

The Social Contract Revisited

Work, Employment,
and Industrial Relations
in the Modern Social
Contract State

REPORT AND ANALYSIS OF THE THIRD WORKSHOP OF
THE SOCIAL CONTRACT REVISITED, OXFORD
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Introduction

This report provides both a record and a critical assessment of the fourth workshop of the Foundation for Law, Justice and Society's programme, *The Social Contract Revisited*. The workshop was held in Oxford on 29–31 October 2008 and dealt with work, employment, and industrial relations in the modern social contract. Work and the workplace have been continuing themes throughout the programme. The first workshop highlighted the fact that the place of work within the social contract is yet to be determined. The importance of work in providing income support and other social benefits, as well as its role in securing decent pensions featured in the second. The third workshop considered whether tax revenue raised from paid work should be the main vehicle for funding essential public services.

A natural development of those earlier discussions was to examine directly the ways in which work is legally, culturally, and economically recognized and supported, and how it is shaped by these factors.

The workshop opened with a lecture by Professor Hugh Collins, which portrayed and criticized recent policy changes with regard to the work environment. The first panel expanded on the theoretical perspective by identifying the moral and legal location of the workplace within our social systems. The second panel focused on the global social contract in relation to work, while the third panel examined the role of unions in advancing equality, social mobilization, and social solidarity. Finally, the fourth panel involved discussions concerning the role of the state and of unions in response to challenges confronting contemporary employment policy.

Beyond the Third Way in Labour Law: Towards the Constitutionalization of Labour Law?

Keynote lecture by **Professor Hugh Collins**, *London School of Economics*

Chair: **Professor Denis Galligan**, *Member of the Board of the Foundation for Law, Justice and Society*

Professor Collins's opening lecture set the stage for the workshop by suggesting that current employment policy represents nothing less than a new conception of justice in labour law. This is because work and employment serve primarily, but not solely, as principal sources of wealth, thereby acting as platforms for the distribution of wealth equality or inequality. Depending on the circumstances, the employment relationship may be a fundamental source of social relationships and personal fulfillment, but can also act as a source of subordination and exploitation. For these reasons, it became important in market economies, at the beginning of the twentieth century, for the opposing forces of labour and capital to reach a form of social contract or constitutional settlement, in order to provide a framework for collective bargaining between employers and unions.

The terms of this social contract were founded on a mutual recognition: trade unions recognized the legitimacy of private ownership of the means of production, and employers would concede both an input into the management of the enterprise and the right of the union to bargain as a cartel on behalf of their members for better wages and conditions. The outcome of the procedure would be regarded as a just settlement, and a fair distribution of wealth and power.

This is an example of, firstly, law's ability to provide a framework while leaving the concrete arrangement to the negotiation of the parties and, secondly, the

tendency to equate procedural justice, at least to some extent, with substantive justice (Sunshine and Tyler 2003: 555).

Collins's argument is that this agenda, known as 'industrial pluralism', remained intact throughout the twentieth century, despite frequent changes in the law. More concretely, and somewhat controversially, Collins argues that, despite efforts by conservative governments to weaken the power and influence of unions, the key elements of industrial pluralism remained in place until they were fundamentally undermined by the new vision that was offered by Blair's New Labour.

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While conservative governments did constrain unions through legislation, they did not offer a new conception of *justice* to replace the one achieved through collective bargaining. Their aim was to tilt the balance of power in favour of employers, while keeping the existing structure in place. The real break with industrial pluralism, Collins claims, came with the Third Way agenda of the Blair government.

Collins's analysis stands at odds to much popular wisdom on the motivation and effect of Conservative policy and legislation. Paul Davies, for example, has argued that they amounted to a 'revolution in governmental policy relating to the collective

representation of workers vis-à-vis their employers' (Davies 1993: 167). He cites a Government Command Paper that claims that, 'traditional patterns of industrial relations, based on collective bargaining and collective agreements, seem increasingly inappropriate' (Davies 1993: 169).

Collins acknowledges that Conservative governments sought to increase flexibility in employment relations (a matter that was dealt with in some detail throughout this workshop), but argues that this does not necessarily constitute a proposal to abolish collective bargaining altogether. But it is difficult to see how this is logically possible. Collective agreements do, in fact, serve as the 'regulatory engine' that limits the range of options an employer has with regard to an individual employee (Davies and Freeland 2001: 765, 770). Moreover, the range of issues that collective agreements often regulate includes not only wages, but also terms of employment, conditions for dismissal, and a role for the union in corporate decisions. It should be acknowledged, then, that if one advocates flexibility (as Conservative governments patently did), doing away with collective agreements is a natural policy choice to achieve that goal.

