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Chapter 1

Labour law at a crossroads

Rights are not eternal realities that exist out of space and time. They are social phenomena which must be considered in a particular historical context, and it is within this context that their birth, development and vicissitudes should be analysed. History is made up of the interaction of many forces – social, economic, political, cultural and ideological – to which can be added the often crucial role played by some outstanding leaders and personalities. Any alteration in these forces can and frequently does lead to a change in the law. This book examines some of the key changes that labour law has undergone in the last three decades in the light of overall societal changes, and the challenges it now meets at the beginning of the twenty-first century. Labour law, like more general social regulation, undoubtedly epitomizes one of the greatest social achievements of the twentieth century. However, it comes as no surprise that today it stands at a crossroads.

Labour law's origins and influences

It is generally accepted that, apart from a few albeit important contributions from other regions,[1] the core of the twentieth century's labour law was first elaborated in Western Europe, as a reaction to both the excesses of the Industrial Revolution and the abuse of rights arising out of nineteenth-century civil law. At the heart of labour law is the acknowledgement that strict civil law equality can lead to unacceptable situations when the parties to a contract where labour is traded for wages do not have comparable bargaining strength. Labour law deviates from the basic civil law and Roman law assumption that no party can complain of unfairness in the terms of a contract which it has voluntarily agreed to become a party to. Instead, the goal of labour law is to ensure that no employer can be allowed to impose – and no worker can be obliged to accept – conditions of work which fall below

1 For example, labour and social rights were embedded for the first time in the Constitution of Mexico, 1917. It is very likely that this influenced the ILO Constitution of 1919. In Europe it was the Weimar Republic's Constitution (Germany) which first enshrined social and labour rights in 1919.

what is understood to be a decent threshold in a given society at a given time. Thus labour law is not just a means of regulating the exchange between labour and capital as civil or commercial law does with respect to civil or commercial contracts; rather, it is a means (indeed it is the principal means) to operationalize what the International Labour Organization (ILO) nowadays defines as 'decent work', which, in addition to protecting the worker, calls for the respect of democracy in overall labour relations, including at the workplace.

The body of Western European labour law was expanded considerably throughout most of the twentieth century in both quantitative and qualitative terms. While labour law initially aimed at protecting the industrial worker, its scope was rapidly broadened so as to encompass non-industrial work, agricultural work and the civil service. By the second half of the twentieth century, virtually all workers who undertook work or provided services in an employment relationship or under a public law appointment fell under the protection of labour law or a comparable civil service statute. The content of labour law was also enriched. At the very beginning, only a handful of issues such as limits on the hours of work, the employment of women and minors, and industrial accidents and occupational diseases were targeted by state regulation. From the 1930s onwards new issues began to be addressed, including the employment contract, pay and conditions of work, workers' rights at the workplace, and last but not least the organization of workers' representation at the workplace and at industrial and national levels, including the right to industrial action.[2] Both before and shortly after the Second World War, detailed legislation was enacted in many countries with a view to consolidating and strengthening already existing workers' rights.

The cornerstone of this legal construction was the employment contract, which provided the legal foundation for the employment relationship; those workers who performed work or provided services under an employment relationship were protected by labour law, while those who worked outside the scope of an employment relationship were left unprotected. Indeed, in Western Europe as in North America an overwhelming number of the

2 Some Western European countries departed from this model. For example, labour regulation in the Nordic countries, especially Denmark, has traditionally relied on collective bargaining rather than on statutory law. Also, in some countries, collective bargaining rights and the right to industrial action can be denied to certain categories of civil servants, like *Beamte* employees in Germany and federal civil servants in the United States. It should also be recalled that unlike individual employment relations, which follow comparable patterns in a great majority of countries, collective labour rights and industrial relations practices tend to vary widely from one country to another.

economically active population worked within an employment relationship so that the majority of workers fell within the scope of labour law or of a comparable civil service statute. As will be discussed later on, one of the greatest challenges of today's labour law stems precisely from the fact that an increasing number of workers perform work or provide services beyond the scope of an employment relationship, and are consequently denied labour law protection.

Western European labour law patterns have been endorsed (or, according to some critics, 'copied and pasted') in other regions of the world such as English-speaking and French-speaking Africa and Latin America, although it is undisputed that in the greater part of these regions wage employment is not the prevailing form of work organization. To a lesser extent, these patterns have also been followed in the law and practice of Japan and many Asian countries. Furthermore, the influence of Western European labour law has been no less noteworthy in international law: while ILO standards ought to reflect universal common wisdom, the formulation of most ILO Conventions and Recommendations has very largely drawn and continues to draw inspiration from Western European law and practice. More recently, European Community law and the European Union Member States have also been influential in the elaboration of ILO standards.[3] By contrast, the United States has built up a quite different set of labour laws and labour relations patterns, which reflect national values and the common law legal tradition.[4] Some elements of the US pattern (for example the concepts of 'bargaining unit', the 'duty to bargain' and 'unfair labour practice') are, however, noteworthy in a few other countries, such as Canada, the Dominican Republic, the Republic of Korea, Panama and the Philippines.

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3 For example, EC Directive 75/129/EEC on collective redundancies and EC Directive 80/987/EEC on the protection of employees in the event of the insolvency of their employer have deeply influenced, respectively, the ILO Termination of Employment Convention, 1982 (No. 158), and the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173). At the ILO Conference, where ILO standards are elaborated by tripartite consensus, it is widely acknowledged that the EU Member States acting as a regional group (with, however, the frequent abstention of the United Kingdom) often play a decisive role, with many of their proposals reflecting what is held to be common wisdom in the EU.

4 Although the United Kingdom has a common law system, following the country's accession to the European Economic Community (later the European Community and now the European Union) in 1973, British labour and employment law has been very deeply influenced by the legal approaches of continental Europe. Today, statutory regulation is the main source of labour law in the United Kingdom, though it is applied in light of common law interpretative criteria; thus statutory rights are held to work like immunities and exceptions to common law rather than as positive rights.

Sources of labour law

Contemporary labour law draws on different sources, which can be divided into five categories.

Constitutions

First, mention should be made of constitutional provisions that formally state employees' individual and collective labour rights. This approach was initiated in Mexico in 1917: while nineteenth-century political constitutions were committed to protect political rights as well as a number of fundamental individual freedoms such as property rights and freedom of trade, the Mexican Constitution was innovative in that for the first time ever it also enshrined workers' and social rights. Thus the Mexican Constitution initiated what is known as social constitutionalism (*constitucionalismo social* in Spanish), an approach which was later followed in most Latin American countries as well as in many countries in other regions, though generally with less detail. Typically, national constitutions provide for a number of fundamental workers' rights such as freedom of association, including collective bargaining and the right to strike, equal pay and equal treatment of men and women, non-discrimination in employment and occupation on grounds such as colour, race, social origin, religion or political opinion, prohibition of child labour and prohibition of forced labour. Some constitutions add provisions relating to protection against unfair dismissal and limits on the hours of work. However, not all constitutional texts include labour and social provisions, and some countries, such as the United Kingdom, New Zealand and Israel, do not even have a written constitution.

