknowledgement of professional freedom would be likewise involved in social citizenship; this should not be understood to mean only formal freedom, but also as the opportunity open to every citizen to be able to make a living from a job that best expresses their own aspirations and talent. Such a guarantee should not be confused with the right to a job, which relates to work as an employee only, but should embrace all sorts B dependent and independent, marketable and non-marketable, public or private B of activities undertaken at the service of others. This also would include a specific approach to the freedom of enterprise. This specific, professional freedom approach would entail, in particular, the right to life-long learning (as provided in the master guidelines for employment adopted in Luxembourg in November 1997). As far as work in the employ of others is concerned, occupational freedom also would include specific rights within companies, in particular the rights of participation and representation. Indeed, as a general principle, stressed in any number of references in the present report, it is not advisable to separate the acknowledgement of rights from that of responsibilities: social citizenship would implie responsibilities that could only be assumed if rights are publicly guaranteed.

There are, nonetheless, reasons to question whether the notion of social citizenship is a sufficient framework to develop a social model equally respectful of freedom, equality and solidarity. Such a notion in fact excludes non-citizens (i.e., non-EU nationals) from the social circle it itself defines and thereby contradicts the universal nature of the values it harbours. Basing free movement, for instance, on European citizenship, rather than on status as worker, would lead to denying free movement to foreign workers living legally in one of the member countries on a permanent basis. The circle of labour-related human rights and that of citizenship do not necessarily coincide, and making human rights at the workplace subject to citizenship could lead to excluding non-Community workers from such rights, despite the fact that the number of such workers, already substantial, can only continue to grow given the respective demographic and economic prospects of European countries and their neighbours to the South or the East. This is why the proposed reflection on European social citizenship must necessarily address the affirmation and deepening of fundamental social rights at the Community level.

Chapter 6 – Transformation of work, women's work and the future of Labour Law. The gender dimension

The important changes taking place in labour relations, and the even more important changes forecast for the decade to come have – or may have – substantial consequences for women's work, consequences as important as those prompted by industrialisation in the past.

One of the most prominent structural changes affecting European labour markets is the increasing number of women who have joined the market over the last three decades, in particular in the Scandinavian countries and the United Kingdom. In view of this, there has been a tendency, in discussions on employment and growing joblessness in European societies, to place some degree of responsibility for the severe unemployment situation on that rise in female activity and employment rates. This fact has, in turn, gradually led to the adaptation of traditional approaches, although not without first overcoming some resistance, and the introduction of a new focus in both the organisation and (harder still) the practice of labour relations, with a view to progressively achieving *greater gender equality*.

The need to respond to changes in labour markets and employment through adequate labour regulation sheds a light of current interest on the issue of female work and in particular in response to the perspective of the development of labour legislation in the context of the evolution of European social policy. The need for such response is confirmed as well by events such as the recent adoption of the Amsterdam Treaty and Council Directives 97/80/EC and 97/81/EC, both of 15 December 1997, the former relating to the burden of proof in cases of sex-based discrimination and the latter to the Framework Agreement on part-time work reached by UNICE, CEEP and CES, as well as the many European Commission community action programmes for equal opportunities for men and women.

Furthermore, the proposals and guidelines resulting from the expert group's work are formulated to take account of the gender issue and, consequently, of the impact of such proposals on the European equal opportunities goal, in keeping with the premises contained in art. 3 of the Treaty of Amsterdam and European Parliament recommendations[125]

A) Evolution of Women's Work in Europe: Reproductive Work and Marketable Work

Any analysis of women's labour relations and the regulation of such relations must be set against the backdrop of an historic review.

1) Birth and consolidation of industrial societies: male productive and female reproductive work

It is a generally accepted fact that industrial society, in which women and children were initially recruited to the productive labour market in large numbers, in the absence of any kind of legal regulations and usually under very harsh conditions, engineered a profound change in the organisation of the productive world and that the resulting social model turned on a gender-based distribution of work. Men were assigned the so-called "*productive*" tasks in the public and the public-private business domains, which were performed under wage-based labour relations and increasingly regulated employment conditions, subject in turn to developing Labour Law and collective bargaining between the social partners. Women, meanwhile, were to engage in so-called "*reproductive*" tasks, performed in the private, family sphere and governed under Civil Law, largely unregulated and under conditions in which women's and children's rights were barely recognised.

Scholarly analyses on the dynamics involved in the transition of predominantly agricultural societies to industrial societies[126]

125. Resolution A4-0251/97 of 16.9.1997 relating to the Commission's Paper on *Integrating equal opportunities for men and women in overall Community policy and action* (COM (96)67 final).

126. Vid. K. POLANYI, *The Great Transformation*, New York, 1944; C. OFFE,

show that after an initial stage of reaction to the new production conditions, non-property owning men began to organise around political associations and in trade unions, to obtain recognition of their civil and political rights and demand labour and social rights. T.H Marshall=s thesis[127] on the gradual constitution, development and expansion of rights provides some very clear insight in this regard.

The process of inclusion and recognition of rights was not the same for men and women. The consolidation of this model entailed the withdrawal (or expulsion) of most women from the labour market and their confinement to the private sphere, in the framework of a gradual change in family mo dels, from the extended family characteristic of farming societies to the nuclear family, the model prevailing in industrial societies.

Notwithstanding that social order, women did continue to have a substantial role to play in certain branches of industrial activity, such as textiles or food, generally as low-skilled labour and in low-paying jobs. During the war periods women temporarily took any number of jobs left vacant by men. This did not mean, however, that they were relieved of their family responsibilities. Moreover, women had always been employed in domestic work, although this traditionally female activity was always scantily and belatedly regulated and difficult to subject to legal control.

Legislative logic during this period as a whole, as far as women=s work is concerned, was paternalistic and A*protectionist*@, largely focusing on their reproductive role (measures to protect women against unhealthy or strenuous jobs, prohibition of night work, etc.), reflected in the earliest ILO Conventions.

127. T.H. MARSHALL, *Citizenship and Social Class*, Cambridge, University Press, 1950.

Labour Law, from the outset, had a clear gender (masculine) bias and much of the doctrine of that body of law was developed assuming that the central figure in a contractual relationship involving subordinate work **B** the employment contract **B** was a skilled, male, industrial, full-time worker hired, as time went on, under open-ended terms, and with a family to support. Notwithstanding national diversity, Labour Law throughout Europe was built around the male worker model. Subsequent recognition of the formal equality between men and women before the law was more a consequence of an extension of existing doctrine to women than of the consideration of the specific characteristics of each gender in the framework of the social division of work; moreover, since these arrangements remained largely unquestioned no real legal innovations were introduced. This is what some texts refer to as the *Aegalitarian@* perspective of law which, with some modern retouching intended to eliminate inequalities, still prevails in the most recent provisions (articles 6A, 2 and 3 of the EC Treaty, amended by the Amsterdam Treaty).

The appearance and development of Welfare States (with national variations, but in all cases based on based on active State intervention in the regulation of labour relations) during the Fordist period opened up new work opportunities for women, primarily in public education and health services. In the former, they were hired to teach the primary grades, a task associated with their maternal role; and in the latter, to take subordinate positions in support of higher-ranking professional and, in general, *Amasculinised@* activities. At the same time, burgeoning administrative tasks in both the public and private domains held out opportunities for women, although largely at lower occupational levels.

The fact that women accessed formal education later than men and often with a curricular slant that in itself entailed a narrowing of occupational choices had an important impact on the ways women could participate in the working world.

Women joined a highly masculinised working world, in terms of the definition of rights and the social partners participating in collective bargaining as well as of daily organisation of the work to be done. Regardless of whether or not it was in fact true, women=s activities tended to be conceived socially as additional to what was understood to be their major role: family and reproduction. Consequently, their earnings were perceived to be complementary to the heads of families= (men=s).

From the sixties onwards women in Europe began to enter secondary and higher levels of formal education. This enabled them to acquire higher qualifications and some diversity in their insertion in the labour market, as well as the tools to analyse the social relations in which they were immersed, affording them a growing capacity to question those relations and assert their rights.

2) Productive and technological change and gradual and growing incorporation of female labour on European labour markets

The seventies is a decade of new social phenomena of various kinds, perhaps the most prominent of which is the beginning of a change in production, with the tertiary sector growing in importance with respect to the (primarily male) industrial sector and the appearance of new activities, yet unregulated; growing heterogeneity of family structures (single-parent families, unmarried mothers, single men and women, blended families resulting from separation and remarriage, etc.), indicative of a further transformation, perhaps equivalent to the change from the extended to the nuclear family; higher education for women and consequently their increased presence on the labour market, particularly in services, since traditionally, employment rates are more closely related to training and qualifications among women than among men; an important change in domestic management, as a result of the development of public services to assume some of the tasks previously relegated to families (nursery schools, expanded education, hospitals) and of the private distribution of goods and services that replace others, as well as the development of household appliance technology, allowing (at least potentially) for new ways to organise time; the appearance of women=s movements varying in form and degree of radicalism which begin to question different aspects of the prevailing social division of work and the conditions under which women access the labour market.

As a result of this series of factors, women with higher qualifications than in previously began to join the labour market *en masse*, often in the emerging tertiary sector, at the same time as labour regulations and legislation (flexibility processes or policies) have undergone increasing change as a result of alterations in production and technology. This undoubtedly has provided new work opportunities for women who are faced, besides, with a growing need to supplement the family income or guarantee a source of income of their own in view of changing family structures. The public sector is becoming feminised to some extent, with greater occupational diversity among women and increased female participation in the private sector, particularly in the service sector, with a certain tendency in the latter for that participation to concentrate around specific kinds of activities and jobs.

However, the changes in the social model on which the division of work is based are not as profound: in addition to participating in the labour market, women continue to be primarily responsible for society=s *Areproductive@* tasks. This phenomenon, known as the *Adual day@*, divided between working and *Anon-working@* time **B** even though the latter, devoted to reproductive tasks, constitutes an additional burden **B**, results in unequal competition between men and women on the labour market, despite the acknowledgement of their formal equality under Law. This situation exists over and above the inroads made by women into what is traditionally considered to be men=s social terrain and working time.

Women=s ability to hold jobs despite this double load has depended, to some degree, on the existence and development of public social services, and the introduction of certain legal provisions that tend to remove some obstacles affecting women=s careers (maternity and nursing leave, leave to care for family members who are ill, etc., some of which are granted equally to men and women).

This is the period when *Aaffirmative action@* (a concept originally referring to the integration of the black minority in the United States) made an appearance, as a way of establishing measures to correct ongoing *de facto* structural inequalities rooted in the past. In the case of women, *Aaffirmative action@* measures attempt to mitigate or compensate for

unequal opportunities to join and take active part in the labour market as a result of the traditional model for the division of Nowadays, women's greater participation in the labour market takes place in a context of further production and technological change that generates new kinds of (post-Fordist) labour organisation with a diversity of co-existing production models and some clearly emerging trends, particularly the variety of employment terms, recourse to (real and fraudulent) self-employment, subcontracting and outsourced labour. This gives rise to new and very diverse arrangements in working relations and thus to the *"flexibilisation"* of employment relations. Women are provided job opportunities just as pressure builds up against regulating and/or deregulating working conditions, in a context that parallels the situation prevailing early on in Nineteenth Century industrial society.

B) Women and Future Trends in Labour Law

1) Changes in the employment contract, non-standard employment terms and self-employment with regard to women

The new kinds of employment relations (part-time contracts, temporary contracts and ETTs or temporary employment agencies, work from home and tele-commuting) affect women in particular. The way gender difference affects new *"non-standard"* employment conditions and labour organisation must be taken into account in order to assess their impact and determine the actual level of protection afforded to female work by Labour and Social Security Law.

Nonetheless, at the same time flexibilisation of the labour market opens up new employment opportunities for women, who show initially greater adaptability to less favourable conditions (*"new vein"* or *"second labour market"* jobs), although often under deteriorating labour, economic and social circumstances.

All of the above implies – or may imply in many cases – that whereas a larger number of women is joining the labour market, they face greater obstacles to accessing rights and social benefits established and regulated by Labour Law conceived for an industrial society and a standard employment contract.

"Flexibilisation" policies, with growing demands on employees with regard to initiative and independence, competition, skills and adaptation, as well as availability, places women at yet another cross-roads: either they forgo their careers (withdrawing from the labour market altogether or accepting lower positions with limited promotion opportunities or temporary and casual employment conditions) or their family responsibilities. Declining marriage and birth rates, delayed marriages, later age at first birth and broken homes, are not unrelated to this decision presented, perceived and experienced in many cases as an option between two mutually exclusive alternatives. If flexibilisation translates to greater demands on employee availability, it may entail a greater burden for women, in turn incompatible with reproductive tasks unless a greater, more equal share of such tasks is assumed by men and society as a whole via public services.