However, the main thrust of the lecture is not on the legacy of Conservative governments, but of New Labour governments. Here it is easier to agree that the framework put in place by Margaret Thatcher survived the reelection of Labour governments in 1997 and 2001. Collins identifies three elements of the social contract drafted by New Labour in employment and industrial relations: firstly, the promotion of social inclusion to encourage labour market inclusion; secondly, the promotion of dialogue in the workplace to achieve competitiveness

and fairness; and, thirdly, enhancing the competitiveness and profitability of business.

Collins suggests that these elements signify a break from the twentieth century political settlement in three respects: firstly, New Labour was no longer interested in the distribution of wealth and in questions of inequality; secondly, the government had no hesitation in intervening, through legislation in working relations where it saw it necessary to promote certain social goals; and, thirdly, individual bargaining would replace collective bargaining as the primary determinant of pay and conditions. It may be noted that these are obvious intellectual inheritances from Conservative governments. Friedrich Hayek, whose influence on Thatcher has been well-documented, has argued that social justice is a 'mirage', and that distributive justice is 'meaningless'. This indeed sits very well with the famous Thatcher quote that 'there is no such thing as society, only individuals'. Furthermore, the Conservative governments made a clear effort to disestablish collectivism and to replace it with individual bargaining. Therefore, it may well be argued that a different conception of justice was in place before the first New Labour government.

Viewed thus, Professor Collins sheds light on the way New Labour employment policy serves as an extension of the Conservative conception of justice, and as such, a fundamental new social contract. A consideration of the different possible interpretations of the social contract that have been proposed in previous workshops would suggest that this new social contract is devoid of a Rawlsian pursuit of a just end-state such as a more egalitarian society, and closer to a Hobbesian conception of guaranteeing procedural justice necessary for society's self-preservation.

SESSION ONE:

What is Work? Activation Policies and Care Work

Professor Joanne Conaghan, *Law Faculty, Kent University*. 'Gender, Work, and Care: a Labour Law Perspective'

Professor Linda McClain, *Law Faculty, Boston University*. 'Care, Work, and the Social Contract: What's the New "New Deal"?''

Chair: **Professor Neil Gilbert**, *University of California at Berkeley*

The purpose of the first session was to explore the status of work, especially wage work, as a social obligation that may be legitimately imposed on individuals as a condition for certain entitlements. The papers queried to what extent forms of non-wage work, including care work, should be recognized.

An interesting socio-legal phenomenon that lends itself as an object for such analysis is the policy of activation which has been developed by governments of developed countries over the past two decades. This policy, also known as 'welfare to work', includes as its central tenet the effort to move more individuals into the labour market. But a closer look at these policies shows that different countries define work in a range of broad and narrower terms.

The two papers in this panel focused on such policies, as implemented in Britain and in the United States, which offer interesting perspectives on basic questions of work and employment, including the meaning of work, the role of the state and of the legal institutions, and identity-grounded conceptions of justice, such as gender-justice, that complement the broad idea of 'social justice'.

Joanne Conaghan's analysis of New Labour's activation policies echoes Hugh Collins's critique in three respects: firstly, activation policies are heavily focused on individual agency and responsibility, and thus

eclipse traditional labour law discourse which is more concerned with collective power relations between capital and labour; secondly, the focus on social inclusion is interpreted as labour market inclusion, with little concern for the redistribution and egalitarianism that should result from participation in the labour market; and, thirdly, activation has an overarching aim of fostering economic growth.

Should flexibility and economic growth take precedence over the eradication of poverty and promotion of independence?

Conaghan's paper brings refreshing clarity to the issue. After assessing the advantages of activation policies – getting people off welfare; eradicating poverty; promoting choice and independence; and promoting macro goals such as economic growth, labour market flexibility, and fairness – Conaghan questions why activation policies are so controversial. She identifies four reasons. Firstly, the stated goals are not always necessarily compatible with each other. For example, should flexibility and economic growth take precedence over the eradication of poverty and promotion of independence? Secondly, the notion of work problematically includes only *paid* work; thirdly, the rhetoric of choice and consent, which is central to activation policies, often masks an obligation to work, backed by sanctions and penalties; fourthly, the moral undertone of activation policies reflects the view that those receiving benefits are 'undeserving' of state assistance, rather than the view that such benefits are an investment in social goals, such as the facilitation of good parenthood or individual choice.