Statutory regulations

A second source is made up of statutory regulations; these take the form of laws, which can be further developed through secondary regulation such as decrees and other regulatory orders. Apart from a few exceptions – most notably Belgium and Denmark (which have traditionally relied strongly on collective bargaining), and until recently Australia and New Zealand (where arbitration awards have for many years been the major source of labour regulation) – statutory regulation in most countries is actually the most important source of labour law. Although statutory regulation as a source of labour law is less prestigious in the United States than collective agreements, it should be borne in mind that less than 15 per cent of the workforce in the United States is at present covered by a collective agreement. It follows that statutory regulation is in practice the most important source of labour law for at least the remaining 85 per cent of the workforce in that country.

Collective agreements

Collective agreements concluded by both sides of industry through negotiation are a third source of labour regulation. While collective agreements are similar to private-law contracts in their form, their effects are quite different from those of civil or commercial contracts under civil law or common law. Indeed, in comparative law and practice there is a wide diversity of collective bargaining patterns. Thus, depending on the country, collective agreements can apply to a given enterprise or an establishment or to a whole industry or a branch of activity. In addition, collective agreements can have regional scope; for example metal trades agreements generally cover a *Land* in Germany or a state in Brazil. Other agreements can have nationwide coverage. For example, the chemical industry in Spain and the textile industries in Mexico both negotiate national agreements. Industry, branch or sectoral bargaining is a key feature in most Western European labour law and industrial relations systems, as it is in Argentina and Brazil, while local bargaining – at the plant, the factory or the company level – is the prevailing pattern when not the exclusive bargaining level in Canada, Japan, the United States, most Latin American countries and many but not all of the countries of Central and Eastern Europe. In a number of other countries the collective bargaining process takes place at different levels (and is referred to as 'multi-level bargaining'); for example, in France and Italy workers can be covered by an agreement applying specifically to their enterprise and at the same time by a higher-level agreement which has been concluded at the industry, the sectoral or the branch level. In addition, inter-professional bargaining is an important negotiation pattern in some countries. In France, for example, a number of social issues, such as unemployment insurance and training, are addressed by inter-professional agreements, which are signed by the workers' and the employers' umbrella organizations. Likewise, a number of Francophone countries in Africa and some States of the former Yugoslavia used to have a general collective agreement that superseded their labour codes. Mention should also be made of inter-professional bargaining at the national level in Belgium, within the framework of the National Council for Labour (Conseil National du Travail), which is a key feature of that country's industrial relations. Agreements concluded within the National Council for Labour have legal effects that are comparable to those of statutory regulation.

The Nordic countries' practice (which also exists in other countries such as Ireland and Spain) of negotiating national-level framework agreements also deserves attention. This practice consists of agreeing upon a common framework for pay negotiations and industrial relations, which are to be further negotiated at the sectoral or company level.

Last but certainly not least, a distinct European Union level of collective bargaining has developed recently, under the form of framework agreements concluded by the European-level workers' and employers' organizations. Some of these agreements, like the Telework Agreement of 2002 and the Agreement on Harassment and Violence at Work, concluded in 2007, are addressed to the national relevant workers' and employers' organizations, which take up their implementation; yet a number of other framework agreements, like those on parental leave (1996), part-time work (1997), and fixed-term work (1999), have been further endorsed by the European Council, in the form of EC Directives addressed to the Member States for further transposition into national law.

The legal effects of collective agreements also vary depending upon the different national regulatory frameworks and industrial relations practices. Thus, in a number of countries (for example the Scandinavian countries), collective agreements are binding on the parties to the collective bargaining only and their respective members; however, employers who do not belong to an employers' organization can be bound by the collective agreement applicable in their respective branch or industry if they have signed a tie-in agreement (*hängavtal*) with a local trade union. In the Scandinavian countries, only union members are covered by a collective agreement, which has the effect of encouraging workers to unionize and contributes to explaining the high rates of unionization in these countries.

The Nordic practice is, however, in sharp contrast with that of some other countries such as Belgium, France, Germany, Portugal or Spain, where collective agreements can be made applicable to third parties, i.e. non-unionized workers and employers who have not been represented at the bargaining table, provided the agreement has been extended by the administrative authority through a decree of extension. Also, in Argentina or Brazil, a branch-level or an industry-wide agreement will automatically apply to all employers and workers included within its scope of application. In contrast, in the United Kingdom and some other countries which have drawn on the British tradition, collective agreements are not legally binding and cannot be enforced before a court or a tribunal. However, collectively agreed terms and conditions of employment can be transposed into individual letters of appointment, thus creating rights and obligations which can be enforced before a court like any civil law contract.

International law

A fourth source of labour law is made up of international law, such as ILO Conventions, and more recently by European Community law (EC law) in respect to the 27 Members of the European Union. ILO Conventions are bind-

ing on the ILO Members only on ratification, and the extent to which they can be used in individual cases depends on the legal system of each country. Ratified ILO Conventions can be directly applicable in individual litigation in a monist system (for example, France, Spain and most Latin American countries), while they need to be further implemented by national law in dualist systems (for example Australia, Canada, Scandinavian countries, the United Kingdom and the United States). By contrast, EC law (EC Regulations and Directives) is binding on all of the EU Member States, for once adopted by the legislative bodies of the European Community it does not need ratification.

Case law

A fifth source of labour law is case law developed by national tribunals and sometimes by international tribunals too, such as the European Court of Justice or the European Court of Human Rights. Case law can have a far-reaching influence in labour–management relations. For example, in Japan, for many years, protection against dismissal was based on case law only, not on statutory regulation. Typically, case law is very important in crucial industrial relations issues such as the right to strike in those countries, such as Germany and Spain, which have refrained from addressing this right in statutory regulation. We can also add, then, that the power of the judiciary to interpret the law can have a potentially significant impact on the effectiveness of labour law. For example, in determining who is an employee, and thus demarcating the actual scope of the law, the courts may give a wider or narrower coverage to labour law.

Finally, some countries have a tradition of establishing terms and conditions of employment through arbitration awards. Until recently this was a distinctive pattern in Australian and New Zealand labour law, but nowadays such industrial awards appear to be no longer used. Arbitration awards still have importance in some countries, as they can be used to settle collective disputes.

We have looked at the broad patterns of influence shaping labour law over time, as well as the five major sources of labour regulation, and the assumption that labour law is or has been very largely Eurocentric can be seen, at least in part, to be accurate. It is therefore important to address some of the factors which in the second part of the twentieth century have strongly determined the expansion and enrichment of labour law in many Western European countries: essentially, economic growth, welfare state policies, labour market conditions, technological and organizational patterns, the international economy and the overall political situation.

The labour law model from 1945 to 1975

The three decades that elapsed between 1945 and 1975 are often known as the Golden Age of Capitalism and frequently referred to in the Francophone world as 'The Thirty Glorious Years' after the famous essay, *Les Trente Glorieuses*, by French economist and sociologist Jean Fourastié.[5] While Fourastié's essay focused on French society, the gist of his analysis can apply in most cases to many other Western European countries. These years were characterized by three decades of unprecedented growth, which were very largely fuelled by post-Second World War reconstruction. A no less important contributory factor to Western European growth was the establishment of the Common Market under the Treaty of Rome in 1957, and the further development and enlargement of the European Economic Community. In addition to enlarging the markets, thus fuelling growth, the Treaty of Rome brought political stability and prospects for long-lasting peace in Europe, which in turn encouraged long-term investment and further growth.