Moreover, a more equitable distribution of family responsibilities in the framework of growing demands on employee involvement and availability may become impossible for both women and men, except at the price of greater subordination and casualised employment, and consequently greater personal insecurity for both. In light of this, it may legitimately be wondered whether the new social and legal system on which the world of production turns and which does not question the validity of the old social model for the division of labour, will also be built along strongly biased gender lines, discriminating against women from the standpoint of economic independence and professional undertakings; and against men with respect to the development of bonds of affection and family relations.

A model whereby men and women would share working time and keep enough free time for both without forfeiting social rights is an extremely interesting course of action in this regard. If part-time work is not afforded protection in the form of recognition and conservation of labour and social rights, if it means the loss of all potential for professional development and reinforces the bonds of economic dependence, if it has an adverse effect on salary levels and access to Social Security benefits with the concomitant strengthening of the bonds of financial dependence, women will have succeeded in accessing the labour market but will continue to be in a position of inequality and social minority.

It may be particularly detrimental to women to restrict the scope of application of Labour Law and its main guarantees to the field of subordinate employment and the traditional contractual articulation of such employment, namely the employment contract, without taking account of work performed for others that is channelled through other kinds of legal or contractual relations, known as independent, autonomous (or self) employment or similar. The ongoing identification of Labour Law with the regulation of the prototype of labour relations associated with the industrial model that gave rise to such relations – and which, moreover, was never even fully representative of all dependent or subordinate work – limits the protection afforded to a smaller and smaller core of workers and leads to even greater segmentation of the labour market.

Under such circumstances, labour law may act as a mechanism for exclusion rather than for promoting adaptability to change, integration and social advancement.

Likewise, according to the most recent Eurostat data, whereas women still constitute a minority of both the active and the employed population – the activity rate for women is around 45% in the EU as a whole, compared to 66.2% for men, although distribution by country is uneven – a larger proportion of women than men is affected by unemployment, except in the United Kingdom and Ireland. In the case of Spain, where the female activity rate is a mere 35.4% (compared to the male rate of 61.9%), given the net increase in women's participation in the working world over the period 1976-1996 (62%), it is no exaggeration to state that virtually three quarters of the new female recruits have joined the ranks of unemployed women. Likewise, young women find it more difficult than young men to secure their first job, among other reasons due to the (statistically unfounded) belief that they are less productive, have higher absence rates and cost their employers more due to the impact of their family

responsibilities B i.e., the reproductive role they are expected With respect to women=s status in private enterprise, Spain is proving to be a very typical case: there is no correlation between the educational effort deployed by women in recent decades and job accessibility or their position in job hierarchies.

State employment and Community structural policies should expressly address the gender dimension and the adoption of specific equal opportunities measures to take account of the social and economic factors particularly affecting women, in accordance with the A*employment guidelines*@ adopted by the Luxembourg Council in December 1997.

2) Employment discontinuity and continuity of employment status among women: the need for affirmative action; the persistence of discrimination in salaries

Women are particularly prone to employment instability, due to the problems surrounding career interruption. Sometimes women workers are dismissed on specific pregnancy- and maternity-related grounds (although nominally for other reasons) or are pressured into returning to work before the time legally stipulated and/or find it difficult to return to work under the same conditions as before taking their leave of absence.

Labour Law should always respect equal rights between men and women, taking account of their individual characteristics, the life cycle and reproductive tasks, so careers do not suffer because of interruptions due to maternity, adoption of children, child rearing and care for relatives, with the concomitant impact on access to benefits contingent upon payments into the social protection system. The main problem lies in the pursuit and identification of mechanisms to make this discontinuity-instability in women=s careers compatible with their return to the labour market and maintenance of their employment status, characterised by entitlement to labour rights and social protection; in other words, to make work and family life compatible, reconciling diversity and continuity in the career cycle.

Moreover, certain kinds of work have been traditionally associated with women, as a public extension of the non-marketable activity performed in the domestic sphere: tasks relating to health care and care for the ill, nursery and primary school, domestic service, cleaning, cooking, etc. This has produced A*occupational segregation*@ based on gender stereotypes that hinder women=s occupational diversification and their integration in non-traditional jobs except in de-regulated or unregulated contexts (underground economy), and this is at the root of indirect and hard-to-prove discrimination in pay. Most home work and tele-commuting, which usually involve low-paid activities requiring little skill, are performed by women.

In this regard, State intervention B not only via labour and employment legislation, but political and public action as a whole B and collective bargaining itself seem to be indispensable to enforce the prohibition of discrimination and ensure greater equality of opportunities between men and women in their access to employment and career development: via, for example, affirmative action measures such as incentives for hiring young women for permanent jobs, the to assume B on their work.
implementation of networks of nursery and primary schools with flexible schedules in keeping with labour market demands; support for building and maintaining women=s careers and access to life-long learning and new technologies; incentives for the actual use of parental rights by both men and women (as set forth in Council Directive 96/34/EC of 3 June 1996 relating to the Framework Agreement on parental leave entered into by UNICE, CEEP and CES) and the establishment of preferential treatment in hiring or promoting women in professions in which they are under-represented (A*quota or priority systems*@).

Given women=s traditional inequality in the working world, a doctrine of affirmative action measures has been developed, under Commission for the European Communities encouragement, in an attempt to counter unfair situations, eliminating *de facto* structural inequalities and granting such measures priority or preferential treatment to achieve truly equal opportunities for men and women.

Nonetheless, the legitimacy and suitability of legislative polices tending to promote affirmative action and the scope of such action and their impact not only on opportunities but on results are currently under debate. The Court of Justice of the European Communities= *Kalanke* Sentence of 17 October 1995[128] is a significant example of developments in that debate, along with the reactions and criticism levelled against the interpretation and application of Community Law B art. 2.4 of Directive 76/207/EEC B set out in the ruling. The *Kalanke* Sentence interpretation was subsequently partially revised by the *Marshall* Sentence of 11 November 1997[129], according to which the establishment of preferential promo tion for women if equally qualified, i.e., unequal treatment impacting results[130],

128. Case C-450/93.
129. Case C-409/95.
130. [Phrase quoted literally in the Spanish text and paraphrased in the English

is compatible with Directive 76/207/EEC, providing such preference is neither absolute nor unconditional[131].

Equality of opportunities, a principle of Community Law, is now laid down in the Amsterdam Treaty (art. 119.4 ECT). It is, however, still weakly formulated and addressed as an exception to the general rule, in which the intention is merely to ensure that Member State legislation on affirmative action conforms to Community Law; it imposes no binding objectives on members nor does it require Community institutions themselves to adopt measures favouring the implementation of such action, despite the provisions of new art. 6A to the EC Treaty which vests the Council with the power to *Atake appropriate action to combat discrimination based on sex...@*. The purpose of equal opportunities is to ensure *Afull equality in practice between men and women in working life@* and to

131. M.RODRÍGUEZ-PIÑERO, *Igualdad de oportunidades y prioridad de la*

d n o t h a v e a c c e s s t o t h e s o u r c e . T . N .] .

m u j e r e n l o s a s c e n s o s e n l a S e n t e n c i a M

a r s c h a l l d e l T J C E , i n : R e l a c i o n e s L a b o r a l e s , n 1 2 4 , 1 9 9 7 , p . 7 .

that end, according to the new wording of art. 119.4 of the ECT, *Athe principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier* Discrimination in salaries and remuneration on the grounds of sex persists despite the acknowledgement, more than twenty years ago, of the principle that men and women performing the same work or, in the new version of the Amsterdam Treaty, *Awork of equal value@* should be remunerated equally (art. 119.1 ECT and Directives 75/117/EEC and 72/107/EEC). A recent EUROSTAT report[132] shows in this regard that the gap between mens and womens salaries (the average female wage at the normal hourly rate is 84% of the male wage in Sweden, 73% in France and Spain and 64% in the United Kingdom) is larger among the highly skilled, older age groups and professionals with university training. On average, according to Eurostat figures, the differences in salaries between men and women with a comparable level of education and holding the same job in the same industry or business sector came, in 1995, to 13% in Sweden, 22% in Spain and nearly 25% in the United Kingdom.

3) The issue of womens *Aworking time@*

It is generally agreed that the relatively stable and homogeneous reference for working time (work week as reference, collective time, etc.) is also growing weaker, in particular under the combined effect of the development of the service sector, the introduction of new technologies (namely, information and communications), the competition of more and more open markets, the changes in worker behaviour with respect to time and new consumer demands. The primary purpose of breaking away from or flexibilising this model is to adapt it to business needs. But the flexibilisation of working time also serves other interests. The value of heterogeneity and, as appropriate, of individualisation is rising, to the detriment of the former standardisation or formal homogeneity of working schedules.

Traditional, scientifically standard Taylorist/Fordist working time B which, nonetheless, allowed for both informal practices and derogation from rigid standardisation to accommodate business specifics B was well adapted to men, but excluded women from the labour market or relegated them to a position of disadvantage. Working time was established around a thoroughly male reference, defined in opposition to female reproductive time. The prohibition of night work for women is a particularly eloquent expression of this male approach to working time.

One of the issues addressed in the current treatment of *Aworking time@* is the intersection between the two contradictory lines discussed above in connection with Labour Law regulation of employment conditions for the new kinds of working arrangements, the defence of the continuity of women workers employment status and the compatibility of such continuity with possible work and employment discontinuity, all of which has a substantial impact on womens potential and capabilities in their active working lives.

The demands for flexible adaptation of working time B the working time that is relevant to Labour Law B, if shared with male workers, can enhance womens working potential by allowing them greater leeway with respect to their individual preferences and their ability to control their own working conditions, but may at the same time clash with family responsibilities B with their other working time, their reproductive time, time not relevant to Labour Law B; womens employment and promotion potential will continue to be adversely impacted by such situations while the traditional social model of division of work B under which they are expected to assume the brunt of the family burden B persists. Under such social conditions, permission for women to work nights, granted under the *Stoeckel* Sentence of 25 July 1991[133], the flexibilisation and irregularity of working schedules (weekends, for instance) coupled with the stepping up of work paces in terms of market behaviour and the need to fully exploit capital goods may aggravate such negative consequences. Moreover, no profound change towards sharing family responsibilities seems possible unless a similar change in all the necessary services is likewise forthcoming.

The new non-uniform arrangement of working time has a decisive impact on organisation of social life as a whole (school system, transport, leisure), raising crucial questions of different kinds and scope. How can working, family and personal time be organised in a context of growing demands on workers time in terms of availability for paid work?

Moreover, the crisis afflicting the traditional nuclear family and the emergence of heterogeneous forms of family organisation are issues that should be taken into account in Labour Law and the regulation of social insurance, in view of their significance in terms of a break with former models of social organisation.

Policy and practice with respect to the reduction and organisation of working time in different countries are very highly dependent on the legal and cultural traditions in each one. In Holland and the Scandinavian countries, part-time work fits into a pattern of cultural choice to allow for a better balance between professional and family activities and is offered, for that reason, as an appropriate formula for female employment under contract. However, according to surveys conducted by Eurostat in the EU Member States as a whole (where 32% of women work part-time, compared to 5% of men) a high percentage of women currently working part-time state that this is not a matter of choice, but rather a result of labour market demand under present circumstances and that, if they could, they would work full time. Furthermore, part-time work contributes to broadening the gap between mens and womens salaries, since the hourly wage for part-time work is lower than for full-time work (85% in Sweden, 71% in France, 69% in Spain and 60% in the United Kingdom), whereas for the time being it has not led to a balanced redistribution of family responsibilities[134].

132. *How evenly are earnings distributed? Eurostat statistics in focus*, in: *Population and social conditions*, 15/97.

133. Case C-345/89.

134. *L´activité économique des femmes dans l´Union Européenne*, 1/97; *Les f e n n*

es

tou jours

sous-représentées

sur le marché du travail, 8/97.

In Spain, although part-time work has followed a sharp upward trend of late as a result of legislative policy intended to flexibilise and facilitate this kind of employment, it is not nearly as common as in other EU countries, and involves women (67%) to a much greater extent than men. Even among the latter, however, who are compelled to accept such employment terms, growth in part-time work has been substantial in the last two years, in particular among young men, given that under such conditions employment **B** albeit casual or temporary **B** qualifies for furtherance of job creation terms, i.e., lower salary rates and social security contributions. According to the figures published by the Economic and Social Council in its report on *El trabajo a tiempo parcial*[135] (part-time work), in the case of males, part-time work is most common in agriculture, the hotel/restaurant trade, retailing and education. Female part-time work centres around domestic service (a little over 50%), business services and recreational, cultural and sports activities (12%), hotel/restaurant trade and personal services (11%), education (9%) and other services. With respect to the average time worked under part-time contracts, women's average working day in 1995 came to 43% of the hours worked by women with full-time jobs, whereas the proportion for men was 46%.