Activation policies do, indeed, present another dimension of the decline of labour law.

Traditionally, labour scholars (and unions) have

not been concerned with people who are not employed. Governments that sought to increase flexibility and competitiveness *within* the labour market could do so by embracing policies that seem to target other social and economic matters.

Such policies do include a social and labour market agenda. Importantly for Conaghan, this agenda is based on a 'dual earner' family model, which replaces the post-War male-breadwinner model. The change in model has significant implications, mainly for women. The new model is advanced not as a new set of rights for those faced with gaps in their income, but rather as a social goal of widening the pool of talents available to the labour market. Employees are thus encouraged to enter and to stay in the workforce. The state is implementing, through its administrative and legal organs, a normative, disciplinary and value-laden agenda that has an effect on the structure of family and its role with regards to the labour market.

The issue, however, is not only an ideological one. Women's increased participation in the workforce creates a real social and economic problem of a 'care deficit' or 'care gap'. Somewhat paradoxically, women's entry into the labour market is fulfilling the traditional feminist agenda of 'defamiliazing' care. However, family-friendly policies in the workplace, along with the reduced support for women who choose to care for children, move care solutions from the family directly to the market. The state, then, is subject to little pressure to offer a publicly funded care strategy of its own.

Other related issues, which are less developed in the paper include the following. Firstly, *should* care be defamiliazed? In other words, is it in the best interest of the family and the state to move child care outside the family? Secondly, the national and racial implications of defamiliazing care are central, since many child minders are immigrants from less developed countries (who often have children of their own). Thirdly, the presumption that those who can work should work carries with it incipient illiberal tendencies mandating the power to regulate an

individual's life. Fourthly, child care is only one instance of an array of possible 'care' scenarios. Others include care of the elderly and care of the disabled. The tendency is to outsource both to the market, although it is less than clear that this benefits all those involved.

Linda McClain's portrayal of American welfare reform describes the sea change brought about by the 1996 Temporary Assistance for Needy Families programme. This programme, initiated by a Republican Congress but signed by President Clinton, replaced the sixty-year-old Assistance to Families with Dependent Children. McClain notes the dominant new rhetoric of welfare reform, which employs the 'mechanism of contract'. Contractual language is used to reconceive welfare rights not as an entitlement but as conditional on the fulfilment of certain responsibilities, including, preeminently, the obligation to work.

Forced inclusion into the labour market, especially of women, is prone to have significant effects on families, especially with respect to the 'care crisis', noted above. Quoting welfare scholar Lucie White, McClain asks:

How could public policy encourage and enable parents of both genders, at all income levels, to play a major role in caring for their children, without reinforcing either the gendered distribution of care work or the marginalization of caretakers from waged work and public life? (McClain 2006: 94)

Such a question may be used to guide deliberation about a new contract for work. Among possible policy instruments that could advance a positive solution, three are suggested: firstly, family leave as part of employment benefits package; secondly, a reduced, forty-hour week; and, thirdly, provision of quality child care, elderly care, and care for people with disabilities.

But McClain's analysis is also forward-looking. Although written before the 2008 election, she searches the Democratic Party platform to discover what may be a new social contract or, as the title of

her paper suggests, a 'new "new deal"'. In certain respects, it does not deviate from the Clinton paradigm, and often refers to the expectation that one should be able to succeed if one 'works hard and plays by the rules'. This expectation has recently become a powerful American motto (Handler and Hasenfeld 2007: 30). But the danger is that the 'rules' merely serve to underpin a controversial moral or ideological agenda, as manifested in the Poor Law distinctions between deserving and undeserving poor.

So, while the new Democratic Party platform seems intent on restoring faith in the government's role in the face of changing global circumstances, it remains relatively constrained by traditional paradigms.

Concrete policy suggestions, such as seven-day leave with pay and the right to *petition* for flexible arrangements (not necessarily to receive them) seem quite modest, when compared to European policies. Similarly, the language of responsibility for taking a role in children's lives, *and* for participating in the labour force, is a continuation of traditional thinking, albeit with a more generous implementation.