At the time, neo-Keynesianism was the prevailing economic and social ideology. This meant that public policies were committed to strengthening the welfare state and promoting full employment. There was a shortage of workers at that time, something which led many Western European countries to open the door to an influx of migrant workers, and there was a sharp increase in female employment during this period. In addition, economies tended to be industry-based; the industrial paradigm consisted of a large industrial plant employing thousands of workers, all with the same employer; work processes were for the most part labour-intensive, and Fordism was the prevailing organizational pattern.[6] These features also determined the emergence of a strong trade union movement.

Two other elements came to underpin growth and prosperity in this period. First, until the Kippur–Ramadan War of October 1973, Western growth relied on the availability of plentiful and cheap energy. Secondly, international competition was restricted by customs duties and other apparent or disguised obstacles. Moreover, top-level production was restricted mostly to countries that shared comparable labour standards and labour costs, while low-wage and low-productivity countries were mostly raw mate-

5 Jean Fourastié, *Les Trente Glorieuses* (Paris, les Editions Fayard, 1979).

6 The adjective *Fordist* refers to a large industrial business engaging in mass production based on job specialization and competencies and pyramidal management (i.e. a hierarchical structure of labour, the separation of product design and manufacture). Fordist enterprises tend to integrate both core and ancillary activities within a unified structure under a single management. It is assumed that most if not all of the workers who work in a Fordist enterprise are in an employment relationship with that enterprise.

rial and bottom-level production providers. The term 'industrialized world' was applied to Japan, North America and Western Europe, while most other countries belonged either to the 'developing world' or to the group of countries behind the Iron Curtain. Thus labour costs did not play a significant role in international trade competition, for there was virtually no competition between high-wage and low-wage countries and, unlike today, offshoring of industries was all but unknown.

This panorama should be completed with some reference to the overall political environment. In the aftermath of the Second World War, most Western European countries (and after Franco's death in 1975, all of them) endorsed political multi-party democracy, which in all cases was accompanied by strong popular participation. This political choice should be assessed in the context of the Cold War environment, which meant that the market economy was not only challenged by the Soviet Union and other communist countries but also confronted internally by national Communist parties, which, in countries such as France or Italy, often relied on strong support from the major trade union confederations. For political democracies, then, it was indispensable to provide evidence that market economies could be both economically efficient and socially advanced. Thus the *social market economy model* was developed, which to a large extent drew on experiences initiated in Bismarck's Germany in the nineteenth century and then were taken further in Nordic democracies before the Second World War. The social market economy implied a trade-off between capital and labour in the form of socially targeted policies in exchange for support for political democracy and the free market model, and such a trade-off was undoubtedly behind many labour-friendly reforms that took place in these years.

It is in this context that labour law found an exceptionally favourable environment in which to flourish. Sustained economic growth, tight labour markets, strong workers' unions, Fordist patterns of work organization, all but harmless international competition, Keynesian policies and political trade-offs all led to successive waves of labour law reform which in most cases strengthened and improved already existing labour rights.

The standard employment relationship

The environment of post-war prosperity led to the consolidation of the 'standard' or 'typical' employment relationship, the key element of which was full-time permanent employment under a contract of employment. A stereotype emerged – namely that of workers performing well-determined tasks in a large production unit, in a subordinate position to the employer or representative of the employer. In return for accepting this subordination, workers expected

to spend part or all of their working life in the same enterprise – perhaps even in the same job and performing the same tasks; they enjoyed protection against dismissal, and were unionized. They expected their real wages to increase. Their basic rights were guaranteed by statutory regulation, over which a second layer of rights and entitlements was added through collective bargaining. State-guaranteed social security from cradle to grave completed this picture.

Two further elements completed the stereotype of the post-war worker: (a) this was a male worker, and (b) he was the household's breadwinner. Female employment certainly existed, particularly in clerical positions, the teaching and nursing sectors, and some industries such as textiles which had traditionally employed women. However, apart from protection during pregnancy, a prohibition on night work in industry (which was meant to serve as protection for female workers long before it was held to be discrimination) and maternity leave, labour law was a long way from being gender-sensitive. De facto or de jure access to many occupations was barred to women, and pay differentials between men and women were not only acknowledged but socially and legally accepted.

Other forms of employment relationship that deviated from the prevailing pattern did exist, however, but the law generally tried to ignore or restrict them. Typically, labour law provided that a worker was to be taken on under a standard employment relationship unless the employer could establish an objective reason for departing from it, for example when a worker was taken on to perform tasks which were of a limited duration or related to a specified project.[7] In the absence of an objective reason to justify a deviation from the general rule, the deviating patterns of employment were to be treated the same, legally, as a standard employment relationship, that is, they were deemed to be contracts of employment of indefinite duration. Social and political acceptance of this model was so great that in 1982 the ILO Conference had practically no problem in adopting by a two-thirds majority vote the Termination of Employment Convention (No. 158). Convention No. 158 is strongly rooted in the assumption that a contract of employment is agreed upon for an unspecified duration, and that a worker with such a contract should be protected against unfair dismissal.[8] To give some idea how

7 Indeed this is still the rule, but many exceptions are accepted nowadays while previously only a handful of such exceptions were tolerated.

8 As at 30 November 2008 this Convention was in force in 34 countries. Given the relatively low ratification rate it has been suggested that erosion of the standard model of employment protection against dismissal had already begun at the time the Convention was adopted.

times have changed since then, it is worth recalling that in 2006 it was only after tough discussion and with great difficulty that the ILO Conference was able to adopt only a Recommendation on the employment relationship.

Many countries in the world copied these patterns, yet very few, if any, undertook to assess whether their overall economic, social and political parameters were similar to those of Western European countries during these years of post-war prosperity.

Worldwide changes and the emergence of a new work paradigm

The last three decades of the twentieth century and the first of the twenty-first have seen the rise of new economic, social and political realities, which have had a far-reaching effect on developments in labour law. To summarize these in chronological order, they were characterized by the end of the cheap energy era, from 1974 on; the increase in international competition, mainly from South East Asia at the beginning of the 1980s and then from China from the 1990s onwards (to which India should now be added); the digital revolution; the demise of communist regimes and the end of the Cold War; and the globalization process. Each and every one of these phenomena has put conventional labour law (i.e. law that has been developed on the basis of the standard employment relationship) under serious pressure.[9]

The labour flexibility debate and the spread of atypical employment

By the second half of the 1970s, Western European economies had already entered into a phase of stagnation and inflation, commonly referred to as 'stagflation', which was accompanied by rising unemployment. Several factors contributed to this phenomenon, among which the completion of post-war reconstruction, the end of the cheap energy era and tougher international competition were perhaps the most important. In any event, the 'Golden Years of Capitalism' were over, and in this new situation a debate was initiated on the sustainability of the welfare state.[10] During this discussion

9 Other important political and societal changes also took place during this period, among them more political democracy, greater popular participation, more human rights awareness and more sensitivity to gender-related issues. The overall favourable impact of these changes on labour law is discussed in Chapter 5.