Leaving aside the solution consisting of voluntary part-time work **B** for which, as indicated above, appropriate regulations must be enacted on the labour and Social Security rights of workers employed under these terms and on a more equitable distribution of their use between men and women **B** the growing demands in terms of adaptation and flexibilisation of working time may lead to discriminatory results, since it puts people with children or those who have other relatives in their care at a disadvantage. This is a particularly serious problem for women, who, in most cases, are the ones that care for children and other relatives, although as indicated above, a growing number of men are likewise affected by such demands. Workers' increased autonomy and ability to control their own working lives, along with a growing range of choices as a result of the development of consumer society and the impact of new technologies may again place women in a marginal situation unless the necessary changes are made in other areas of social life.

4) Collective representation and women's participation in trade unions, employers' associations and collective bargaining

The growing participation of women in the labour market does not correspond to their membership in trade unions and employers' associations or participation in collective bargaining, which ties in, on the one hand, with the problem of gender representativeness and legitimacy of the social partners and, on the other, of women's effective exercise of their collective rights as tools for participating in working and social life.

The origin and development of trade unions and employers' organisations associated with the Fordist (industrial and masculine) production model seems to hinder addressing and accepting the profound changes in production and, with them, women's growing participation in the labour market and the consideration of the gender dimension in the scope itself of their action: from defensive positions that associate women with the causes of unemployment and casualisation of the labour market itself, to difficulties in accepting their specific labour-related demands as opposed to assuming them to be included in general bargaining **B** despite the fact that this is the institution that best adapts to changes in the labour world **B**, to the imbalance between the proportion of women in the working world and female presence in collective bargaining and decision-making bodies in such representative organisations.

Moreover, the very history of trade unions, their organisation and culture may curb women's more active membership. In so far as due account is not taken of the persistence of the old model for the social division of labour and no serious effort is made to change the distribution of family responsibilities in terms of gender, union representation activities will themselves constitute an extra burden for women, to be added to the time devoted to work and other occupations, making it extremely difficult if not impossible for them to participate in such activities.

In European countries, women's membership in trade unions is, generally speaking, proportional to their presence in the active population, although it is particularly high in countries such as Finland and Denmark and low in France, Greece and Holland. However, even in countries where women's union membership is high, they are severely under-represented in executive bodies[136].

135. Madrid, 1996.

136. Y. KRAVARITOU, *Equal opportunities and collective bargaining in the*

Nonetheless, due to the convergence of a series of complex social causes, among them factors relating to the development of women's and similar movements, women have been of participating in society in new ways that may enable them to acquire a more relevant role in different decision-making domains. One of the needs facing trade unions and employers' organisations is to incorporate both the structure and representative action of such social movements.

As far as employers' organisations are concerned, although there are unquestionable differences among European countries, it may be generally asserted that the logical consequence of the limited number of businesswomen, and the greater *de facto* difficulties they face to hold top-level positions, is a similarly small number of women in the decision-making positions of such organisations and on collective bargaining bodies. While at such levels the burden of traditional roles may be lighter (among other reasons because greater affluence provides more ready access to services to support reproductive activities), the unequal presence of men and women is yet another indication of the complexity of the problem; the traditional model for the social division of labour and the associated gender stereotypes seem not to have been broken at this level, either. The situation of women who work with their husbands in the latter's business constitutes a good example of this.

Trade unions and employers' organisations must open their representative power to new subjects, new realities and new needs and, most significantly, those arising from the gender issue.

5) Role of public authorities and social partners in combating discrimination and implementing the principle of equality of opportunities

The struggle against discrimination and the furtherance of equal job opportunities by including the gender dimension in public action and policy and, as appropriate, unequal, preferential treatment for women in order to actually reach such equality should, inescapably, be one of the elements considered in the construction of European social citizenship B or the constitutionalisation of social rights at the Community level B, in so far as they are tools to reach full and active participation in community life, tools that are closely related to the right to access employment and social protection and that continue along the lines drawn B albeit hesitantly B in the Amsterdam Treaty. The principle of substantial equality must be secured by public authorities who are, furthermore, bound to adopt the necessary measures to enforce it in the suite of policies they implement.

Encouragement of legislation which recognises women workers: specific needs for protection and promotion should continue to be developed and expanded in the future for as long as womanhood itself continues to be a source of prejudice and discriminatory consequences, as the European Commission acknowledges in its recent report on the follow-up of the Paper A*Integrating equal opportunities between men and women in overall Community policies and action*@: despite the many activities being conducted to promote equality between men and women, more often than not they comprise isolated measures with no essential impact on the overall situation of gender equality[137]. Despite the difficulties considered above, collective bargaining has an instrumental

137. COM (1998)122 final, Brussels, 4.3.1998, p. 3. [Phrase quoted literally in the Spanish text and paraphrased in the English version, because the translator did not have access to the source. T. N.].

role to play in correcting such situations. Affirmative action, as *ultima ratio*, is a necessary tool if the formal equality endorsed in legal texts is to be converted into actual and substantial equality, a concept which is not wholly foreign to such texts, albeit under different formulations and varying scope and on occasion somewhat modestly worded, as in the new version of art. 119.4 of the ECT, amended by the Amsterdam Treaty.

Chapter 7 B Labour law and economic performance

The new dimension, with all its implications, is undeniably the uncertainty which surrounds the economic context of market, production and labour, brought about by swiftly evolving market situations, the changeability and diversity of demand and the continued innovation in processes and products. This should not, however, lead us to the conclusion that European economies are about to swing from the Fordist model of mass production, based on the management of foreseeable risk, towards a model defined by uncertainty. We are entering an era of diversity which affects products, services, work, methods of co-ordination, and efficient production models (a diversity made possible by the accelerated pace of development in information technologies and mastery of them)[138]. Globally speaking, this implies that we should think of the development of collective economic frameworks in terms of co-ordination, rather than of strict regulation. Surveys conducted in Europe show that a substantial portion of workers feel that they gain on professional quality and autonomy of their work, which gives them a feeling of greater control over what they do[139]. We must therefore seek to manage such pluralism in the most efficient possible way. All of this is at stake in the term *Aflexibility@*[140] B an umbrella word commonly being used to sum up the changes taking place in the world of work. But first and foremost, we must put flexibility into its wider European economic context. For the point is not to return to the, in any case outdated, principles which constituted the basis of the interventionist centralised state in the post-war period, but to determine both what flexibility is and what it is not, in terms of economic efficiency and of its capacity to sustain a new model of economic development. In this regard, there is a clear framework for economic reflection, which, although obvious, always merits express reference. The creation of jobs with reasonable or high added value and the wealth they in turn create are what will alleviate the tax and social burden resulting from unemployment and its social repercussions (poverty, dependence, health disorders, etc.). Firstly, the creation of jobs will reduce social costs and the volume of passive social spending needed to defray such costs; and secondly, the expenses involved will be financed by a larger number of taxpayers.

Flexibility is defined in this chapter to be the pursuit of a collectively efficient response to economic contingencies and hazards. This, however, involves breaking out of a vicious circle. If such a response is found, a flexible economy is in a position to create jobs and wealth, to procure the means for greater security than a rigid economy. But to find that response, it is necessary to provide people with greater security in the crucial problem of developing their human capital. It is a matter, therefore, of breaking the circle, of setting in motion a *Avirtuous@* process. Now one knows from the history of our productive organisations and markets, that there exist, roughly speaking, three possible responses to the event1. Either the event is shifted towards those who offer their labour on the market, for them to prevent it by an adapted offer, or precautionary savings. Or it is shifted towards the state (otherwise called the community), which takes on responsibility for the social and financial cost of errors of adjustment to the event on the part of private actors B an example is public compensation for unemployment. Or it is divided between partners in the work relationship (companies, employees, communities), for them to agree on a redistribution of responsibilities which is equitable and efficient B these two requirements, moreover, being connected. This third response B fair and efficient distribution of responsibilities B seems to be the only one adaptable to economic contingencies and hazards, that is to say, to the growing portion of events taking place on the market, in labour and production organisations or at the core of economic relations, events which are impossible to foresee and which must be addressed with initiative, autonomy of decision and action, skill and the effective deployment of people=s capabilities.

A) Putting Flexibility in its European Economic Context

The stream of discourse on flexibility carries with it ideas that it is first of all necessary to move aside (Section 1), before examining how and in what form the requirement of flexibility is born of the characteristics taken by the economic development of Europe (Section 2).

1) Combating the Flexibility Ideology

Among the false conceptions of flexibility, there is first the scarcely-hidden hope of those who identify flexibility with the fact of harvesting all the fruits of social and economic co-ordination without having to pay anything in exchange. The gratuitousness of work and social security exclusively financed by its beneficiaries are on the horizon of these hopes. They are not so fanciful as one may think, when one observes, in the most vulnerable sectors of the population and the labour market in Europe, the development of under-paid and precarious jobs, the absence of social security through the non-satisfaction of criteria of attribution, the gradual disaffiliation of territories and of entire social groups outside standards of life considered elsewhere as normal; and when one observes, in certain countries, the degree achieved by the partial taking on of wage and social contributions by the State budget or social funds, in the name of employment progress. Such a concept of flexibility permits no development of the social dialogue in Europe. It only has as a perspective the continued fall in remuneration and social guarantees. And as regards employment, it generates illusions.

138. See, for a discussion of such diversity, R. SALAIS and M. STORPER, *Les mondes de production. Enquête sur l=identité économique de la France,* Paris, Editions de l=EHESS, 1993. In English, with a comparison of the situations in the United States, France and Italy, M. STORPER and R. SALAIS, *Worlds of production. the action frmeworks of the economy*,Cambridge, Harvard University Press, 1997.

139. See: C. BERETTA, *Il lavoro dramotamento e reproduzione sociale,* Milano, Angeli, 1995. 45.4 % of Italian, 47.2 % of Dutch, 40 % of British and Irish, 33.4 % of Austrian and 28 % of German workers deem that they are in full control of their work.

140. Or *Asouplesse@*, the French translation of the term used in the paper presenting the Presidency=s conclusions on the outcome of the Special European Council Meeting on Employment held in Luxembourg (20-21 November 1997) B Note SI(97)100 of 21 November 1997.

It reappears, nevertheless, across certain conceptions of globalisation and of the position occupied by the European economy. One can distinguish three concepts of globalisation, the economic war of all against all; de-localisation without cost; the enlargement, to cover the entire world, of the area of activity of each company. Only the latter corresponds with what have become, basically, European enterprises: enterprises which rest their individual and global competitiveness on comparative advantages in terms of quality, know-how, continuous innovation, diversity, and capacity to serve demand more closely. With those which succeed and create jobs, the mastery of costs takes place within a path of growth and investment which aims for absolute advantages beyond price on the world markets. Thus they may perform efficiently on the world stage.

The first two meanings of globalisation are only bad literature. To believe in the war of all against all is the best way to make it happen and to suck European industry towards a spiral of decline and of loss of competence. Outside the standard and bottom-of-the-range products on a pure price argument, to de-localise is only sensible if the enterprise finds, wherever it goes, the competent workforce and the institutional environment which it needs to do that which it has to do. As the DGII communication underlines, the rate of openness to import in the European economy, taken as a whole, is just 8%[141], similar to that of the United States. The response to the challenges of flexibility does not therefore reside in common ideological places, except to think that those who activate them aim in fact at setting in competition against themselves those national and regional economies which comprise Europe, for a short term individual profit differential. To generalise on such behaviour would lead Europe towards an economic model of low salary costs and low competence. It is not globalisation which threatens the economic development of Europe, but the refusal to comprehend the nature of its opportunities and the inability to grasp them. What is needed, to understand and grasp how a flexible economy can guarantee security whose scope is broader than the mere notion of protection**,** is an economic reference adapted to the European economy and its present and future characteristics.

2) Finding an Economic Referent Suited to the Future of Labour Law in Europe

In a dominant manner **B** it is the fruit of almost 25 years of continuous technological and organisational innovation which responded to the shock of 1973 **B** the work accomplished by the European workforce no longer has the status of a simple production factor, and its products no longer come down to being simply a price-support. Contemporary developed economies are transformed into vast collections of ever-changing products and services[142]. We are dealing with diverse and even heterogeneous products and services which, in a complex and variable way and one which is *localised* in space and time, link the value of exchange to the value of use (in other words, price and utility). Company strategies seek to follow as closely as possible the dynamics of the market and production around them. In so doing, companies spur the restructuring of labour markets and reorganisation of the productive geography in Europe. What is sought are potential reservoirs of innovation, product and service quality differentials with no increase in cost, appropriate collective infrastructures, quality of life, skills in the labour force, empowerment of initial, lifelong, vocational and higher training systems.