A new social contract must take into account the advantages of a parent (not necessarily a mother) spending more time with his or her children, and the role of the state in realizing this goal. In so doing, it will address the growing problems of neglect and restore a more positive work–life balance.

SESSION TWO:

The Global Social Contract

Donald Dowling, *White and Case*: 'US-Based Multinational Employers and the "Social Contract" Outside the United States'

Professor Karen Bravo, *Law Faculty, Indiana University*. 'Transborder Labour Liberalization: A Path to Enforcement of the Global Social Contract for Labour?'

Chair: **Professor Fred D'Agostino**, *University of Queensland, Australia*

The second session dealt with two interrelated yet distinct phenomena resulting from the effects of globalization on labour markets. Firstly, international competition has made it difficult for employers in developed countries to provide social benefits such as health and pensions, to the extent they have in the past. This has led to companies moving to countries where lower wages are paid and benefits are less generous. Secondly, foreign workers pose a challenge to a host nation's solidarity and homogeneity. While many developed countries depend on the labour of guest workers, it is often the case that their rights and status are not secured. They are excluded from the host country's social contract. Both these issues raise the question of the boundaries of the social contract and the feasibility of constructing a 'global social contract'.

The lack of minimum protection laws in many states have led to 'legal sweatshops' being erected on US soil

Donald Dowling argued that, despite the fact that employers play a vital role in any given society, they have not been brought within the social contract. Their obligations have not been systematically

considered, especially in comparison with their performance domestically. This comparison, which Dowling provides, is notable in the United States, where labour rights are in a poor state, with no caps on hours worked, no severance pay, no recognition of trade unions, and no health insurance. Dowling contends that a prime problem is the lack of minimum protection laws in many states, which have led to 'legal sweatshops' being erected on US soil. Dowling seeks to dispel 'exaggerated, or even wrong' accusations of the practice of US employers when they operate abroad. Far from exploiting employees in developing countries, such employers adhere to standards that are much more onerous (from their perspective) than the comparable standards that control US-based industries. These include paid leave, maternity leave, recognition of unions, health insurance, and so forth. This practice may be explained by rational self-interest, such as the interest in avoiding penalties and bad publicity. A different explanation is needed to account for the fact that American employers adhere to standards above those demanded by domestic laws, as observed in the willingness of American employers in the retail, apparel, toys, and home-improvement industries to impose upon their suppliers codes of conduct that protect the *supplier's employees*, even though no legal obligation exists to do so. Similarly, some American employers offer higher pay than their domestic competitors so as to attract local talent.

Dowling presents a complex environment in which the multinationals operate, and the picture is not altogether positive. While it may be the case that most American employers abide by the letter of the law (and even above it, if it increases their chances of attaining good workers), this is not necessarily to say that they are not behaving in an exploitative fashion. Though employers may be 'playing by the rules', they are often rules that were the product of their own influence. There is evidence that Multinational

Enterprises (MNEs) act to limit not only external competition, but also growth of local business.

A related problem is the responsibility of American employers to their suppliers' employees. The fact that this responsibility, if it exists, is an extra-legal responsibility, attests to the structure of the law and its biases. According to OECD Guidelines for Multinational Enterprises (2000 Section II.10), MNEs are expected to 'encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the *Guidelines*'.

Arguably, responsibility for the chain-of-supply should be incumbent on employers, and we should reject business patterns that seek to outsource responsibility for employee welfare along with production.

The argument thus presented also begs the question: if labour standards in developing countries are so generous, why are US enterprises relocating to these countries? Two possibilities arise: one is that there is a significant gap between the law on the books and the law in action, and that these employment rights are not manifested in reality; another, that labour standards may be more generous but pay is very low. These possibilities are not mutually exclusive, and both are of general interest. The first, concerning problems of implementation, is not uncommon in the field of employment and labour relations. The second point shows that the false conflation of pay and conditions' should be disaggregated, for the two may require a very different analysis.

Karen Bravo's paper addresses the reverse phenomenon within the global social contract: instead of MNEs moving out of developed countries, the focus is on labour migration into those countries. The argument, in essence, is striking in its simplicity:

1. Capital and labour are part of an interconnected mix.
2. Liberalizing the movement of capital through free trade agreements without liberalizing the movement of labour (migrants) puts labour at a

disadvantage that is hard to justify and ineffective.