10 See, for example, Pierre Rosenvallon, *Crise de l'Etat providence* (Paris, Editions du Seuil, 1981).

doubts were cast on real or presumed rigidities of the labour market, and the 'labour flexibility' debate came to the forefront. Some 30 years later, the labour flexibility debate is still underway as most of the labour market reforms have been made on the assumption that the market needs more flexibility than is actually permitted under current labour law. Thus 'flexicurity' (a balance between flexibility for employers and security for employees) has become a hotly debated issue in Western Europe, as reflected in the extract quoted in box 1.1. Flexicurity-oriented labour policies would seem to be encouraged in a recent Green Paper of the European Commission (2006).[11]

Box 1.1 Varieties of flexicurity[12]

There are different national formulas for flexicurity. A first approach is the flexibilization of the whole workforce. This includes the 80 per cent of workers in traditional, permanent work or with 'typical contracts'. There are two main ways of implementing this flexibilization: through new ways of organizing work or through more diverse or flexible working time arrangements. At the same time, this should be complemented with some form of employment security.

The Danish system is a well-known example of such an approach. It combines comparatively relaxed employment protection legislation with a high level of unemployment benefits paid by the government and very active labour market policies (ALMP). The security element of flexicurity is mainly provided by the government, not by the employers. 'Protect workers, not jobs' is the simplified message of the philosophy behind this model. Austrian reforms also focus on that element, with the creation of a severance pay fund which is transferable and not linked to one employer only.

The second approach is the *normalization* of the rights of 'atypical' workers (e.g. fixed-term contracts, temporary contracts or part-time contracts) while retaining the flexibility of these forms of contract.

The Dutch system tries to incorporate this idea by providing more social protection rights for non-standard workers (in particular part-timers but also those on non-permanent contracts) and by improving their entitlements (social security, pension, etc.) to reach levels comparable to those of their

11 Commission of the European Communities, *Modernising labour law to meet the challenges of the 21st century*, Green paper (Brussels, 22 November 2006); available online at http://ec.europa.eu. A review of this paper by Joaquín García Murcia has been published in the *International Labour Review* (Geneva, 2007), Vol. 146, No. 1–2, pp. 109–14.

12 European Foundation for the Improvement of Living and Working Conditions, *Varieties of flexicurity: reflections on key elements of flexibility and security, 2007* (Dublin, 2007), background paper; available online at http://www.eurofound.europa.eu.

permanent counterparts in the labour market. Other countries [such as Italy or Spain] have very similar patterns and are considering how to increase the rights for their 'atypical workers'.

Different national approaches have to take account of very different starting points. In particular, the proportion of 'atypical' or non-standard workers varies significantly between Member States. […] Both the United Kingdom and the Netherlands have high rates of part-time work, particularly amongst working women. Fixed-term contracts are very much in evidence in Spain, representing over 30 per cent of the entire workforce. It is noteworthy, however, that recent major labour market reforms in Spain have attempted to redress some of the disadvantages associated with previous episodes of labour market flexibilization (e.g. excessive labour market segmentation, declining levels of per capita productivity). This has taken the form of new provisions to safeguard and promote the rights of atypical workers and to create incentives for employers to convert atypical to typical contracts.

The choice of a particular form of flexicurity is linked primarily to the historical development of labour markets, collective agreements and the role of the government in these, as well as to basic considerations of public policy in the employment and social protection areas. Policy development depends very much on national traditions as well as on the capacity of individual countries to generate the resources to pay for the chosen solutions.

It is important to recall that a system in place in one country cannot be easily transferred to any other Member State, as policies are embedded in a specific national context. Potential reforms need to take into account the different levels of application (worker, household, enterprise, sector, national) and their interaction.

Nonetheless, an 'open reflection' on an integrated policy is useful. This could lead to a new approach, encompassing the whole set of social policies, including labour market policies and social protection systems in a wider sense.

The labour flexibility debate addressed four real or presumed rigidities in labour law. To begin with, it was argued that protection against unfair dismissal prevented enterprises from adapting staffing levels to their production cycles. The second point was that working time rigidity prevented enterprises from organizing working shifts in keeping with actual needs, especially when these were dependent on unpredictable market fluctuations. The third was that inflexible job classification did not permit enterprises to redeploy workers when and where they were needed. A fourth argument was that minimum wage regulation or, where relevant, sectoral collective bargaining,

increased overall labour costs and had a negative impact on competitiveness, in particular when they pushed pay rises above productivity increases. It was further argued that the legislation created a two-tier labour market in that it overprotected those people who were at work but acted as a deterrent for enterprises creating employment so that newcomers could be offered jobs. Thus labour law needed to be flexibilized so as to allow room for employers recruiting staff and organizing the enterprise in a more efficient manner, something which was assumed not to be feasible under existing labour law. The overall social protection system was also called into question; it was argued that apart from being financially unsustainable the benefits on offer were too generous, thus discouraging job-seekers from actively seeking work and making it less likely they would accept any job that was offered to them.

None of these assumptions were free of controversy. However convincing, the arguments of those who urged more labour flexibility were firmly opposed by no less convincing arguments from those who claimed that the apparent 'rigidities' of the labour market actually did not have a significant impact on the overall economic situation, let alone that of the labour market. Other voices drew attention to the positive economic impact of labour regulation, on the grounds, for example, that there were positive cause-and-effect relationships between high wages, labour standards and high productivity. Attention was also drawn to the role played by the labour law in the overall socio-political context, as it provided an element of social fairness which contributed to political stability.

The labour flexibility debate was very largely an ideological one, which more often than not relied on ready-made statements rather than on statistical evidence. However, as the debate continued to run, so unemployment rose to levels unprecedented since the end of the Second World War, becoming a major social and political problem. Leaving aside what so far had largely been an ideological and academic discussion, policy-makers then addressed existing social and labour regulation, in the hope that a new bargain could be worked out, with increased labour flexibility and erosion of workers' rights being traded for job creation. This paved the way for the first wave of labour law reforms in which, for the first time for many years, the law was revised with a view to permitting forms of employment different from the hitherto standard employment relationship. Most Western European countries undertook one or several of these labour market or employment promotion reforms, though the purpose and content of each legislative reform varied from one country to another.

While most of these reforms addressed all of the above-mentioned real or presumed labour market rigidities, those which proved to be the most controversial related to the contract of employment. While the standard pattern of

employment (full-time employment with a contract of employment for unlimited duration) was not cast aside, the reforms permitted the use of a wider variety of employment contracts. In a number of countries, rules protecting workers against unfair dismissal were also eased. France, for example, did away with the need for government authorization of collective dismissals while in Italy emphasis was put on the progressive dismantling of the hiring system, which provided for the compulsory intermediation of the public employment service.[13] Several countries also legislated to lengthen the probationary period and to provide for longer periods of employment during which a worker could not claim protection against unfair dismissal; for example, the United Kingdom excluded workers with less than two years of service from the protection afforded under the Employment Protection Act 1975 (later on it shortened this to one year) and Germany revised the Protection Against Dismissals Act 1951 with a view to excluding enterprises with less than 10 workers from the scope of statutory dismissal protection (the threshold was only five workers under previous legislation).

