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The Links Between Collective Bargaining and Equaliy

International Labour Organization

International Labour Office

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The Links Between Collective Bargaining and Equaliy

Abstract
Working paper by Adelle Blackett and Colleen Sheppard, prepared for the ILO, analyzes the links between collective bargaining and equaliy at international level and addresses the efforts to monitor and regulate the right of association and collective bargaining.

Keywords
agreement, association, bargaining, Catherwood, collective, conduct, Cornell, corporate, declaration, effective, employment, freedom, fundamental, global, globalization, government, human ILR, international, labor, labour, law, legislation, monitoring, NGO, organize, organization, organization, portal, principles, programme, promoting, questions, report, rights, standards, strikes, trade, unions, university, work, workers, workplace

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InFocus Programme on Promoting the Declaration on Fundamental Principles and Rights at Work
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InFocus Programme on Promoting the Declaration on Fundamental Principles and Rights at Work

WORK IN FREEDOM

International Labour Office

The Links between Collective Bargaining and Equality

Adelle Blackett and Colleen Sheppard

DECLARATION/WP/10/2003

Working Paper

WP. 10

Working Paper

The Links between Collective Bargaining and Equality

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September 2002

* We gratefully acknowledge the research assistance of Ms. Sabaa Khan and the final footnoting and bibliographical assistance of Ms. Aida Abraha and Mr. Amarkai Laryea.

Foreword

In June 1998 the International Labour Conference adopted the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Declaration obligates all member States of the International Labour Organization to respect, promote and realize freedom of association and effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation. [1] The *InFocus Programme on Promoting the Declaration* is responsible for the reporting processes and technical cooperation activities associated with the Declaration Follow-up; and it carries out awareness-raising, advocacy and knowledge functions – of which this Working Paper is an example. Working Papers are intended to stimulate discussion of the issues covered by the Declaration. They express the views of the author, which are not necessarily those of the ILO.

Professors Blackett and Sheppard were commissioned by the ILO to write this Working Paper, as an input for preparing the ILO Director-General's Global Report to the 2003 session of the International Labour Conference [2]. Their paper explores a complex and wide-ranging subject, i.e. the interface between collective bargaining and equality under current conditions of work. It argues that these two fundamental principles and rights are mutually reinforcing and can together promote workplace governance which reconciles economic with social goals. The paper draws upon a number of concrete examples of how the negotiation process has contributed to the promotion of equality of opportunities and treatment on grounds such as gender, disability, and religion, and shows how an equality agenda can enhance the scope, effectiveness and legitimacy of collective bargaining.

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The ILO is grateful to the authors for their contribution to the study of equality and collective bargaining, and to this exercise of providing background information to the 2003 Global Report. This process was conceptualised and overseen by Manuela Tomei, the ILO official responsible for that report, and her team-members Janine Rodgers, Mara Steccazzini, and Tzehainesh Teklè

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InFocus Programme on Promoting the Declaration

March 2003

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[1] For the text of the Declaration, please visit our website at http://www.ilo.org/public/english/standards/decl/declaration/text/index.htm

[2] ILO, Time for Equality at Work (Geneva, 2003)

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Introduction

The ILO's Declaration on Fundamental Principles and Rights at Work could hardly be clearer: both the "effective recognition of collective bargaining" and the "elimination of discrimination in respect of employment and occupation" are so central to the ILO's social justice mandate[1] and decent work agenda[2] that Members have a good faith obligation to respect, to promote and to realize" them.[3] Both "immutable"[4] principles have their distinct, robust normative justification, with a deeply egalitarian and democratic thread underpinning them that stresses the centrality of enfranchisement within the world of work. For generations, both have received dynamic interpretations and have been generously applied through the painstaking work of the ILO's sophisticated supervisory mechanisms.[5] And now, with the ILO Declaration, both are urgently reaffirmed by the ILO and its Members "in a situation of growing economic interdependence" as essential components to promote a vision of "sustainable development" that sees the economic and the social as mutually reinforcing.[6]

Despite this noble pedigree, initiatives to explore the interface between equality and collective bargaining are of decidedly more recent vintage, and to date have focussed overwhelming on gender.[7] The ILO Declaration happily resists any impulse to establish a hierarchy between collective bargaining and equality, appropriately contenting itself to set these principles apart from the broader range of norms within its labour standards arsenal. In a trans-national context that is increasingly integrated, cosmopolitan, and challenging of traditional labour regulatory infrastructure, the time is ripe to investigate the complex and changing relationship between the two fundamental principles and rights at work.