3. The solution, then, should be, to liberalize labour from nation state constraints.

The economic and legal structure created by a variety of free trade agreements grants MNEs the freedom and, indeed, the incentives to move to less developed countries. But allowing movement for one actor (MNEs) while restricting movement for another (the migrants) is hypocritical; it also distorts transnational labour markets by creating a context that facilitates their exploitation.

Bravo describes how MNEs can draw on technology and capital superior to that of the local competitors operating in a developing country and may thereby disrupt existing social and economic arrangements, bringing about displacement and unemployment. But immigration laws prevent individuals from responding to these changed circumstances, as classical economic theory would expect. They are held immobile by national borders of the states, and serve as a pool of cheap labour.

Whilst some people may leave the developing country and enter, illegally, a developed nation in search of employment, their illegal status significantly reduces their bargaining power in the labour market, exacerbating the disparities between employer and employee, and allowing for employee exploitation that in turn drives down wages of local, legal workers.

To frame the argument in social contract terms, while labour is confined within a domestic social contract, MNEs can operate within a global, borderless social contract. As logically convincing as Bravo's argument is, it seems politically impractical. The reason for this discouraging conclusion is the juxtaposition of two conceptions of justice: on the one hand, a distributive justice agenda that revolves around an economic analysis of incentives and disincentives; and, on the other hand, a conception of justice that is grounded in politics of identity, feelings of solidarity, culture, inclusion, and exclusion. To put matters more bluntly, racism and

ethnic strife inhibit what would seem to be an economically rational and moral policy.

However, history may provide some basis for optimism that this situation may change over time. Over a period of several centuries, the social contract developed from a very localized concept to a national one. The move to a global social contract may be an extension of this trend.

The practical implications of this policy suggest that it may not have the immediate dramatic effects of mass migration. People are motivated not only by the prospects of higher income, but also by family ties, community relationships, and cultural norms that lead them to stick to the familiar and the convenient.

A telling example is provided by Britain's decision to allow free movement for nationals of the eight central and eastern European countries that joined the European Union in 2004. Though there were worries that this decision would lead to mass immigration and to eventual unemployment in Britain, a Department of Work and Pensions study revealed that, 'there was no sudden flood of migrants from the new EU Member States, but rather a steady flow to sectors where labour was in demand' (Portes and French 2005: 4). The research concludes that, 'the economic impact of accession on the UK labour market appears to have been modest, but broadly positive' (ibid.: 33).

SESSION THREE:

Industrial Relations: Social Dialogue and Social Contract

Professors Paul Teague and John Grahl, *Queen's University, Belfast*: 'The New Social Contract and Industrial Relations'

Attorney Allison Beck, *Machinists Union*: 'Social Dialogue in US Industrial Relations – Can We Talk?'

Dr Doreen McBarnet, *Oxford Centre for Socio-Legal Studies*: 'Tax and Corporate Responsibility'

Chair: **Paul Dodyk**, *Chairman of the Advisory Board for the 'Social Contract Revisited' programme*

As unions rapidly decline, and as collective agreements become less significant as a mechanism for regulating labour relations, minimum standards through legislation have taken the place of collective agreements in some countries. In others, however, industrial relations have taken a different turn, and unions are invited to take place in a continuous social dialogue, one that includes employers and government.

Presentations in this session analyzed the reasons for the decline in union power on both sides of the Atlantic, and assessed the efforts of unions in European countries to revisit their roles and obligations, in search of a new social contract between labour and capital.

John Grahl and Paul Teague identify the traditional social contract, both in relation to collective agreements that determine the economic status of those in employment, and the welfare state as it governs the rights and obligations of those suffering a loss of income. By their analysis, this social contract is fragmenting, possibly irreversibly so, owing to two main factors. The first is the trend towards greater *flexibility* in industrial relations. Traditionally, trade unions generally produce greater rigidities in the labour market, but their aim of securing sector-wide

collective agreements is in inherent tension with, and being superseded by, the corporate interest in reaching particular, decentralized, and even individualized contracts with employees. This corporate interest is often referred to as part of the agenda of flexibility, here understood as the ability of employers to set wages and conditions of employment in a manner that quickly responds to market and technological changes.

Employers have, therefore, been aiming to reduce the coverage and density of collective bargaining, and have successfully managed to weaken the powers of trade unions in the process. As a result, the role of trade unions as the effective guarantors of the social contract at work is undermined. One notable consequence is the sharp rise in income inequality. Collective agreements were relatively successful in keeping wage inequality in check, by placing both a floor and a ceiling on wage settlements. As the coverage of collective agreements is reduced, so is the ability of trade unions to fulfill this role.