In many other countries, recourse to fixed-term contracts of employment was made easier, though the presumption that a worker is taken on for a contract of employment without limit of time was not reversed. Also, several countries (Belgium, France, Germany, the Netherlands and Japan) acknowledged the existence of triangular arrangements and consequently regulated the hiring or 'dispatching' of workers by temporary work agencies (TWAs), while some others (Spain, Sweden) prohibited that practice (a prohibition which was later lifted). Other emerging patterns of employment which date back to this time, and should be added to the list, include part-time work, on-call work, employment training schemes and some new forms of apprenticeship contracts, internships and home-based work.

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13 In Italy, a law of 1949 had introduced the Numerical Recruitment rule (*Chiamata Numerica*), a system of hiring whereby the employer was required to submit to the public employment service a list of available jobs, specifying only the number, category and skill levels of the workers needed, so as to permit the office to select the workers to be placed with the employer on the basis of order of precedence. This rule had been set up in the context of the Cold War as it had been alleged that job-seekers known to be communists were discriminated against when they applied for jobs (in particular in some big industrial enterprises in northern Italy). The *Chiamata Numerica* was used to combat discrimination on the grounds of political opinion. Though later becoming more flexible through various reforms, the *Chiamata Numerica* system was not abolished until 1991 when it was no longer needed. Some years later, in Case C–55/96 *Job Centre Coop. Arl.*, the European Court of Justice ruled that state monopoly of placement was contrary to the provisions of the EC Treaty that provided for free competition in the provision of services (Judgment of the Court (Sixth Chamber) of 11 December 1997, [1997] ECR I–7119).

As they diverged from the prevailing patterns, the emerging forms of employment became referred to as 'atypical work', a term which became so popular that it is still used more than three decades later. The term 'precarious work' was also frequently associated with atypical work as all these forms of employment had the effect of weakening workers' rights in comparison with the protection that workers enjoyed under a standard employment relationship. It is little wonder that this terminology was suggested by those who opposed the legal recognition of new emerging patterns of employment. In effect, in a 'battle of the slogans', the use of terms like atypical and precarious would seem to convey negative feelings, as much as the term labour flexibility implies that existing labour law is rigid and therefore should be mistrusted and reviewed, that is, flexibilized.

Yet none of these forms of employment were unknown before the 1970s. Temporary work agencies were already in existence in the 1940s; the well-known agency Manpower was created in 1948. Moreover, part-time work and home-based work had been in existence for a long time. But until the 1970s atypical employment had only a token presence in the overall labour market. What was different from that time onwards was the widening of the slot occupied by atypical work in the labour market. Also new were the State attitudes to these forms of employment. While for many decades the neo-Keynesian State had favoured stable employment, from the mid-1970s and early 1980s it started to have a less negative approach to atypical work. In many cases the State actually promoted atypical employment, for example when an enterprise launched new operations or agreed to take on particularly vulnerable job-seekers.

The spread of atypical work and the support it started to receive from policy-makers and law-makers came as a surprise in trade union circles and among labour law academics, an overwhelmingly majority of whom had taken it for granted that labour law could only be revised with a view to improving already guaranteed workers' rights and conditions of work. Thus, when in 1985 the International Society for Labour and Social Security Law put atypical work on the agenda of its XIth World Congress, most of the academics then attending expressed great concern, and a great majority of them made strong pleas for state intervention to stop the development of atypical employment. Some 20 years later, however, it is undisputed that atypical employment has become a structural element of the overall labour market, even if it takes a minority share of total employment.

Box 1.2 Atypical work in the United States[14]

Atypical workers – temporary workers, on-lease workers, part-time workers, trainees and apprentices and dependent-independent contractors – are a growing portion of the American labour force. In 2005 the Department of Labor classified 16.2 million people – or 12.1 per cent of the workforce – as atypical workers. Of these, there were an estimated 10.2 million independent contractors, 2.5 million on-call workers, 1.2 million temporary help agency workers and 813,000 workers for contract-work companies out of a total workforce of 139 million. In addition, in 2003 the Department of Labor found that there were over 5 million involuntary part-time workers – those who want but do not have regular employment. A survey of firms in all industries and of all sizes conducted by the Upjohn Institute found that 78 per cent of all private firms used some form of flexible staffing arrangements.

International competition

To a large extent both the sustained economic growth and the prosperity of the Golden Age of Capitalism relied on the fact that international trade was not overly affected by competition between high-wage and low-wage countries. On the one hand, well-paid and highly skilled and productive Japanese, North American and Western European workers produced high value-added goods; on the other hand, low skilled and low-paid workers in the developing world supplied raw materials and low value-added production. Customs duties and bureaucratic obstacles to imports[15] completed the protective shield behind which the welfare state distributed wealth, prosperity and protection to both employers and workers.

In the 1980s, however, this situation started to change, with the emergence of the 'newly industrialized' countries, first in South-East Asia and, from the 1990s, China and India. This was coupled with the lifting of customs protection and other non-customs barriers to global trade that came in with the negotiations which eventually paved the way to the establishment of the

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14 Katherine V.W. Stone, 'Rethinking labour law: Employment protection for boundaryless workers', in Guy Davidov and Brian Langille (eds), *Boundaries and frontiers of labour law: Goals and means in the regulation of work* (Oxford, Hart Publishing, 2006), p. 170.

15 For example, when Asian video-cassette recorders started to invade the French market in the early 1980s, the government ordered that custom formalities be completed in the small provincial city of Poitiers. Because warehouse capacity was limited in Poitiers, it effectively restricted the number of VCRs that could enter the country.

World Trade Organization (WTO) in January 1995 and with it bilateral and multilateral trade agreements. Thus high-wage and low-wage countries started to compete internationally in the same brackets of an increasingly globalized market. International flows of capital, information and other technological innovations as well as new patterns of work organization were also major contributory factors to the delocalization of production, which inevitably affected employment levels in high-wage countries. It was in this context that labour costs and overall labour regulation policies became a critical issue in Japan, North America and Western Europe, as we shall discuss in more detail in Chapter 4.

Technological change and the emergence of post-Fordist organizational patterns

The history of mankind has been punctuated by technological change. At least two significant developments took place in a very short period of time: the first one during the 1970s and the second at the end of the twentieth century. During the 1970s the steel and coal industries in northern countries entered into a long-running process of attrition; at the same time robots arrived to replace workers on assembly lines in the metal trades, while many new technologies were introduced into previously labour-intensive processes. Structural change arising out of these developments led to massive job reductions and resulted in a sharp increase in unemployment.

Yet this was not a worldwide problem as essentially it affected only the old industries in Western Europe. At that point, through negotiation and labour–management consultation, many countries addressed and mitigated the social and economic effects of the introduction of new technologies and the downsizing of some industries. State subsidies, redundancy payment funds and the widespread use of social security and other safety-net mechanisms (such as the Wages Guarantee Fund in many Western European countries or the *Cassa Integrazione Guadagni* in Italy, described in box 1.3) were amongst the tools used to cope with these changes. To a large extent, attention was focused on adjusting labour law to the emerging challenges; yet the basic assumptions on which labour law was based were not affected.