The definition of the necessary skills and products, the rules, standards and know-how have become an essential part of competitiveness, rather than a common base already familiar to those involved. Unlike *Acommodities@*, products understood in this way present, to varying degrees, dimensions of creativity, commitment and uncertainty in the final result. We are leaving the realms of predictability to enter a world which is uncertain, to the extent that tomorrow we must do something different from what we are doing, but are unable to define precisely, today.

This acknowledgement requires us to define what should be the relevant *economic framework for flexibility* on the basis of which we can *evaluate*, positively and negatively, the changes taking place in the world of work and *draw up* a realistic scenario for the future of labour law in Europe. We must draw up a framework for observation and judgement which is suited to economies which are becoming structured by a requirement of flexibility in the uncertain. Certainly it is a challenge of European social dialogue to find an agreement on this framework of observation and judgement of flexibility. For workers' rights and systems of welfare protection will necessarily develop according to the form this agreement takes. A great deal of research agrees in concluding that an appropriate analytical framework could include the following four terms: *possibilities, proximity, human capital* and *territorial development*. Let us present them briefly :

2.1 Economic possibilities

Europe will be a Europe of economic *possibilities*. The enlargement of the size of markets, and security guaranteed by the strength of the Euro, will make the production of a number of new products and services profitable, and exercise a strong incentive to innovate. These products will find their demand. Since the present proliferation of products and services shows the increasing diversity of use values which everyone, company or simple consumer, expects to find on the market and in the face of which he is more and more expectant and selective. This phenomenon is required to accelerate. If we were to draw up the map of Europe's international specialisation by adding the specialities from each country of which it is composed, we would undoubtedly reveal a first-class world power, right in the front line for the vast majority of products, services and new technologies. European unification will result in the multiplying these effects, provided it uses this diversity as the basis for its future economic development and not as a pretext for financially-dominated restructuring by regrouping and *Acannibalisation@*, which would have the opposite effect, destroying part of this potential.

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141. Cf. the report presented by the European Commission at the Dublin European Council in December 1996: *The mutually beneficial effects of strengthened co-ordination between economic and structural policies (Europe as an economic unit),* ESC(96)8.

142. Note (although the theory will not be elaborated on here, as that is not the aim of this paper) that there are problems posed by the scope of the changes which is too vast to be taken up in economic theory. Economic theory tends to rely on use of the concept of commodities (or goods), which enables it to equate economic co-ordination with the general categories of market and value of exchange, without getting involved in the varieties of use or co-ordination conventions which may exist between producer and user.

2.2 Proximity

Europe will be a Europe of *proximities*. The creation of proximities permits the definition of adapted products, a necessary condition for taking advantage of the enlargement of potential markets. The intensification, which is in progress, of economic exchanges within the European area is already accompanied by a strengthening of links between producers and users, of lasting co-operations in many forms, creators of various proximities between economic actors. A territorial restructuring of the European economy against a background of the creation of proximities between producers and users is in progress. It will accelerate at the beginning of the next decade. All these factors are economically efficient, since they ensure the necessary suitability of products and services for their given uses.

2.3 Human capital

Europe will be a Europe of *human capital*. To grasp the potentialities which we are going to mention, requires the mobilisation of Atrue@ capabiliities to work, that is to say those which imply apprenticeship, professionality, know-how, capabilities incorporated in persons and communities of persons. The economic strength of Europe in a world context resides not in simple, moreover necessary, development of its technologies, not in a simple return to expansive macroeconomic policies, but in the capacity to favour the development and the reproduction of specific human capital, effectively to take advantage of technologies, the enlargement of the market, and monetary stability. Policies addressing education, lifelong training, occupational mobility, standard of living and quality of life or labour mainstreaming are, then, likewise primary considerations in the development of lasting competitive advantages for the European economy.

2.4 Territorial developments

Europe will be a Europe of *territorial developments*. Its different industrial, regional and sectoral (sometimes transnational[143]) fabrics should be capable of the endogenous creation of their own resources (in jobs, skills and financing) on account of its growing specialisation in specific products. This will be furthered by the stabilisation in anticipated exchange rates, demand and revenue in the larger area unified by the Euro. Given that this should bring efficiency and the reproduction of work capabilities, the weakening of the national framework within which economic growth is defined, is not necessarily unavoidable. What is unavoidable, however, is the disappearance of the Anationalist@ vision in these national frameworks[144].

B) Flexibility in People's Work and Capabilities

Flexibility is often associated with a need to loosen the legal framework governing work, welfare and codes of good practice. It is therefore assumed that flexibility and security contradict one another. Such an assumption would seem all the more obvious in so far as the post-war social protection systems, based on steady jobs held by adult males whose salary covered the needs of a nuclear family, has become outdated in view of labour market changes. Must security, then, be forfeited for the sake of flexibility and efficiency? Such an approach overlooks the fact that people=s capabilities and productivity depend, essentially B as can be deduced from the effects of unemployment and the duration of joblessness B, on an ensured quality of life and the means they are provided and which they obtain from their work and social activities to plan and implement life ambitions with a meaningful content. This is a key item in particular in growing employment among women. It is at the core of equal gender treatment on the labour market. But more broadly, the reproduction and development of collective capabilities depend, in the long run, on community-wide agreements on the breadth and quality of social investments.

The point is, however, if we bear in mind what has been considered with regard to the strengths which enhance the competitiveness of the European economy, that the nature of the *positive* relationship which exists between economic efficiency and flexibility should be ascertained. This positive relationship involves a new linkage between the social and the economic. Rather than making welfare a type of compensation made available after supposedly unavoidable economic damage has been done, it should be turned into something which gives people and intermediary groups their own resources, which, in turn, will enable them to arm themselves with *active security* to rise to contingencies. This active security would, at the same time, place them in a position to learn about exposure to such hazards and protect themselves in the long term. This is the subject of Sections 1 and 2.

It therefore follows that to the functions of security by guarantees of a minimum standard of life classically allocated to social security systems, and which endures, the need for economic flexibility adds an objective, that of shaping, of maintaining, and of developing the capabilities of people during the life cycle. In a flexible economy desirous of maximising its economic growth, and its level of employment, concerns with regard to human capital become primary: its financing, its varied and developing characteristics (otherwise the capabilities), its methods of training and upkeep, the nature of decision-making processes in its regard, and its efficiency. Section 3 considers the nature of these capabilities in the context of flexible work.

143. Note, for example, that the economic areas of co-operation and integration between France and Germany, which are being created on the basis of a number of complex products (aircraft, motor vehicles and a wealth of associated components or certain chemical specialties, etc.) are dominated by this type of product, which are the result of a diversified economy and a process of technological learning and not by standard products. Cf.: R. SALAIS, *Identité économique nationale et échanges croisés entre la France et l=Allemagne*, in: C. DIDRY, P. WAGNER, B. ZIMMERMANN (s. dir.), *Le travail et la nation. La France et l=Allemagne à l=horizon européen*, Paris, Editions de la MSH, to be published in 1998.

144. Investors who contribute to the financing of specific assets whose yield, whilst it may be high, is initially uncertain, are particularly in need of an institutional framework which brings stability to medium- and long-term forecasts and generates confidence that they will actually be met. Hence the importance of the long-term stability of the Euro.

Whereas the post-war model was that the state should intervene through macro-economic employment policies, such action should now be part of *labour policy*. In this way, priority would be given to improving the collective efficiency of the economic fabric established in different territories, and to the autonomy of deliberation and decision-making by intermediary groups, in line with the option of subsidiarity. The improvement of living and working standards should no longer be the direct and explicit target of policies, but the result of joint endeavours aimed at creating job opportunities and improving work capabilities. This should bring about a new balance between legal inventiveness and political instrumentation which would once again make the creation of conventional frameworks of activity paramount. These issues will all be developed in Sections 4 to 6.

1) From Passive Protection to Active Security

What becomes pertinent within economic co-ordinations, is no longer their reduction to predictable risk, but rather the management of uncertainty in its whole extent. One can manage risk by settling within a series of defined behaviours in advance. The risk may be externalised in the form of protection founded upon actuarial calculation without it injuring economic efficiency. One must, on the other hand, control uncertainty by an open, that is to say not predetermined, combination of freedom of action and a range of possibilities. Uncertainty must therefore be internalised. The paradox then is that to be efficient, flexibility must be founded upon the security of people. The governance of work within the context of uncertainty rests on a convention of confidence between employer and employees[145]. Now, such trust cannot exist without giving every individual real freedom of action, in other words, without a freedom which has the means to be effective. What is valid for entrepreneurs (guarantee of ownership of their assets, freedom of management) is also valid for employees (guarantee of the development of their human capital, real freedom of action) in a context of flexibility within uncertainty.

Economic theory has now properly established that work is not about exchange in the usual meaning of the word. Even once agreement has been reached and the job contract signed between employer and employee, the reality of the commitments made by these two individuals (wages and working conditions on the one hand, effort and quality of work on the other) remains uncertain. The contract does not settle the exchange on the spot. Nor does it guarantee optimum adaptation to individual preferences. In fact, it opens up a mutual test process which can only be settled, and perhaps not even then, by the completion of the product, its sale and the distribution of results. What is at stake, as economists well know, is the uncertainty that surrounds the quality and effort of work.

Overcoming this uncertainty requires an institutional framework which will cover the relationship of work and all those involved in it. To use a fashionable term, the accomplishment of work requires governance. Systems of social and legal protection of labour are an essential side of this governance. However, there are essentially two notions regarding the nature of this governance.

The standard approach considers that the rational individual will naturally behave in an opportunistic manner. According to this hypothesis, as soon as workers have a margin of action which is invisible to the employer, they will tend not to live up to the standards of quality and effort expected of them. Likewise, if employers are the only ones aware of market demand for what they are offering, they will cheat on the exact value, so that they will then have more room for manoeuvre when dealing with the claims made by their employees. The standard approach therefore perceives social protection as a mixture of constraints and incentives which will keep the opportunistic individual on the straight and narrow. It uses the same argument, for instance, as that which states that an unemployed person will only go job-hunting if the difference between welfare compensation and wages is great enough **B** an idea which ignores the value of work in itself in terms of what it offers for identity, social integration and demonstration of one's own ability to do things. In the same way, businessmen are too often considered to be concerned about little more than maximising profit, people as forgetful of the needs and social environments their companies require as they are incapable of undertaking long-term commitments that condition the development of employment.

This is an inadequate view. Within a context of flexibility, the governance of work is more complex than a question of opportunism, since it is in the obligation to spare some latitude of action to the partners, in other words a space for freedom. This responds to a concern for efficiency. On the one hand, events in work or on the market of the product are interlinked: it is the feature itself of situations demanding flexibility. On the other hand, possibilities of effectively surmounting the problem will arise if the decision to act will be entirely a matter for those in a position to act. It serves nothing to have defined in advance what must be done, since the nature of these possibilities cannot be foreseen. The process commenced will only be efficient to the extent that mutual expectations are established between the actors to leave the other without interfering, and, in co-ordination, to take as support for one's own action the results of those by others. The governance of work therefore rests on a convention of confidence.

The existence of this mutual trust will rest with the contextual system of social and legal protection. If it is supported by what the various partners consider to be legitimate principles of justice, has been part of an agreement based on such principles and has already defined in advance the way in which the contingencies, costs and responsibilities are shared out, if it sets out the way in which the anticipated gains will be distributed if contingencies are favourably resolved, then the co-ordination between the parties may proceed efficiently. The establishment of such trust entails, certainly, the concurrence of a series of conditions, a circumstance which is anything but easy and workable. Nevertheless, the obtaining of full employment in most European countries in the post-war period shows that it occurred at that time and that it is therefore possible. For one benchmark, which may give rise to empirical investigation, for a good compromise between these different parameters might be the degree to which each planned reform or system promotes a virtuous circle between work capabilities and effective freedom. For the most tragic observation which

145. The reader will note that this second section confines itself to drawing conclusions based on the Commission's recent Green Paper entitled *Partnership for a New Way of Organising Work*, COM(97)128 final, of April 16th, 1997.

can be made about current systems is that they have in no way vanquished (indeed they have sometimes even maintained) the vicious circle between the degradation of work Unemployment is the best illustration of this.

2) Unemployment and loss of collective efficiency

Many authors explain the persistence of high unemployment rates and low rates of job creation in Europe in terms of the rigidity of the labour market and the "*overly generous*" social protection systems which allegedly increase labour costs and undermine the competitiveness of European economies to below tolerable levels. Such arguments do not stand up under a review of the national statistics available.