A second, less observed, explanation for recent fragmentary trends in the social contract at work involves the growing influence of human resource management (HRM). Having been diverted in recent years from its traditional role of securing the welfare of employees, HRM is now being deployed for the more expansive, employer-centric goals, identified by Hugh Collins, of increasing productivity and efficiency in the firm.

So if collective bargaining serves as the platform for the traditional social contract at work, the HRM model may be seen as setting the conceptual and organizational platform for the individualized, modern contract. The implications of this model have yet to be studied, but it is a clear possibility

that HRM increases the divide between core and periphery workers. HRM has the potential, through the use of targets and indicators, to erode the working relations between 'insiders' and to 'performance manage out' groups of workers. This change reflects the reduced role of collective agreements in defining the rights and obligations in the workplace, in favour of a more individualistic perspective of employment relations. As a result, workers who previously might have turned to trade unions as their representatives in employment disputes, have instead been increasingly using litigation in courts. As we have seen in the gender-focused analysis above, some of this litigation is based on identity politics that have, at least to an extent, replaced the classic, labour vs. capital divide of the past.

The 'constitutionalization', or 'juridification' of employment relations is a growing phenomenon, resulting in negative externalities, including lawyer fees, instability in the workplace, an adversarial atmosphere, and the decentralized and disorganized character of many modern labour markets. These externalities have replaced the positive goods supplied by the traditional social contract at work.

Globalization, advances in technology, and changes in family structure, demand a renewed emphasis on employment security and income

All this begs the question: can this trend be reversed? In some countries, such as Finland, Ireland, and the Netherlands, successful efforts have resulted in creating 'social partnerships' between unions and employers, which grant unions a positive role in restructuring the firm. The important caveat, however, is that the unions' involvement is limited to wage bargaining, usually at the plant level. Their role in negotiations with the government, involving public expenditure in return for trade

union moderation, has no place in contemporary social pacts. Here, again, we find that pay receives significantly different treatment than other terms and conditions of employment. Moreover, the union's effect, where it exists, has become increasingly localized, thus exacerbating the decentralization of markets and reducing the ability to promote labour market goods. Where, then, do we go from here? As indicated, even though unions will probably not have the same role and influence that they enjoyed in the larger part of the twentieth century, they may still prove important in devising the new balance, or new contract, between work and family, and in reducing the burden of adjustments from school to work, from work and pensions, and through periods of unemployment, along the lines of the Danish flexicurity model. It is crucial to emphasize, however, that globalization, advances in technology, and changes in family structure, demand a renewed emphasis on employment security and income. These changes also require that governments re-enter the social pact, to share their burden of social responsibility.

Offering a complementary analysis, Allison Beck provides several reasons for the decline in union power and prestige in the United States. One set of explanations is structural: the increase in foreign imports in the 1970s and 1980s; deregulation of airlines, trucking, and telecommunications; new technology; corporate flight to the union-free, low-wage South; and the near-slave labour conditions around the globe.

However, from her vantage point as an American trade union lawyer for the past thirty years, Beck also implicates both employers and government in actively seeking to weaken the role of unions in the workforce, through the deliberate undermining of worker co-determination and workplace democracy, and their refusal to act against those who do likewise.

The consequences are significant. Over the course of the twentieth century, unions have provided equality of bargaining power, replacing 'industrial autocracy with industrial democracy' and corrected injustices

in the workplace. They have contributed to a higher standard of living for workers, economic security, and economic mobility that has increased prosperity for everyone. Their decline in the United States has led to the lowest proportion of worker representation in the world. More generally, labour's decline has squeezed the middle classes, raised inequality, lowered the standard of living and undermined democratic values.

The dire situation of unions in the United States can be attributed in part to the long-standing reluctance of employers to treat employees, through their unions, as partners in a collective enterprise. Although employers have refused to recognize unions even in countries where worker unionization is a statutory, or even constitutional, legal right, in the United States, we can also find evidence of government actions to reduce union power. Following political appointments by the Republican administration, the National Labor Relations Board (NLRB) handed down decisions that turned a blind eye to what a US Appeals Court termed 'daylight robbery'; to the firing of workers who tried to form a union; or to the bribing of workers to withdraw union support. More generally, the NLRB expresses, in Beck's view, 'a transparent anti-worker, anti-union and anti-collective bargaining bias'.