Box 1.3 Wage protection for temporarily laid-off workers: the *Cassa Integrazione Guadagni*[16]

The *Cassa Integrazione Guadagni* was created in 1947, to help enterprises that were forced to lay off workers on a temporary basis, or put workers on short-time working because of temporary economic difficulties. Under this scheme the workers received 80 per cent of their previous wages, up to a maximum level established by law, and their contributions to pension schemes were assumed to have been paid, even if they had not been. Devised originally as a means of temporary income protection for employees, in the expectation that the company and its employees would soon resume normal activity, the wage protection scheme was gradually extended even to cases in which there was no prospect of a return to normal production and work patterns, so that it became a de facto welfare instrument for the management of labour surpluses.

A reform introduced in 1991, however, sought to restore the fund to its original function of providing assistance during purely temporary labour surpluses. It imposed a rigid time limit on eligibility for making up lost pay, and recourse to special availability-for-employment and workforce-reduction procedures in cases where the surplus was structural or there was no prospect of re-employing the surplus employees. This objective was only partially achieved because, as a result of serious economic crisis suffered by Italy from 1992 onwards, the legislator intervened to modify the legal rules governing the fund's operation, and extended the time limit on eligibility for special intervention to make up pay and allowed such eligibility to extend into areas where it had been formerly excluded. In particular, special intervention was made available to commercial enterprises with more than 50 employees, to craft enterprises whose main customers were experiencing serious economic difficulties, to agricultural and stock-rearing cooperatives and to catering and restaurant enterprises.

In contrast, the second technological change, arising out of the irruption of information and communications technologies, has raised a completely different challenge, as it has profoundly affected the entire substance and organization of work. The widespread use of information technologies has generated the need for a response from policy-makers and law-makers, which in the field of labour law has still to be comprehensively developed. Below are some of the issues which have arisen as a result of the introduction of information technology in the workplace.

16 Source: European Foundation for the Improvement of Living and Working Conditions, database EMIRE, Italy, *Cassa Integrazione Guadagni (CGI)*.

- The hierarchical, Fordist pattern of work organization is no longer necessary, and is sometimes simply not feasible if the employee is not directly under the employer's supervision, for example, if the employee is a teleworker.
- Tasks are increasingly individualized; it is no longer necessary for all workers to share the same workplace as tasks can be coordinated electronically.
- Decentralization of productive processes and delocalization is made easier. The 'enterprise' becomes a strategic concept rather than a physical unit. Those who take decisions that affect the worker's job, conditions of work and lifestyle are no longer the worker's legal employer.
- It is becoming more difficult to determine what should be meant by 'working time' as the worker continues to perform work-related functions from his or her home, or is required to remain on stand-by on a bleeper or a mobile phone.
- New opportunities are available for the employer to keep an eye on what the worker is actually doing (through the use of pagers, mobile phones, electronic badges, video-cameras, screening of the worker's email and use of internet).
- Workers' personnel data can be gathered, stored and exchanged more easily.
- New illnesses and occupational hazards have arisen, which might be linked to the use of IT.

We will discuss in Chapter 5 how labour law has responded to these questions.

The end of the Cold War

The Cold War environment has had an effect on labour law in several ways. During the Cold War certain countries passed legislation which made members of the Communist Party or even sympathizers of the Soviet Union ineligible for trade union office or excluded them from certain sensitive posts. One example was the Labor–Management Relations Act 1947 (the Taft-Hartley Act) in the United States, under which members of the Communist Party were barred from holding or seeking trade union office.[17] In Germany too, discriminatory dismissals on the grounds of political opinion were made

17 Mention could also be made of the US Supreme Court decision in *Black* v. *Cutter Laboratories* (351 US 292 (1956)) which confirmed the validity of a dismissal as a consequence of the application of a collective agreement that had established as a waiver cause the affiliation of workers to the Communist Party.

possible, as civil servants could be dismissed on the sole grounds that they belonged to parties that sought 'to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany'. This referred to members of the Communist Party and those of extreme right parties, and could be applied to any job in the civil service.[18] On the other hand, Cold War politics was very probably behind some core ILO Conventions of the 1950s and 1960s, the adoption of which – as of any ILO standard – called for a large consensus between governments, labour and management. Thus the Abolition of Forced Labour Convention, 1957 (No. 105), prohibits the use of forced labour '(a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system, and (b) as a method of mobilising and using labour for purposes of economic development'; these were practices which were being used widely in the Soviet Union at the time. The Employment Policy Convention, 1964 (No. 122), urged Member States to 'declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment'. This carefully chosen wording suggested that full employment in the communist world – something which the communists argued was feasible in a socialist economy but not in a market economy – was not necessarily productive, nor was employment always freely chosen.

The Cold War also influenced labour law in a way that was more favourable to workers as both the State and the employers were supposed to be willing to trade social and labour-friendly legislation in return for workers' and unions' political support against communist ideology. To a certain extent this was not really a new departure: it has been argued that the ILO was created in 1919, among other reasons, as a capitalist response to the Bolshevik Revolution of 1917. In any event, the Cold War environment was at the root of the split in 1949 of the World Federation of Trade Unions, from which a large number of non-communist national trade unions seceded to create the

18 A representation against Germany was made by the World Federation of Teachers' Unions in 1984, which alleged that German law was in breach of the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111); under this Convention political opinion was forbidden grounds for discrimination. In 1985 the ILO Governing Body decided to refer the case to a Commission of Inquiry, which visited Germany in 1986. After having gathered a great deal of evidence, the Commission concluded that there had been a breach of Convention No. 111 by the Government of the Federal Republic of Germany. A comprehensive review of this case has been made in Klaus Samson, 'The "Berufsverbot" problem revisited – views from Geneva and Strasbourg', in *Les normes internationales du travail: un patrimoine pour l'avenir, mélanges en l'honneur de Nicolas Valticos* (Geneva, 2004), pp. 21–46.

International Confederation of Free Trade Unions (ICFTU). Unlike communist unions, which advocated class struggle and the construction of a society based on socialist ownership of the means of production, ICFTU unions endorsed and supported political democracy and market economy, from which they expected a larger share of both political participation and the national income. Indeed, many labour-friendly laws adopted during the Cold War were at the same time supported by the State and not very strongly objected to in business circles. In addition, labour-friendly legislation was economically sustained by overall post-Second World War prosperity.

The end of the Cold War, coupled with the internationally competitive environment of the last few decades, has led to a change in the parameters within which labour law had previously evolved. Two variables upon which labour law had grown during the Golden Age of Capitalism have now disappeared.

Current crises in labour law

Crises in labour law today can roughly be grouped into four different categories: those which relate to the coverage of the law itself; the adaptation of labour law to new technologies and new patterns of work organization; the territorial scope of the law; and challenges to the ideological foundations of labour law.

First, in relative terms, the coverage of labour law tends nowadays to decrease as larger groups of workers perform work or provide services beyond the scope of an employment relationship. This trend is in sharp contrast with the expanding coverage of labour law that had prevailed during most of the twentieth century. One of the characteristics of labour law in the last century was precisely its expansive nature. What is today meant by labour law took its roots from rules that were initially applicable to factory work. Indeed, it is worth recalling that in the first decades of the twentieth century 'industrial law', not 'labour law', was taught in faculties of law. In Britain, for example, the first piece of labour legislation was the Factory Act of 1802.[19]

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19 The first Factory Act was enacted in 1802: it focused on child labour in cotton and paper mills. Further amendments and enlargements turned the Factory Act into a detailed set of regulations for working conditions in industrial workshops, but did not address the employer–employee relationship, which was dealt with mainly under the Master and Servant Act. (Nowadays under UK labour law, the contract of employment is a common law contract, which statutory law and regulations provide with exceptions and immunities rather than positive rights.) Factory Acts still make up the backbone of labour regulation in countries such as India and Pakistan, whose legal systems have drawn on British traditions.