The study published by the Commission[146] in 1995 in a paper on the future of social protection in Europe, shows a country-by-country comparison for 1993 of GDP *per capita* and the percentage of the GDP earmarked to finance social protection. It draws attention to the dual nature of social protection expenditure. It is both a cost that must be financed by charges levied on the wealth produced and an investment in human capital which, like any other investment if properly conceived, generates greater wealth and creates jobs. For, GDP *per capita* is likewise an indication of a country's global productivity and the percentage of GDP earmarked to finance social protection is an indication of the rate of investment in human capital (although, to be more precise, such expenditure should be examined in detail and the expenses assumed by household income or free time added). There is a positive correlation between the two; moreover, no country deviates very far from the correlation line. In other words, the richer Community countries can afford better social protection, but that is so *because their large investment in human capital allows for greater productivity among the working population*.

Unemployment rate (% of the working force) in 1996. (Source: Eurostat)

N.B: The countries are rranged from right to left on the abscissa in increasing order according to expenses in social protection in GDP.

The above Figure shows unemployment rates by country in 1996. They range widely, from countries with high unemployment (Germany, Spain, France, etc.) to countries whose joblessness is substantially lower (Netherlands, Portugal, United Kingdom, etc.). A comparison of charts 1 and 2 shows that there is no correlation between the unemployment rate and the relative weight of the cost of financing social protection; indeed, unemployment is low in the group with high social protection costs and, *vice-versa*, countries with small social protection burdens are afflicted with high unemployment. The most striking examples are the Netherlands and Denmark in the former group and Spain in the latter.

The problem of unemployment, as indicated above, is related in one way only to systems of social protection. And it has nothing to do with their financial cost. It has to do with whether or not expenditure is geared to combating the vicious circle linking loss of work capabilities and employment stagnation or loss of initiative and insufficient creation of business and enterprises. Far too often, funds have been siphoned off by social policies calling for passive solutions to unemployment (early retirement systems, public subsidies for restructuring, exemption from social security contributions to favour employment among specific segments of the population: young people, unskilled workers, etc.). While their effectiveness with respect to their stated objectives has never been soundly proven, such policies have nonetheless continued to draw on the available financial resources at the expense of potentially more productive applications.

Joblessness, moreover, is a wholly insufficient indicator to evaluate necessary redeployment. In connection with the capacity of post-war welfare systems to maintain an agreement of mutual trust between workers and employers and to restore the population's productivity levels, the unemployment characteristics that go hand-in-hand with the crisis such systems are undergoing differ qualitatively from one European country to the next and which would merit a more thorough review.

146. *L'avenir de la protection sociale: cadre pour un débat européen*, COM(95)466 of 31 October 1995. Similar statistical observations in Y. CHASSARD, *L'avenir de la protection sociale en Europe*, in: *Droit social*, June 1997, pp. 634-639.

In France, for instance, entry in the statutory system of employment is based on a generational queue. Employment levels increase at a slower pace than the population looking for a job, a phenomenon that automatically translates into *long-term unemployment* (1.1 million people in January 1997, or 34% of the total looking for jobs). This is the prelude to exclusion, because not everyone who is working and becomes unemployed is ensured a place on the queue. The long-term jobless, of any age, represent a growing portion of the beneficiaries of the *Revenu minimum d=Insertion* (minimum income for mainstreaming), which is why that measure was not taken. Social justice, written into labour machinery, is objective and general: a position, tasks, a salary schedule, a hierarchy, working hours stipulated and written down in advance, in other words, what in France is called a *Ajob@*. Any economic hazard translates into a divergence from a measurable norm. It sets off corrective effects. The social effect, total or partial unemployment indemnity, materialises once the existence of a cause beyond the control of the actors (deterioration of the economic situation) is verified. The economic effect consists of the detection of a surplus of labour that has to be reabsorbed to re-establish apparent labour productivity. With such a model, obviously, any attempt at flexibility runs the risk, on the one hand, of being quantitative (which puts undue constraint on economic decisions and hinders what would be efficient choices in view of the circumstances), and on the other of translating into employment casualisation. For only those who have a *Ajob@* in the statutory sense are guaranteed social justice. All others are confined to tasks bereft of employment status and subject to very weak protection, which, furthermore, are only rarely a gateway to normal employment.

In Great Britain, the standard for measuring the effectiveness of a system of social protection is, for unemployment, the degree to which indemnities preserve the unemployed worker=s sense of self-responsibility. It is he, above all, who is expected to make an efficient effort to find a new job. It follows from this that the expression of the Welfare State crisis is the *fragmentation of working lives* in successive unconnected tasks. A sequence of tasks for an individual no longer constitutes a job that generates social rights (in particular, reserve or retirement income), nor human capital to be appraised on the labour market. The rapid recourse to public aid based on the means test breeds dependence and loss of capabilities (in particular as regards endeavour and responsibility). Private financing by the social protection market leads to growing and grossly underestimated economic costs. The restoration of individuals = earning capacity conceivably entails the establishment of collective support systems.

In Germany, where unemployment signifies deprivation of a job, interpreted as dispossession of social identity, mass uemployment threatens the existence of *collective bargaining systems*. The latter usually operate comprehensively in order, most particularly, to keep workers within their labour community (company, town, sector) and protect them from the loss of identity that deprivation of a job represents. In lieu of being considered, as it is in France, as directly associated with macroeconomic causes and, therefore, incumbent upon the State, economic contingency remains at the company, sector or regional level and is treated above all like a problem of economic efficiency. This leads to the possibility of agreements combining flexible working hours, work-sharing and investment in training. In the name of excessively high real salaries and labour costs, these systems soon fall prey to attempted circumvention, via the location of plants in other European countries or the restriction of social benefits.

Creating, maintaining and developing work capabilities becomes a primary concern in a flexible economy. Autonomy and flexibility are not innate qualities. They are learned, the result of training and experience. It is a fragile process which must be safeguarded through the establishment of an underlying legal and social framework. The above discussion of the kinds of unemployment stresses that a key feature in such a framework is the dimension of the actual and responsible freedoms which are at the disposal of the actors on the economic and labour stage. In France, indeed, long-term unemployed and casual workers suffer the full weight of that loss of freedom of choice of life and work, which undermines their capabilities. In Great Britain, the difficulty to move upward in one=s career on the sole basis of labour market interplay contributes to the same result. And given the impact in Germany of the feeling of belonging to a community on the delivery of a high quality of work (which is one of the strengths of German competitiveness), such losses of freedom may be expected to take unprecedented but economically unfavourable forms.

3) Capabilities in the Context of Flexible Work and Effective Freedom

At the heart of the necessary work capabilities appears the capability to master the uncertainty of markets and production situations. It is a matter of a triple uncertainty: in time (situations encountered are never identical, nor entirely repeatable); in space (places of exchange and of production vary according to those who demand them); between persons (the identity and the singularities of persons with whom their must be efficient co-ordination, vary from one situation to another).

Mastering uncertainty involves the practical resolution of the tension between two extremes. Firstly, the contingencies which occur must be dealt with on the spot (*hic et nunc*) by the right person. That person's responsibility is total and is an inherent part of the market or working situation in question. The organisation of production and hierarchical relationship are only a support, not a solution to the problem. Secondly, by virtue of the very variability and heterogeneity of possible situations, skills are acquired practically for life. True, they can only be within a given area of expertise, or in other words within one defined occupational state. But it is experience and accumulated confrontation with constantly changing situations which provide the worker with his *Aknow-how@*, enabling him to discover the appropriate action to take in the face of uncertainty. Furthermore, it is only the incorporation of this long-term requirement for immediate action which will permit the individual to learn the lesson of what happens in a working situation.

It therefore follows that, in the context of flexible work, we cannot necessarily equate work capabilities with a high level of qualification, and that such capabilities can only be developed if use is actually made of them (hence the acute importance of getting into work and staying there). Efficient

deployment entails working situations which guarantee real freedom of choice and the latter can only exist if the definition of the jobs and tasks undertaken in an enterprise provide the people who carry them out with opportunities for learning and mobility. In this way, the time spent working in the course of a life becomes permeable, permitting input from a combination of work in a variety of different forms (employee, self-employed, ...) with occupational training and diverse social In short, the best way to understand the difference in nature between protection and security in the face of contingencies, is to see the latter as a constituent part within the former. To improve capabilities in a flexible working situation, one must be in a position to learn from exposure to contingencies. A framework consisting of *protection against* is an obstacle to learning from contingencies, since it is basically negatively oriented. If the flexible worker is to be able to learn, he or she will need a framework which provides *security in the face of* contingencies. This framework would give the individual the chance to anticipate in the long-term, at any given moment. There can be no mutual trust in a working situation unless individuals have a guarantee that the life's ambitions which are close to their hearts will remain feasible. It is thus that they will be able to form and embark upon Aloftier@ life=s ambitions, for themselves and their nearest relations, which contribute even further to the enhancement of work capabilities and this in turn to higher added value. It is in this sense that, far from being weakened by the need for flexibility, the securities of life linked to the respect for a minimum standard (for example that every individual will have an effective right to a place to live and not simply to a minimum amount of income) are reinforced, or even more easily and more specifically definable, as a consequence of this need. But to the static dimension which takes note of or restores respect for a standard of living, we must add the dynamic dimension of individual and collective paths of life and work.

4) Labour Policy and Subsidiarity

The only route by which a positive combination of flexibility and security is possible is within *a labour policy* centred upon people=s experiences and paths of life and work. The economic calculation associated with this is based on a simple principle: once the value added by the individual's work exceeds the cost of employing him or her, a surplus of wealth and utility is produced for the community. Admittedly, implementation of this is complex. It must incorporate modernisation, temporal dynamics and moments of critical evaluation, but it is nevertheless decisive. It is clear that labour policy cannot be confounded with the activation of social expenditure which simply lowers the monetary cost of putting people into work, either by paying the employer the difference in cost between the wages paid and productivity (assuming that this could be measured in the first place), or by lowering the minimum wage. The processual element comes first and gives active expenditure concrete content. The point is to produce the experience which improves the individual=s human capital and increases his or her earning capacity. This may include different types of training, creating institutional mechanisms or improving the efficacy of those which already exist, making available shared facilities which would help put people into work[147], and so on. In particular, the existence of experience. This is due to the fact that, on the one hand, the attachment to a given employer is jeopardised by the unpredictability of the contingencies, whilst on the other, only this type of real-life experience can produce an enhancement of capabilities and efficiency of the capital invested in individuals.

specific social needs which are not spontaneously met by the marketplace constitutes support for such expenditure. These needs may be identified and their coverage engineered at the regional level under forms to be worked out by the social and economic actors[148]. A number of experiences of this nature has already been conducted to mainstream the long-term unemployed or people headed towards social exclusion.

In view thereof, the purpose of labour policy is not limited to classifying problems in terms of target populations nor to specific social strata. It is more general. It concerns the redefinition of principles of public action geared to the systematic and dynamic improvement of human potential, human potential that should be appraised from two standpoints: the course of people=s lives and the course of their careers; collective capabilities, in work, innovation and productivity, needed for the economic development of European sectors and regions.

Seen from the standpoint of the individual, such a labour policy aims at creating continuities and not, as is the case with employment policies, managing queues, files, etc., after severance. Instead of being activated as a consequence of contingencies and managing its effects (at the familiar risk of perpetuating the situation by stigmatising the individual and placing him or her in state of dependence), welfare expenditure is then based on integrating and maintaining the individual in the sphere of work. The institutions in charge should act within a processual and localised framework. Their task is to monitor the experience/career of the individual. The premise for their action is that each individual is free and responsible for his or her own life and ambitions. But rather than leaving individuals to their own devices (and exempting themselves in advance from any supervision by paying out a minimum subsistence allowance), welfare institutions should act according to the principle of subsidiarity. A key area in their intervention is to assess the moment at which the risks taken in the context of work could cause the individual to meet with a contingency which he or she is unable to control, in other words, not so much unemployment itself, but a more precarious situation, poverty or dependence. The thrust of their action then, must be to provide individuals with the necessary conditions to exercise effectively their responsibilities towards themselves, and not exercise this responsibility in their stead. This principle of subsidiarity, which is so essential in the building of Europe, has three

147. The same views were voiced long ago and more eloquently by Alfred Marshall when, as an economist anxious to help put an end to poverty, he considered the links between economic development, putting people into work and efficiency wages at the end of the last century. Part IV takes up once again the concerns expressed in Theme III: the creation of a new culture with the capacity for occupational integration as set out in the *Guideline proposals for member state employment policies in 1998*, a Commission document dated October 1st, 1997. In Theme IV, this same document puts forward the idea of the usefulness of refocusing state aid policies on promoting investment in human resources and adaptation capacity.

148. G. LUNGHINI, *Disoccupazione e bisogni sociali*, lecture delivered on the occasion of the 30-31 May 1997 working group at Santiago de Compostela.

consequences.