Against the backdrop of such a bleak picture, the question again arises: what can be done? Beck suggests that it is important to renew the trust between the corporate sector and the unions, and to conduct a respectful, mutually beneficial social dialogue. The state, for its part, should create a legal structure that supports, and makes enforceable a requirement that the unions have a strong voice within this dialogue. The unions, on the other hand, should adapt their role such that they act not only as representatives of workers' interests in the

narrow, conflictual sense, but also to increase the productivity of the firm, competitiveness, and the skills of the employees. With more rights come more responsibilities.

Beck's conclusion is interesting because it suggests a process similar to the one currently underway in Europe. This proposal for a platform of social pacts, or social dialogue, was criticized in this workshop by Collins and Teague for reducing union influence in wage deliberations, and reducing union activity to the all-important aim of productivity in an era of global competition. So what exactly does happen when productivity and efficiency conflict with more traditional union objectives, such as limiting wage inequality and industrial co-determination? Does this new prospect suggest an abandonment of the traditional social contract in industrial relations? And if so, is this new approach preferable to that which went before, or are unions being railroaded down this road because, in Grahl and Teague's words, 'they have nowhere else to go'?

If the explanation for this change is grounded in political realism, rather than normative ideals, then perhaps the concerns over the death of collective bargaining have been exaggerated. The inequalities in pay that have pervaded the corporate sector and been highlighted by the recent collapse of the financial sector, and corporate flight to developing nations may be about to undergo a reversal of direction. In some countries, workers are revivifying the benefits of collective bargaining, and governments, legislatures, and courts are becoming more willing to listen. It is indeed possible that changes in demography, technology, ideology (e.g., awareness of race and gender relations in the workplace), and the like will bring about new terms for the social contract in industrial relations. It is not a foregone conclusion that the future holds only a limited role for unions.

SESSION FOUR:

Social Security in a Changing World of Work?

Professor Roger Blanpain, *Professor of Labour Law, University of Leuven, Belgium*: 'The World of Work in the XXI century: Challenges and Opportunities'

Professor Harm van Lieshout, *Professor of Industrial Relations, Tilburg University, The Netherlands*: 'An Actor-Centred Institutional Approach to Flexicurity'

Chair: **Professor Matthew Diller**, *Fordham University Law School*

The world in which people could expect a 'job for life' is gradually diminishing. Flexible work patterns such as part-time work, temporary work, and agency contracting are forming a growing proportion of labour markets, partly owing to worker demand, but also as a result of employers' changing needs. A vast, informal, and growing sector of employees currently work without benefits, social security, or health care. Demand for labour market flexibility is increased by employers who want to be able to hire and fire with greater ease, creating diminishing job security in many labour markets.

The two presentations in this session cover several of the themes that were prominent throughout the workshop, including the impact of globalization, new technology, demographic changes, and so forth. Taking these structural changes into account, they investigate the ways European countries have come to deal with this changing background, and the way they balance employer (and, at times, employee) demands for increased flexibility with the need to provide job security and financial security to workers.

Roger Blanpain describes contemporary local and global labour markets, noting how new technologies and globalization have led to enterprises externalizing a large proportion of their operations and

constructing chains of supply, instead of using in-house production methods. Extensive outsourcing and the automation of the manufacturing process has led to a significant reduction in the proportion that the 'real economy' (agriculture, manufacturing) holds, and to a significant rise in the service economy. Blanpain explains how this leaves products and goods in the grip of services such as storing, marketing, distribution, billing, and the like. He uses the term 'glocalization' to refer to the trend towards both increased globalization and increased localization, since the term 'globalization' is insufficient to represent the complex reality of the ongoing, more expensive, need for personalized services.

Against this background, Blanpain would seem to agree with previous participants on a number of aspects. Like Dowling, he argues that multinational enterprises are a vital element for human progress, supplying, as they do, 75 per cent of inventions and new technologies, and being a significant producer of jobs worldwide. He, like Bravo, is unequivocal in his call to countries to open their frontiers, for their own sake and for the sake of people from less developed countries. As for the role of trade unions and collective bargaining, he suggests that the changing character of the world of work may lead to the decline of collective arrangements to the point that they become mere frameworks for industrial relations. Whilst accepting that the 'social contract we used to know is coming to an end', he also points to a new one that is currently evolving.