Consequently the first legislative concerns were focused on limiting the hours of work, the work of minors and women, and workers' compensation in case of industrial accidents and occupational diseases. Nevertheless it did not take long to extend the field of application to non-industrial environments, first to commerce and services and later on to agriculture. Labour laws also had an impact on public administration, in that civil service statutes adapted at least part of the labour law principles to the relationship between the state and its employees. This reached its peak in the 1970s and the 1980s when practically any relationship between a physical person who performed work or provided services in subordination to another person or to a legal entity was presumed to be in an employment relationship if it was in the private sector or in a service relationship in the case of public administration.

So where do we stand today? Everything points to the fact that the scope of labour law has a tendency to attrition. First, one should bear in mind that, whether de facto or de jure, labour law does not apply to the informal economy, which is taking a bigger share in the overall labour market worldwide, thus proportionally reducing the scope of application of labour laws. This trend can be clearly observed in most developing economies: for example, according to ILO research in Latin America, between 1990 and 2003, despite all the economic adjustment and market reform of the 1990s, private investment did not grow sufficiently to create enough formal employment for newcomers to the labour market. It follows that six out of 10 newly employed people were working in the informal economy, which by 2004 represented 63 per cent of the overall employment in the region.[20]

This phenomenon is not, however, limited to developing countries. In industrialized countries too, while salaried employment is still the prevailing pattern, it is no longer as hegemonic as it was in the second half of the twentieth century. Nowadays, autonomous work and other forms of non-subordinated employment – which the Italians call 'parasubordinated' – are undoubtedly increasing everywhere. The explanation of this phenomenon is quite complex; it certainly does not arise from a single cause. However, we will return to this subject in the following chapter, when we address the scope of the employment relationship.

The second category of crisis lies in the adaptation of laws to new technologies and work patterns. While labour law evolved against a background provided first by a Taylorist[21] and later on by a Fordist pattern of work, today it has difficulties in adjusting to new patterns of work organization that are

20 ILO, *Labour overview of Latin America and the Caribbean, 2004* (Lima, 2004).

21 Taylorism is a theory of management that analyses and synthesizes workflow processes, particularly in mass production, with a view to improving labour productivity.

emerging, which – for lack of a better term – are called post-Fordist. It should be recalled that within the Fordist model all the production processes, and often their marketing too, were put under a single command. Also, within one company all the employees were in principle subordinated to a single employer. Subordination and dependency were practically synonymous terms and generally interchangeable. While outsourcing and subcontracting were actively practised in some industries or activities, in most others they were rather marginal. Employee status provided the worker with protection and the wisdom of labour-friendly legislation was not under discussion.

Fewer workplaces today resemble this model of a single-employer, single-job site, with full-time jobs which last for a lifetime. Like Fordist enterprises, post-Fordist organizations keep their strategic objectives under a single and unified command. However, Fordist companies also keep all the production and distribution processes under direct control; by contrast, post-Fordist organizations decentralize and contract out most of their production. This phenomenon is known as *productive decentralization*, which encompasses several different definitions; it includes varied practices and has fuelled much discussion in national and international labour law forums.[22] Post-Fordist organizations define the activities and operations which they keep under direct control – their core activities, which are almost always those of greater added value – and contract out non-core activities to other companies. This is not an entirely new phenomenon, as big assembly processes have always relied more or less on parts from external suppliers. What is new, however, is the ever-widening definition of what constitutes non-core activities, which can now encompass entire production processes.

The contracting out of non-core activities can take different forms: some, such as transfers, mergers and takeovers of enterprises (or a part of them), are well known and their legal effects are often addressed by labour law. In contrast, other strategies for decentralization may take the form of arrangements that the law in general and labour law in particular have great difficulty in grasping. Practices like outsourcing, networking and franchising fall within this category. Loans of workers among legally different companies, as well as the supply of labour through temporary work agencies, can also be part of the same strategy. In the same way, increased use is made of civil or commercial contracts for the execution of tasks or the provision of services

22 Thus, the subject was addressed in the Xth Spanish Congress of Labour and Social Security Law, Zaragoza, 1999, and in the XVIIIth World Congress of the International Society for Labour and Social Security Law, Paris, 2006. See also Juan Rivero Lamas and Angel Luis de Val Tena (eds), *Descentralización productiva y responsabilidades de la empresa: el 'outsourcing'* (Navarra, Aranzadi, 2003).

which in the Fordist pattern were carried out directly by the main enterprise using its own employees.

In all cases this strategy has a potentially destabilizing impact on the legal protection of workers, whose employment security and conditions of work may depend on the strategic decisions of an entrepreneur who, legally, is no longer their employer or never has been. The notion of *business risk* is implicit in labour law: those who develop an enterprise project harvest its benefits but also assume its risks, including those which arise out of the employment of workers who are subordinated to the enterprise. Yet, following the logic of the productive decentralization argument, a parent company does not assume the risks of the employer in relation to the workers of its subsidiaries or contractors. This is a systemic issue, to which labour law has not so far been able to elaborate a systemic reply.

The third crisis facing labour law today arises out of the weakening of the effectiveness of national law in a globalizing environment. Apart from some exceptions with respect to transnational employment relations, national labour law is applicable only within the political boundaries of a given national State. However, because of technological change, as well as the opening up of international trade, movements of capital and technology, and therefore investment, can nowadays ‘jump’ national borders, whereas laws do not and cannot. On the other hand, it would be naive to deny that labour law places some financial burden on to the shoulders of the employer, and this has obvious importance when the time comes for an investor to decide where to invest. All other factors being equal, moderate labour costs and business-friendly legislation can act as important incentives for investment.

At the same time, tariff barriers and other forms of protectionism tend to be dismantled over time, something which deprives countries not only of revenue but of an important means of protecting both the internal market and the local workers. It follows that, nowadays, a State is no longer entirely free to formulate its own labour and social protection policy, because it cannot improve local levels of social protection without considering the potential implications on the country’s competitive position vis-à-vis other states that do not do the same. This cannot but limit the effectiveness of labour law in a purely national context. For that reason, we can talk of a crisis of territoriality, for the economy is worldwide whereas the law is binding only within national boundaries. Unless labour law, like the economy, can become transnationally effective, it will be very difficult to maintain the dynamics that allowed it to offer better protection to more and more workers during most of the last century.