Social institutions should intervene as a matter of priority with those whose patrimonial and relational resources do not or no longer permit them to exercise full responsibility for their own path of life. This is why the guarantee of a standard of life remains imperative, as at the origins of social security schemes, but also that new problems are posed. It is not normal, for example, that a small employer who goes bankrupt may not have a fibre of security then, so much so that, in order to begin, he took personal risks with his own heritage. On another level, but related to the above, it follows that, mirroring the changes in labour law in Europe, there is some prospect of a swing from employment policies based on financial aid paid to employers under a general and predefined criterion of employment towards aid to individuals focusing on the development of their capabilities in respect of flexible work (in the precise meaning set out in this report which, we feel, is adapted to economically and socially desirable trends in the European economy). There is any number of possible stumbling blocks in this approach, in particular the risk of contributing to stigmatising individuals if they are subjected to narrow-minded institutional surveillance mechanisms instead of being engaged in a creative process to allow them to exploit new possibilities. But the possible benefits are no less impressive.

Several incidents show that the existence of direct or disguised employment subsidies gives rise to competitive downbidding among European regions. This reinforces the role of low labour costs as the sole item considered by business concerns in deciding where to locate, which in turns leads to a static, short-term vision of economic development that reflects poorly on its advocates. It is, as we have seen, a conception with its back turned to Europe=s real economic chances; if generalised, it would destroy those chances, which can only be maintained if their potential is exploited. Preventing social dumping is tantamount to combating unfair competition. It is merely a question, it must be realised, of applying the principles of equal treatment and prevention of anti-competitive practices laid down in the Treaty of Rome. This in turn draws attention to the need to give some thought to the way in which the application of the principle of equal treatment can be made to be consistent with structural policies aiming to improve, in the various regions and sectors, absolute competitive advantages on the basis of labour quality and specific skills. After all, by censuring purely monetary and financial distortions of cost, the principle of equality steers inter-company competition towards the pursuit of such Areal@ advantages as organisation, quality and adaptation to market demands. This, then, is also suggestive of not an employment, but a labour policy[149].

In the same vein, it may be noted that the exemption from or reduction of social security contributions to favour the creation of jobs should be carefully controlled. There is a comprehensible temptation in this regard with respect to unskilled workers. The macro-economic reasoning in this regard, correct in itself, is nevertheless based on an inaccurate view of the way the labour market and companies actually operate. On the one hand, observation shows that the general

149. These reflections are equally, if not more, applicable to the problems of tax harmonisation in Europe.

Conversely, one may find it debatable that senior managers accumulate the advantages of being paid on capital returns B by way of share options or good redundancy cover B with an appropriate salary and social security status without being forced to make great contributions, for example, by systems of capitalisation. Social solidarity may be considered around this requirement to guarantee to each an effective capacity to exercise this own responsibility to build his life, a capacity of which one has seen that it was one of the foundations of a flexible economy.

paucity of jobs makes selection processes more competitive: such subsidised jobs are taken preferably not by unskilled jobless workers, but other, better qualified candidates. For, if able to choose between two candidates for the same job, a company will tend, if the cost is the same and within certain limits, to recruit the one it feels will make the greater contribution, i.e., quite often, the higher qualified of the two. And this is doubly detrimental: firstly, the Aunqualified@ workers continue to be excluded and secondly, the potential skills of the qualified workers lie fallow. It is the European labour market as a whole that actually needs to be brought back into balance by increasing the job opportunities for skilled labour and thereby inducing an upswing in the labour market[150]. Moreover, the existence of skilled labour openings

150. This does not do away with the problem of adaptation of skills to needs, nor of the initiation of careers (acquisition

in itself leads to the creation of other competencies and external savings, laying the grounds for a positive dynamic that would combine rising productivity and creation of further business. Because skilled employment, in short, is efficient, it demands a logistic environment in which there is a need to cover a number of tasks requiring little or no skill and therefore to fill such positions.

Unskilled labour is indisputably overburdened by compulsory labour costs. This may be corrected by specific measures, such as for instance establishing funding solidarity for social protection systems between large capitalist companies **B** which create very few net jobs, indeed, which have settled into an ongoing process of downsizing **B** and small and medium enterprises that do create jobs (by introducing a bias, often referred, in the modulation of contributions on the basis of participation in employment development). In the case of unskilled labour, the priority should continue to be given to unemployed unskilled workers or workers who have lost their skills due to long-term unemployment: more broadly, persons on the verge of social exclusion should continue to be the target for mainstreaming policies geared to individuals (see below).

One essential stance advocated in the policies to be implemented, referred at the beginning of this chapter, is to manage to re-establish the grounds on which social protection system financing is based, rather than progressively sapping resources to fund overly generous policies involving lowering or elimination of labour costs. Reaching such a balance is no easy matter. The re-establishment of financial balance calls essentially for the creation of socially profitable job opportunities, i.e., jobs in which the added value created is greater (eventually, at least) than the cost of putting the employee to work. The contrary, encouraged by the artificial profitability of government-subsidised jobs, occurs far too often. Another stance **B** representative of a direction in which current British thinking is aimed **B** is to lay the groundwork for or to recreate the spirit of civil responsibility in people with respect to the social protection systems that protect them. Rights to which no duties are attached only rarely lead to responsible and efficient work. This stresses, once again, the importance of a system of rules that must be well understood, collectively discussed and sufficiently reliable to constitute the basis for mutual trust in the performance of work.

of experience and risk in productivity).

Considered from the standpoint of the community, essentially, the emphasis is on the deterioration of work capabilities and efficiency stemming from vulnerability to economic contingencies. Structuring the action of the social institutions concerned around employability calls for understanding that term from a versatile, broad and, above all preventive standpoint. Employability and vulnerability need not be considered as contradictory terms, but it must be understood that the two are dynamically related and that Agood@ employability rests on the reduction of individual and collective vulnerability to contingencies. The criticism that must be levelled against the notion of employability as the sole grounds for active policies is that it is based on increasing the rate of work force turnover on the labour market. In fact, even if it may be profitable for the individual employer in the short term, it has never been shown that turnover of this type is collectively efficient, bearing in mind the losses in human capital that it entails. It is as if, when faced with the danger of a mountain avalanche, our first concern were to be the rebuilding of the houses that had been destroyed as cheaply and as quickly as possible, rather than trying to protect them by drawing up a land occupation plan which defined the areas that could really be built on. The difference between passive protection and active security lies in the attempt to reduce financial costs by a policy of prevention.

A concept in terms of social security no longer takes the occurrence of economic risk as a phenomenon by nature, a natural catastrophe. At its centre is posed the problem of its capacity to prevent it. Coming first are integration in employment, and, that done, the vulnerability to unemployment of those who are working, be it by improving their future employability in a preventative manner, that it is to say in work, its conception and its organisation. In fact many initiatives are already going in this direction. What this is, in matters of hygiene and safety, medicine at work, further education, or even apprenticeship, is, if one wishes to stop there for a moment, that it is in this perspective that active policies develop. The economic foundation of information and consultation of the employees of a business resides in the idea that receipt of their opinion is likely to improve protection against economic or technological hazards. The accrued requirement of employers of having an adequate workforce at any time, also responds to a logic of preventing the event. One may multiply the examples.

Social institutions must act in a second-rate logic, likely to be restricted to supporting decisions taken by collective agreement at the pertinent level (business, sector, territory, Europe) and ensuring a standard realisation. This results from the Apolitical@ spirit of the concept of subsidiarity and calls for a reversal in the respective roles of politics and the law. Collective bargaining conceived in this way is no longer of a strategic nature (to take as little as possible from ones own interest and, for that, to attempt to manipulate the other without oneself taking on any true commitment). This negotiation comes to the charge of European common goods (the level of employment, social justice, the development of the capabilities of individuals). It is constructive and comprehensive, transcending private interests. It comprises a social dialogue linked with drawing up joint conventions which will include a mixture of rights, duties, and fundings. Without these conventions in fact, distrust would win in a social context of uncertainty. It would be impossible to satisfy the requisites of effective freedom and personal responsibility necessary to an efficient flexible economy.

5) Collective Frameworks for a Labour Policy

The more jobs and the more opportunities for work and earning there are, the more assurance there will be of a certain security in life and the lower will be its financial cost. The best security is therefore that which is based on job creation. This in turn depends on the creation of activity, skills and new wealth. It therefore follows that a labour policy cannot purely be limited to the optimal management of people's careers. It must also have adequate collective frameworks, which will need to be supplied by national and European policies designed to improve collective efficiency. The point is not to allocate existing resources in a different way by means of financial aid, but rather to encourage the creation of resources at the time and in the place where opportunities arise. Structural policies on research and innovation, occupational and continuing training, joint infrastructures, the setting up of networks of companies and representative groups, mechanisms promoting professional mobility and the creation of enterprise all appear to be paramount.

This is why any deliberation as to what should become of labour law in Europe must be placed in the context of developing European employment. But in return, placing it in this context will help us to reformulate the employment issue. One thing is sure. Employment is more likely to result from structural policies aimed at collective efficiency than if it is made the direct and explicit target of economic policies[151]. This

151. Needless to say, a structural policy strategy aimed at collective efficiency entails a certain type of macro-economi

cenvironment if the effect these policies are to have on employment is to be maximised. Going into too much detail about the nature of this would take us outside

is a direct result of the changed nature of economic development which we considered above: diversity, human capital, proximity, territoriality. It is not general, vertical policies, but close, long-lasting, horizontal co-ordination between the parties which will create networks and intermediary collective organisations that will generate and maintain employment. Furthermore, by working on the company environment, these structural policies will improve collective efficiency and reduce the inequalities in working productivity between different regions. This in turn will lessen the incentive to opt for relocation blackmail, rather than giving proper thought to the matter of what medium-term strategy to adopt.

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the scope of the group's report, but it still needs to be done.

It is essential that these policies should be placed in their territorial context. Let us return for a moment to the idea of globalisation as an opportunity for European companies to make the world their individual sphere of action. We have already seen that this opportunity is based on the prospect of a steady increase in non-price-based competitive advantages. If these advantages are really to be obtained, the company must be a permanent part of its environment, which involves carving out a territory, the search for co-operation within a network covering the whole enterprise chain, partnerships with the surrounding population (local groups, professional associations, public research laboratories and agencies, universities and systems of general and vocational training). These are the economic, social and political territories within which the issue of flexibility, if it is to have any meaning or scope at all, must be defined. There and only there can we generate the collective dynamics which will positively link up improved productivity with the creation of both resources and activity. This is where we will find the joint structures which legislation should help to update in Europe, in order to turn these into spaces for public deliberation that will enable the definition of the resources which can be mobilised and allocated. In short, these should gradually become the spaces within which the parties concerned can really exercise their freedom to act (in the way that has been described above).

6) Individual Professional State and Intermediary Collective Mechanisms

Co-ordination between individual prospects and collective needs will be feasible as a consequence of something that should become a political imperative (and it can only become this if Europe acts to impose it as a convention between the parties involved, thus making it a mutual expectation which can be taken for granted[152]). This imperative will be to keep people in an Aprofessional state@[153] throughout their lives. It is this state that will then guarantee the efficiency and development of their work capabilities. For, since the exercise of real freedom and job changes are necessarily associated, the maintenance of such an professional state can only be conceived of within collective mechanisms. The proposal calling for the institution of social drawing rights[154] is an illustration of the stand taken in favour of such collective mechanisms.

Such individual rights would gradually be acquired in the course of performing a job. They would bring about a liberation in terms of time, thus providing a space in which flexibility at work could be put into practice, provided that the idea of right-generating work were to extend beyond salaried employment to self-employed, charitable and public service work and to the time spent acquiring continuing training, ... in whatever forms may be defined. In this way, the individual would become a creditor who could lay claim to provisions which he or she could freely use (hence the notion of drawing rights) at different times in his or her life. The capital thus accumulated could take the shape of money or rights (for instance the right to perform a charitable activity or follow a course, whilst at the same time retaining the resources required to continue living during this period).

We cannot fail to see that, in each of these points, the need for a collectively-established framework. Provision (of money or rights) could be supplied in a combination of ways: by the state or territorial collectivities, by companies through their contributions to the welfare protection of their employees, by individuals themselves in their savings (of leisure time and money), or by social security institutions through the benefits they pay out. There is a need to safeguard continuity over time **B** which is essential in the life of an individual **B** in the accumulation of these rights and the opportunities to draw on them in the face of changes in work, social systems, protection type or European country. Similarly, thought should be given as to how we can define the initial allocations and subsequent increments which would give the cast-iron guarantee of an adequate base of rights and opportunities to those who, by virtue of their own circumstances or their social origin, have little in the way of patrimonial, monetary or human assets. We must draw up procedures for collective deliberation which will permit the necessary reconciliation between the needs of the community to which one belongs (the firm, the region, ..) and the individual's freedom to use his or her rights. The objective of accompanying this with the compilation of statistical indicators designed to gauge the degree of effectiveness and success of the rights thus defined, is therefore all the more important.