In this new social contract, a prominent role is given to less traditional labour arrangements, currently being introduced in the European Union. Notable among them is the model of *flexicurity*, which has been most completely implemented in Denmark. As its name suggests, flexicurity offers an effort to reconcile the need for increased employer and employee flexibility, with a serious effort to provide

employment and financial security for individuals, within and outside the labour market.

Grahl and Teague frame the labour market and the welfare state as playing complementary roles, providing financial and social security for those inside and outside the labour market, respectively. Flexicurity can be seen as tightening the social contract between the two, and providing a better grasp of the inter-relations – financial, emotional, temporal – between those inside and those outside the labour market. Blanpain's paper also highlights the growing need for knowledge and creativity in the workplace, in order to respond to new technologies and win the 'battle for the brains' that will be central in the twenty-first century workplace.

Harm van Lieshout's paper addresses an important element in flexicurity, training, by exploring training models in three jurisdictions – Germany, the Netherlands and the American state of Wisconsin – and analyzes their effectiveness in light of the role of the state, of unions, and in light of the special features of the organization of work in each.

Van Lieshout examines the success of Germany's training model, which he attributes to the ability of employers to hire apprentices for lower wages than regular workers in an arrangement that requires union cooperation. There is an implicit understanding that apprentices accepted to the programme will climb the occupational ladder and will be given the skills necessary to fill a wide range of jobs in the firm. The employer's screening process, therefore, begins at a relatively early stage, and relies on the state providing a high-standard, relatively firmly regulated secondary school system. Lastly, because of the large investment in training, employers expect

(from employees) a high rate of worker retention.

A very different structure exists in the United States, where low levels of union support result in firms training workers 'on the job', at low wages.

There is no significant benefit, therefore, to a lower, apprenticeship status. Job performance during the first few years is perceived as the most important indicator for future performance. Moreover, since there is no true apprenticeship system in place, firms often prefer to hire adults with relevant work experience from other firms. Employment relationships are consequently highly individualized and utilitarian, and characterized by a lack of loyalty and trust on both sides. Employees will move from firm to firm if they receive a better offer, and employers have no incentive to invest in expensive training programmes.

In the United States, low levels of union support result in firms training workers 'on the job', at low wages

Whilst Germany's training model has been studied as an exemplar for other jurisdictions, Van Lieshout demonstrates that a combination of factors is necessary to ascertain the success of a particular training model. His conclusion is that a change in rules (for instance, by imitating a training model in another jurisdiction) will not necessarily translate well in a different context if certain factors concerning the government, labour force and level of union influence are not taken into account. In addition, the German model, by placing such emphasis on entry level screening and training, may raise serious obstacles for older workers looking to switch jobs in mid-career.

Conclusion

The workshop highlighted how closely related to the classic idea of the social contract the individual and collective contracts within the workplace are. As Hugh Collins noted in his opening address, employment is not only an important source of income and wealth; it is also a basis for social relationships and fulfillment, on the one hand, and the main source of inequality, subordination, and control, on the other hand.

The centrality of work in our lives only emphasizes the need to establish a clear idea of the way work should interact with family life. In particular, gender disparities in the workplace mean that women receive less pay for similar work, and thus rationally take on the role of primary care taker. Balancing work with care for children and for the elderly is becoming increasingly difficult, and leads many families to address this 'care deficit' by recourse to the market, outsourcing their care needs, often to immigrant workers.

Clearly, the social contract for work must be, at least to an extent, a global social contract. The movement of multinational enterprises to less developed countries to utilize cheap labour, and the immigration of workers from developing countries, predominantly under vastly more restrictive terms, will prove to be one of the key challenges confronting policymakers today. The traditional social contract for work is increasingly becoming a thing of the past. As union power, prestige, and coverage declines, the corporatist dynamics, in their twentieth century form, cannot govern industrial relations in the twenty-first century. On the other hand, the neo-liberal agenda of individual contract and complete managerial authority is proving to be not only unfair and inequitable, but also inefficient and cost externalizing.

A new role for unions and for the state is in order. Flexible labour markets are required, as long as this does not serve as a pretext for the implementation

of a 'dismissal at will' workplace. Instead, enhanced financial and employment security should be advanced alongside a more adaptive corporate regime, that will serve the needs of employers as well as those of employees.

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