The fourth crisis derives from the overall challenge that neoclassical thought has raised against the welfare state. Neoclassical thought has given

birth to neo-liberal and *structural adjustment* policies, which have quite often been demanded by international financial institutions as a pre-condition for the granting or the release of loans. Its cornerstone is faith in the market's capacity for self-regulation; this is why the market is placed above all other values and at the heart of the society's economic, social and political interactions. The assumption is that what is good for the market is also good for society as a whole. Like Adam Smith's invisible hand, the market is capable of generating all the rules it needs to work properly. In neoclassical wisdom, heteronomous regulations are likely to produce malfunctioning, although sometimes this is a necessary evil. From this viewpoint, labour law is itself a necessary evil, and should be limited to the setting up of a threshold of basic rules. Beyond that threshold, labour regulation can only serve to prevent the market from generating growth, employment and wealth, which in time would be fairly distributed. Neoclassical thought is reflected even in its terminology: it refers to labour law as 'labour market regulation', giving the word 'regulation' a negative connotation. Terms such as 'manpower', 'workforce' and 'human resources' are preferred to 'workers'; labour rules are called 'constraints' and labour rights are called 'labour costs'.

There are many reasons to believe that this change of language is not merely semantic. For example, 'labour market regulation' is one of the parameters used by the World Bank's *Doing Business* database to help potential investors to assess and perhaps select the countries in which they might invest. The database provides indicators on the cost of doing business by identifying specific regulations, which it believes enhance or constrain investment, productivity and growth. These indicators relate to a number of topics, including the employment of workers.[23] With respect to labour, the database develops indicators relating to the difficulty of hiring new workers; restrictions on working hours; the difficulty of dismissing a redundant worker; and the cost of dismissal, expressed in weeks of wages. Higher values in the table indicate more rigid regulations while the absence of regulation is represented by 0. Countries with business-friendly labour regulation, or no regulation, are rewarded with a low index while those with labour-friendly regulation get a higher index. Implicitly, this conveys the message that countries with labour-friendly regulation are unattractive for investment. On the contrary, regulation to protect investors or enforce contracts is considered favourably in the

23 *Doing Business* provides indicators on the following topics: starting a business, dealing with licences, registering property, getting credit, employing workers, protecting investors, paying taxes, trading across borders, enforcing contracts and closing down a business. The indicators are developed by the Finance and Private Sector Vice Presidency of the World Bank Group.

Doing Business indicators. In short, State regulation is seen as a virtue when it protects business and a sin when it protects workers.

There is a great deal of literature and analysis which either follows this approach or strongly rejects it. Those who challenge this view remind us that neoclassical thought assumes that the market is perfect, and therefore does not acknowledge that monopolies or cartels exist, not to mention more or less hidden subsidies that in practice undermine fair competition. It also assumes that rules are respected by all, that there is neither public nor private corruption, consumers are perfectly informed and credit is made available to all those who intend to initiate or develop a business. It has also been argued that the *Doing Business* database is based on methodological assumptions that are not consistent with reality (see box 1.4).[24] It should also be added that on the basis of research carried out on OECD countries, the ILO did not find evidence that supports the assumption that legislation which protects against unjustified dismissal has had a negative impact on employment;[25] some years ago the OECD came to comparable conclusions with respect to its Member States.[26]

Box 1.4 An ILO view on *Doing Business: The Employing Workers Indicator (EWI)*[27]

In November 2007, the Governing Body of the ILO had a discussion on the EWI of the World Bank's *Doing Business* indicators. The Secretariat prepared a paper noting some of the conceptual and methodological flaws of the indicator as well as its potentially negative implications for policy making. In particular it stated that:

- The EWI is a poor indicator of the investment climate and of labour market performance to promote employment and decent work.

24 See in this respect the ICFTU reply to *Doing Business*, available online at http://www.icftu.org. See also Alain Supiot, 'Le droit du travail bradé dans le "marché des normes" ', in *Droit Social*, December 2006, and Janine Berg and Sandrine Cazes, 'Policymaking gone awry: The labour market regulations of the World Bank's Doing Business Indicators', in *Comparative Labor Law and Policy Journal*, Summer 2008.

25 Peter Auer and Sandrine Cazes, *Employment stability in an age of flexibility: Evidence from industrialized countries* (Geneva, ILO, 2003).

26 OECD, *Employment Outlook* (Paris, 1999).

27 Excerpts from Document GB 300/4/1, 300th Session of the ILO Governing Body, November 2007, World Bank *Doing Business Report*: *The Employing Workers Indicator* (document submitted for debate and guidance).

- There are serious methodological and technical limitations with the indicator.
- The design of the indicator and the scoring system suggests that reducing protection to a minimum and maximizing flexibility is always the best option. The EWI does not take into account the need for balance in labour market institutions and policies to ensure that both enterprises and workers have the right combination of security and flexibility to adapt to competition while ensuring an adequate security of income and employment.
- International research does not provide conclusive evidence for the view that labour market regulations are the main cause of informality or that lowering labour market regulations beyond certain points will promote employment and transition to formality.
- The Bank claims that 'it is now possible for an economy to receive the highest score on the ease of employing workers ... and comply with all 187 ILO Conventions'. This claim is misleading. Countries can achieve an EWI high score and face problems in the application of ratified Conventions.
- The *Doing Business* ranking has been used to promote policy reform in developing countries, including via direct or indirect conditionality. While benefits can be derived by reducing the cost of red tape and unnecessary regulations to a minimum, there is a serious problem with promoting reforms of labour law based on the same cost-minimization principles.

In addition, the paper noted that:

- There is little in common between the findings of the *Doing Business* and other investment climate indicators.
- The EWI does not take into account the raison d'être of labour legislation.
- The EWI does not consider the wider economic benefits, or 'positive externalities', of labour market regulations.

On the other hand, the approach whereby labour rules are equated with constraints and additional costs fails to consider those rules which would have positive economic effects. Thus safety and health regulations as well as laws and regulations that encourage training doubtless have beneficial effects on productivity; paid vacations stimulate tourism and leisure industries; maternity leave encourages the workforce to reproduce; and greater job stability confers greater experience on the worker, which is very likely to make him or her more productive.[28] For example, it is commonly accepted that Japanese

28 See for example Peter Auer, Janine Berg and Ibrahim Coulibaly, 'Is a stable workforce good for productivity?', in *International Labour Review* (2005), Vol. 144, No. 3.

shūshin koyū (life employment) has created a strong link between Japanese workers and their companies and increased motivation, which would seem to have played a crucial role in the economic success of Japan. In short, rights-based regulation – or, if preferred, 'regulated flexibility' – can also be an important asset for a country developing a comparative advantage in global trade and investment.

Furthermore, there would seem to be some inconsistency in neo-liberal thought, for it advocates free transnational movement of goods and capital, but not of labour, despite the fact that it treats labour like a commodity. Thus US farmers who receive State subsidies can freely export their products to Mexico, but Mexican farmers who are ruined by US subsidized agricultural exports cannot freely emigrate to the United States to sell their labour in the US labour market. Finally, one cannot fail to observe that those arguments which challenge labour law on the grounds that it affects business seem to follow a reasoning which in its substance is not so different from the claims made during the nineteenth century against the abolition of slavery or of child labour in factories.

However, it would seem that very few, if any, of these considerations have been taken into account in a great number of labour market reforms, which have been ideologically inspired by neo-liberal thought and have thus disregarded the positive cause-and-effect relationship between labour law and the economy. The weight of neo-liberal thought in today's policy-making therefore raises a challenge of enormous importance to labour law.

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