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152. It cannot be emphasised enough that the principle of subsidiarity does not mean the disappearance, but on the contrary requires the exercise, of responsibility at European level. The responsibility in question, however, is not that of centralist intervention based on uniform, systematic criteria. The best definition is that it is a responsibility based on the premise that those involved in the situation are autonomous and can therefore define themselves the nature of what is in the common good in such a way that it can be properly implemented in the situation in question. The responsibility involves a duty (but not a right) to intervene in those cases where the parties involved are unable to define the nature of what is in the common good in this particular situation (cf. R. SALAIS et M. STORPER, 1993).

153. This concept is proposed in A. SUPIOT, 1997, *op. cit.* From a historical point of view, it is striking that, once again, we come across the features, even moral features, developed in the occupational groupings of the second part of the 19th century. Codes of ethics and good practice, the development of professional associations, their advisory and training activities and placement of the self-employed and *professionals* into new jobs are all evidence of just how up-to-date such intermediary groups really were.

154. A. SUPIOT, 1997, *op. cit.*

Summary

In this survey, the expert group established by the European Commission=s DG V has attempted to take a cross-disciplinary and transnational approach to the evolution of labour law. Its aim was to bridge the gap between *legalistic* surveys of the evolution of positive law and the *sociological, economic and cultural* approach to the realities of the working world, in an attempt to produce a description from a normative angle of the links between law and new social practice. It was ultimately an exercise calling for an *understanding* of trends as much as for the actual drafting of *proposals*.

A) General Framework

1) The classic labour law model

The point of departure for the analysis was the observation that the socio-economic regulatory model that had underpinned labour law since the beginning of the century is undergoing a crisis. Important national differences aside, that industrial model may be ideally or typically described as a regulatory framework hinging on a standardised form of subordination, the widespread nuclear family and the institutionalisation of the parties having an interest in collective bargaining within a national State.

From an institutional standpoint, this model may be seen as a triangle whose three sides are companies, trade unions and the State. With regard to internal organisation, Fordist companies engage primarily in mass production of fairly standard products. They systematically separate the design and implementation stages of production. Standard employment relationships are based on an employee-employer relationship (subordinate work) in which the former, whose training lasts for a relatively short period of time, is paterfamilias (male breadwinner) and hired on open-ended terms to provide services defined by his job profile. Fordist trade unions are active organisations centred not around specific trades (prior corporatist model), but business sectors. The key bargaining level is the industry (with the exception of the United Kingdom, where the company level has always prevailed). The State is *Keynesian* B aiming primarily to maintain domestic demand (at the risk of inflation), *national* B protecting its domestic markets from foreign competition B and *conciliatory* B instituting machinery for social bargaining. Labour law, and the social protection deriving from it, tend to become standardised in the sense that they favour employment relationships that fall into a single pattern (based on a dual system, subordinate employment/self-employment) and guarantee workers passive individual security, uniform working hours, relatively independent collective bargaining and a special status for civil servants, associated with the notion of public service.

2) Current trends

We cannot fail to see that all three sides of that triangle are collapsing. The internal reorganisation of businesses has Labour law brought specific democratic demands into the socio-economic sphere, and they need to be maintained and reformulated in the light of present circumstances. The group paid particular attention to four of these. Firstly, *equality* must be maintained, but must incorporate the relatively new issue altered the distinction between design and implementation, particularly as a result of the emergence of production Adedicated@ rather to non-standard articles; as a consequence, employment relationships have become more flexible, involving long or ongoing worker training. Women have entered the labour market *en masse*, thereby undermining the patriarchal Fordist model. Stable employment is being replaced by more casual working arrangements which are not defined exclusively in terms of job or position. Trade unions, in turn, in the face of the unemployment brought on by the economic crisis, have been obliged to redefine their role: no longer concerned solely with male salaries and working conditions, they also deal with issues such as employment, company survival and gender equality. Lastly, the State has abandoned its Keynesian policies in favour of anti-inflationary strategies and budgetary control, turning its attention to maintaining competitive conditions; its sovereignty, meanwhile, has been curtailed to some extent by emerging regional movements and the appearance of authority at European level.

3) Group guidelines

In considering its approach to these changes, the group ruled out two possible courses of action: on the one hand, decomposing labour law and *bringing* the employment relationship and protection against risk *within the scope of civil law* and on the other, *dissociation* of social and economic interests via, firstly, flexibilisation without the intervention of social partners and the State and secondly, the proclamation of social rights regardless of the individual=s involvement or otherwise in economic activity. The third course, finally chosen by the group, is based on a diagnosis of socio-economic evolution and retrospective reference to the democratic demands that led to the institution of social law.

4) Diagnosis

The expert group took due note of the proliferation of the production systems that characterises the pattern of European growth at present. In this context, traditional employees and mass production still hold a *relatively* important place, alongside other types of industrial organisation. From the standpoint of both individual and collective action, this proliferation of options leads to growing uncertainty. The notion of flexibility must be interpreted in this context. Its economic reference is not only the need to optimise market relations (as if the market were the *sole* model for economic coordination and as such to take the place henceforth of the welfare model). It is first and foremost the need to optimise the numerous production relations, involving *security* for both workers and companies, the development of individual and collective *potential* and the building of *local* production relations based usually on *territorial* proximity.

5) Democratic requirements

of gender equality. Secondly, freedom entails *maintaining worker protection against dependence*. But new forms of such dependence are emerging. Thirdly, *individual security*, involving a wide range of social rights, must be reconstrued not as security *against* exceptional risk, but *in the light of* an

ubiquitous risk associated with the inevitable rise in uncertainty. Coping with uncertainty must be made an integral part of the very definition of security. Lastly, *collective rights* guarantee the actual participation of the people concerned in the definition of the *meaning* of work, of both the *purposes* and means of economic development. It is for this reason that they must be maintained and at the same time expanded to take account of new kinds of collective representation, action and bargaining which should not, however, replace former practice altogether.

The group has worked on reformulating the conditions which would ensure the effectiveness of those four demands in different aspects of labour law. To that end, it sought not to invent an entirely new model, but rather to *selectively* embrace tendencies *already* emerging in the evolution of European law and to propose an intelligible framework which may serve as a guide for future policies.

B) Work and Private Power

1) Analysis

The notion of subordination has evolved along three lines. Firstly, hierarchies appear to be flattening out. Greater *operational* independence may be observed even among workers involved in traditional employment relationships. At the same time, although self-employment is growing very slowly in European countries, from the legal standpoint the presumptions attached to the status of employee are losing ground. Both the courts and lawmakers appear to want to broaden the scope of self-employment. Nonetheless, a second tendency may be observed whereby, despite greater *formal* leeway in subordinate relationships, the casualisation of labour, mass unemployment and new management practices may make subordination weigh more heavily in employment relationships in the form of *informal* pressure on workers, in particular younger, female and less-skilled workers. Finally, the third trend involves more complex relations between employers and workers due to the appearance of third parties, namely subcontractors or temporary employment businesses.

This evolution has important consequences on the protection provided by social law. The first consequence is, in many cases, increasing *personal insecurity*. Cases of *Afalse self-employment@* or casual workers who are *Ainvited@* to refrain from joining a trade union are eloquent proof of this. The second effect is the *Agrey area@ between dependent employment and self-employment*. Legally independent subcontractors, individuals or businesses are sometimes financially dependent on one or several clients or principals; conversely, the circumstances of legally dependent workers are increasingly resembling those of self-employed workers. Finally and thirdly, the employment relationship in *networked companies* need to be addressed, and in particular the principal=s liabilities with regard to the health and safety of the subcontractor=s employees, protection of temporary workers or even companies= joint responsibility as regards compliance with working hours, etc.

2) Guidelines

In view of these trends, the group of experts highlights the need for a twofold choice: 1) reassertion of the essential principle whereby the parties to an employment relationship are not vested with the power to establish the legal status of that relationship; 2) a desire (with an eye to the future) to expand the scope of labour law to cover all kinds of contracts involving the performance of work for others, not only strict worker subordination.

In that optic, the group advocates the following overall guidelines:

- *adoption of a Community definition of the notion of employee*. Such a definition exists currently only within the area of freedom of movement for workers. By imposing it, the Court of Justice wanted to prevent any State from limiting the scope of this principle at its own discretion by way of a restrictive definition. This reasoning applies to all Community social law provisions;
- *upholding the power of the courts to redefine an employment contract*. The technique of an array of possibilities, tried and tested in case law, must allow for the scope of labour law to be adapted to the new ways in which power is exercised in companies. At the same time it must ensure no restrictive definition of subordination is formulated on the basis of a single criterion (including *Aeconomic dependence@* or *Aintegration into someone else=s company@*);
- *consolidation of a specific status for temporary employment businesses, along with the introduction of categories of employers= joint activity and joint responsibility*, should make it possible to deal with the problems inherent in the growing complexity of employment relationships resulting from the increasing tendency to resort to dependent companies. In parallel, combating labour trafficking certainly continues to be a priority. All of this might form the subject, with due respect for the principle of subsidiarity, of European-scale intervention (modelled on directives relating to intra-European provision of services; or on the directive requiring companies engaging in work on one and the same construction site or civil engineering project to co-ordinate all worker health and safety matters);
- *application of certain aspects of labour law to workers who are neither employees nor employers.* The need for protection tailored to the special situation of these workers has been covered in labour law in several countries (the German notion of *arbeitnehmerähnliche Person* or the Italian *parasubordinazione)*. Those workers who cannot be regarded as employed persons, but are in a situation of economic dependence vis-à-vis a principal, should be able to benefit from the social rights to which this dependence entitles them.

C) Work and Employment Status

1) Analysis

In labour law, the notion of employment status establishes a bond between the various kinds of protection and the definition of the working circumstances prevailing throughout the worker=s lifetime. But the Fordist model of employment status is disintegrating in four areas. First, the continuity of *status* was typically associated with the continuity of a *condition (employment)* throughout an entire lifetime. However, such continuity has been called into question by internal

(different jobs, same employer) and external (casualisation of contracts) flexibilisation and also by high unemployment rates. Secondly, Fordist employment status was defined in terms of a person=s *occupation.* It has, however, been noted that such a criterion has been giving way to other definitions, in particular, to the principle of job evaluation in *monetary* terms (see unemployment rules, for instance). Thirdly, the *proliferation* of different kinds of employment status makes a mockery of Fordist standardisation. It should be noted that public authorities have contributed substantially to this disintegration through their policy of subsidising jobs, in both the public and private sectors. Finally, the concept of a *single employer* is likewise contested, both in regard to the entity concerned (groups or networks of companies) and over time (succession of employers).

2) Guidelines

In view of this situation, the expert group advises against maintaining the *employment model* within the confines of labour law. Given the inevitable flexibilisation of labour markets, it believes that would encourage the working world to split into two. Rather, it advocates redesigning the notion of security, at three inter-connected levels:

- *employment status should be redefined to guarantee the continuity of a career rather than the stability of specific conditions.* The prime aim is to protect workers during transitions between jobs. Particular attention should be paid to workers rights to redeployment in the event of dismissal, *status changes* (from employee to self-employed for instance), links between employment and training, between school and working life; access to a first job and the avoidance of long-term unemployment. Secondly, new legal instruments must be developed to ensure continuity of status above and beyond different cycles of work and non-work. What is at stake is nothing less than abandoning the linear career mo del. Career breaks and shifts in occupation should come to be considered a normal part of ongoing employment status. Such continuity may be ensured by law or collective agreement;
- *employment status should no longer be determined on the basis of the restrictive criterion of employment, but on the broader notion of work*. Social law may no longer disregard non-marketable forms of work. Nonetheless, the group rejected the notion of activity as imprecise. Work is distinguished from activity in that it involves an obligation, voluntarily assumed or legally imposed, under onerous or gratuitous terms, subject to a status or a contract. Work always has some legal connotation.

Broadened employment status accordingly covers three of the four circles of social law: the rights inherent in wage-earning work (employment), common rights connected with occupational activity (health and safety) and rights ensuing from unwaged work (care for others, volunteer work, training on one=s own initiative, etc.) together constitute the three circles of rights associated with the notion of employment status. Universal social rights, guaranteed irrespective of work (health care, minimum social assistance), fall outside this notion and should therefore be protected under specific legislation. The principle of equal treatment for men and women, however, applies to all the four circles.

Broadened employment status goes hand-in-hand with various kinds of social drawing rights. The specific social rights emerging today are new from two standpoints: they may be unrelated to employment in the narrow sense (time off for union activities; training credits; parental leave), even where associated with work whereby credit was accumulated; and they are exercised on a discretionary basis rather than in terms of the unexpected advent of risks. As a supplement to traditional social rights, these optional rights allow workers to deal with flexibility on an individual basis. This is why the group recommends that thought be given to redesigning labour law in terms of the distribution of *social drawing rights*, a notion that seems an appropriate way of coping with the demand for Aactive security in uncertain circumstances@.

D) Work and Time

1) Analysis

Without prejudice to the genuinely important issue of quantitative working time, on which current debate is focused, the group concentrated on qualitative analysis. Three new factors are transforming the perception of social time. Firstly, Fordist time, as a *general* work standard, made the regulation of time one of the system=s primary regulatory tools. However, such a tool is appropriate only in Taylorist mass production contexts. The appearance of new production systems calls for new standards for measuring work, the subordination related to and the insecurity generated by such work. In particular, the transfer of many trades to the tertiary sector, including those in the manufacturing industry, involves qualitative changes in time-based relations. Thus, *overstraining* and *keeping workers at the employer=s disposal* may paradoxically go hand in hand with a formal reduction in working hours. Maintaining a purely quantitative standard for time can easily mask the diversity of work involvement which calls for new kinds of protection. Secondly, flexibilisation of the organisation of work entails *fragmentation* of time, which should be reviewed from two standpoints. From the standpoint of the *individual worker*, part-time work and flexible working hours hold out both the promise of freedom and a threat of greater subordination. Women especially fall victim to this process. The key question in this regard lies in the conditions under which bargaining on flexibility and part-time work is conducted. Major differences are observed between countries where the process has been bargained collectively (Netherlands) and those where there is no collective setup. From the *collective* standpoint, the fragmentation of time entails new problems of coordination. Collective timing disappears and with it the conditions for social integration. The debate about Sundays off is revealing in this regard. Finally, a new *issue related to free time* that eludes Fordist patterns is clearly emerging. The latter wrongly define free time as non-working time. But such time is partly devoted to unwaged tasks (training, domestic chores, community life) which should be treated as actual *work* (see above). Work, furthermore, casts its shadow over free time (on-call work, unpaid tasks, etc.). This raises the question of the conditions under which workers can *genuinely* dispose of their non-working time freely.

2) Guidelines

Although there is no longer any such thing as standard time, the law can still ensure a degree of coordination for the temporary employment status. With this in mind, the group has drawn up certain guidelines:

- *a comprehensive approach to individual time and collective time is required by law*. We have to draw all the consequences from the general principle whereby work is adapted to human needs (and not the other way round). From the individual standpoint, it is important, for instance, not to limit consideration of the question only to the time services are provided, but to consider contract duration as well. This affects the conditions under which certain elementary safety rules are learned, for instance. In the same vein, the different stages of life and the changing needs they entail (maternity, child rearing, training) should be protected in full. From the collective standpoint, the law should ensure respect for certain principles underlying co-ordination and social timing, with respect to both family and urban life;
- *that overall idea is broken down into substantive principles*. General principles, leading to effective subjective rights, should be guaranteed at Community level as well. For instance, *the right to family and social life* is a principle enshrined in Article 8 of the *European Convention on Human Rights*; it is broader in scope than Directive 93/104, confined in turn to a Fordist definition of free time and addressing worker health and safety only. The issue of night work could be reassessed in the light of such *principles;*
- *this overall approach is implemented through collective bargaining*. Individualisation of time should not be confused with changes in contract terms and conditions on time. Collective bargaining is the most appropriate platform to lay down rules governing time. Such bargaining should be systematically encouraged, subject to penalties as appropriate. But this entails a significant change in the ground rules on collective bargaining, as discussed below.

E) Work and Collective Organisation

1) Analysis

The group of experts found collective bargaining, although in the midst of reorganisation, astonishingly *dynamic*. The vigour of this Fordist institution is characterised by its expansion in three areas. First of all, more *issues* are being addressed under collective bargaining, in so far as it now deals with company management (time and work flexibility, social plans) and builds bridges between the world of those with jobs and the world of those without (maintenance of employment). Secondly, more *parties are covered*, in so far as such bargaining now *also* takes account of workers who are not employees and non-standard employers (associations). Finally, the *tasks* of collective bargaining are expanding, and not only as regards the internal management of companies. Such expansion is set against a backdrop of increasingly complex relations between the law and collective agreements: collective agreements are vested with the enforcement of legal provisions, in addition to quasi-legislative functions, either because the law specifies that it is supplementary to agreements or because the legislative process includes social consultation (at Community level, this tendency is enshrined in Article 3 of the *Maastricht Agreement on Social Policy*).

- *with respect to representation*: the group finds the exclusive focus on representation at the company level risky. It is in this light that it undertook its discussion of the *dual* system of representation (works councils/union delegation). The group feels that these two elements are more complementary than adversarial. Such complementarity should be regarded as reciprocal support. Trade unions need someone to liaise for them inside companies, someone whose legitimacy can be

Nonetheless, this dynamism must be considered in association with two *adverse factors related to social consultation* which both result from and feed into it. Firstly, there is the issue of *representation*: on the one hand, union membership is declining; on the other, representation is becoming more fragmented and complex both within and outside trade union circles, with the appearance of alternative representation (the unemployed and other groups such as consumer and environmental associations). This involves a dual shift, that is reorganisation within trade unions and/or realignment of their relative importance in bargaining. The same process may be observed on the management side, where manufacturing companies are over-represented with respect to the *Anew employers@* (essentially small and medium-sized enterprises). The second issue involves *the setup* for joint consultation and action. On the one hand, there is a redrawing of the Fordist map: individual companies tend to acquire ever-greater relevance to the detriment of the central role traditionally played by whole industries (appearance of the *Öffnungsklauseln* in Germany, Italy and other countries). Moreover, a second map is being traced which tends to overlap the Fordist map. A new pattern of company/company networks (groups, areas)/Europe is being superimposed over the company/industry/nation hierarchy. Coordination of the various players involved is consequently becoming very confused and this confusion is particularly obvious in the difficulties arising around the interpretation of *most favourable treatment*, a fundamental principle of traditional labour law.

2) Guidelines

In view of such trends, the group of experts recommends:

- *active support from public (in particular Community) authorities for recasting collective bargaining*: broadening the scope of bargaining and extending the parties covered and tasks involved should be encouraged as the sole response to demands for flexibility that is consistent with the tradition of labour law. Such support may consist of rules on mandatory bargaining and procedural rules on representation;

attributed to the election process; inversely, company representatives should be able to count on the backing provided by higher levels of organisation to mitigate the effects of Acompany corporatism@. Likewise, the group warns against neo-corporatist tendencies that refuse to acknowledge alternative forms of representation: the expansion of items for discussion, parties covered and tasks involved automatically entails the acceptance of alternative forms of profiling collective interests by

subject areas. In the light of the above the group advises against the principle of simple trade union monopoly, in accordance with the trends of case law, particularly in France;

- *with regard to the proliferation of bargaining arenas*: while acknowledging the relevance of other bargaining levels, the expert group stresses the importance of recasting centred on *networked companies* (Directive 92/57 is a first example thereof) and *territorial networks whereby businesses and other interest groups join forces* (at local or regional level, for instance). This approach seems to be an appropriate way to meet the challenges deriving from business reorganisation and, more generally, it may facilitate the transition from employment policy to labour policy as mentioned above. As far as most favourable treatment is concemed, the group recommends that the interpretation of such treatment should not be confined to workers' individual and monetary interests, but also include other collective and non-monetary criteria such as maintenance of employment or protection of the environment.

F) Work and the State

1) Analysis

Like Fordism, the national, Keynesian State is undergoing a crisis. The terms of *regulation* are affected first: the State faces increasing individualisation of lifestyles and demands from civil society and such individualisation openly challenges the paternalistic traits that the welfare State may have acquired. Moreover, the opening-up of the European market, budgetary constraints and the need to combat inflation are putting an end to the continual expansion of State services. Secondly, the terms of *public action* are changing. The general trend in public services is to move from the State as manager (one that delivers services directly) to the State as guarantor (in which services are provided by private or mutual bodies, subject to the rules set by the State to guarantee all citizens equal access to such services). This entails new kinds of involvement in civil society. Civil servants have not been spared: there is a tendency to convert officials' special status into ordinary employment contracts (to varying extents, depending on the country). Finally, *sovereignty* in certain areas has been transferred to the Union.

These three trends threaten political society's potential for self-determination. The latter cannot be fully satisfied either by a minimal (neo-liberal) State or by simply maintaining the welfare State. State intervention of a new kind should be developed, particularly in the socio-economic sphere.

2) Guidelines

The group of experts suggests that such recasting should be linked to an overall concept of social rights based on solidarity.

According to the group of experts, this *solidarity* should not be thought of as solidarity in the face of *individual need*. Such an interpretation would mean that social rights would be reserved for situations where a dearth of individual resources was established. This would convert the social State into an aid-providing or even a charity State. Nor should its purpose be defined as the passive protection of individuals and companies on the basis of a closed list of risks. Instead, it should be regarded as solidarity guaranteeing individual and collective *security* in the face of risk as referred to earlier.

Two types of guarantees must be provided in this area:

- *procedural guarantees*. Social rights entail the participation of the people concerned in determining them via *collective mediation*, notably through recognised representative bodies and a limited number of social consultation entities. The law establishes the major goals of the system, but the accomplishment of such goals is set out in terms of conventional logic. Accordingly, agreements are no longer merely ways of regulating the relations between the parties involved, but a legal tool that engages the parties in the pursuit of the objectives laid down by law. Independent agencies, managed by a wide range of collective players, would provide a common language for the State and individuals in this task of accommodating the general interest;
- *substantial guarantees*. In terms of material content, the European Union must give priority to guaranteeing fundamental social rights at European level. These basic principles, which have already been partially acknowledged in the EU Charter of the Fundamental Social Rights of Workers, might usefully be incorporated into constitutional law. This approach fits easily into the Community dynamic, characterised by the prevalence of socio-economic factors at this stage of its construction. These fundamental rights must be worked into all the four circles defined above in accordance with the principle of subsidiarity.

Rather than the concept of social protection, social citizenship might synthesise the objectives of recasting labour law and social law in general. Despite the disparate national definitions of citizenship, this concept may be acknowledged as a suitable instrument for shaping European social law. The advantage it has to offer is that it is *extensive* (it covers many rights, not just social security); it links up social rights to the notion of *social integration*, and *not only* to the notion of work. Above all, it enshrines the idea of *participation*. Indeed, citizenship assumes the participation of the people concerned in the definition and implementation of their rights. In addition, it is remarkable that social citizenship can be legally acknowledged, as in Germany.

G) Combating Gender Discrimination

1) Analysis

The expert group felt that gender discrimination in the employment field is such an important, ongoing issue that it should be dealt with in a separate chapter. Their basic observation was as follows: current transformations in work that give rise to discrimination on grounds of gender add to rather than replace the factors underlying discrimination that can be traced back to the organisation of work deriving from industrialisation. Such organisation, which draws a distinction between reproductive female work and productive male work, was formalised under traditional labour law, which was strongly male-orientated, taking the male worker as its almost exclusive benchmark. Although women joined the labour

market en masse in the 1960s and have continued to do so, labour law has not yet succeeded in ending such discrimination: the spread of the formal right to equality for women workers has helped to combat certain types of discrimination, but has not tackled the *real* discrimination factors arising out of the gender segregation of labour and the sharing of domestic responsibilities. Wage disparities and extra workload (the *Adouble working day@*) subsist. Discrimination has since been made worse by two sets of circumstances. The first set is generated within the field of production itself where changes in work in all the senses described above have had a very real and particularly strong impact on women: increasing subordination, greater insecurity, disturbances in private life on account of more flexible working hours. These all affect women in particular. In addition, external factors resulting from transformations in family life often end up by increasing the economic burden on women, thus reinforcing the impact of the first-mentioned factors.

2) Guidelines

In view of such heightened discrimination, the expert group recommends:

- extending attempts to achieve formal equality for men and women to all areas where it is insufficient;
- backing up this protection through specific steps that cover situations affecting women in particular and persisting inequalities in the distribution of domestic chores: maternity leave, continuity of employment status despite breaks; training leave, etc. These steps may even take the form of positive action, so it urges the Commission and the Member States to make full use of article 141(4) of the *Amsterdam Treaty*;
- paying special attention to the issue of *representation of women=s interests* in collective bargaining. As trade unions and employers= organisations are still essentially male bastions, one option would be the introduction of special requirements for women=s representatives in social consultation bodies.