An incontrovertible starting point of this study is that despite overwhelming ratification of the ILO's leading Right to Organize and Collective Bargaining Convention (No. 98), 1949, effective collective bargaining remains elusive for the vast majority of workers. Globally, only a minority of workers benefit from the free and fair collective representation of their rights, needs and interests. The unequal access to collective bargaining reflects the extent to which dominant paradigms of collective bargaining fail readily to resonate with the plural structures of work, including but not exclusively in the informal economy, including, but not exclusively in the developing world. Moreover, the emerging post-Fordist paradigms pose difficult

[1] Constitution of the International Labour Organisation, 28 June 1919, Can. T.S. 1946 No. 48 [hereinafter ILO Constitution]; Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted June 18, 1998, 37 I.L.M. 1233. Available at http://www.ilo.org/public/english/standards/decl/declaration/text/index.htm [hereinafter ILO Declaration].

[2] Decent Work, Report of the Director-General, International Labour Conference, 87th Session, Geneva, 1999 at http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm

[3] ILO Declaration, op. cit., art. 2.

[4] ILO Declaration, op. cit., preamble.

[5] See Maupain F., "L'interprétation des Conventions Internationales du Travail", in Dupuy R.-J. (ed.), *Mélanges en L'honneur de Nicolas Valticos: Droit et Justice*, (Paris, Pedone, 1999), p. 567; Swepston L., "Human Rights Law and Freedom of Association: Development through ILO Supervision", in *International Labour Review*, Vol. 137, 1998, p. 169.

[6] ILO Declaration, op. cit., preamble; Sen A., Development as Freedom (New York, Random House, 1999); Langille A., Freedom of Association and the Effective Recognition of the Right to Collective Bargaining: A Reflection upon our Fundamental Commitments (Geneva, ILO, 1999). Available online at www.ilo.org/declaration. It bears noting that in its preamble, the ILO Constitution also refers to the "special and urgent importance" of the principle of equality in employment, intimately linked to its conviction expressed in Art. II(a) of the Philadelphia Declaration that "discrimination poses a threat to human dignity."

[7] See e.g., Olney S., Goodson E., Maloba-Caines K. and O'Neill F., *Gender Equality: A Guide to Collective Bargaining* (Geneva, ILO, 1998).

challenges to the foundations on which 20th Century approaches to industrial relations have been constructed.

This starting point is important beyond its basic reminder that although the ILO's decent work vision applies to all workers,[8] effective collective bargaining is a "good" that remains an aspiration of many. In a small number of countries, collective bargaining has been the principal means by which terms of employment are set; at the other end of the spectrum, collective bargaining is accessible only to a small and shrinking number of workers. Among those excluded from the effective exercise of collective bargaining in most countries, despite coverage levels, one finds a disproportionate number of those workers who also hail from traditionally-disadvantaged societal groups, the same societal groups itemized by the ILO in its core standard, The Discrimination (Employment and Occupation) Convention, 1958 (No. 111). This makes inequality of access to collective representation particularly problematic, both because it challenges its internal "effectiveness" and because it reinforces and potentially deepens inequality on the basis of grounds of discrimination, inequality that the ILO seeks to eradicate. As a result, inequality of access raises a crucial challenge to the traditional justifications that privilege collective bargaining mechanisms, particularly if they favour the most privileged to the potential detriment of the least privileged. Part 1 of this study explores this uneasy coexistence between equality at work, broadly understood, and the cardinal emphasis in the ILO Declaration on the need for access to collective bargaining to be "effective". It maintains that, with due regard to their application to varied societal contexts, collective bargaining frameworks should not be imagined to be equality-neutral; rather, the choice of collective bargaining framework can play a crucial role in determining whether the systemic challenges to equality of access to collective bargaining can be mediated. It adds that in an increasingly complex, integrating world, special care needs to be taken to cultivate new sites for social dialogue, sites that ensure representation for traditionally-marginalized or excluded groups.

Part 2 looks squarely at the situations in which workers are in a position to exercise their fundamental freedom of association and right to bargain collectively, to consider another level of interface with the fundamental right and principle of equality. It explores the complex interaction between the largely majoritarian device for workplace governance that is collective bargaining, and the structurally "minority" position[9] of equality-seeking groups in the workplace. It considers the controversial but real possibility that one fundamental principle and right at work could in fact impede the effective recognition of another, by recalling (mainly) historical examples of the existence of discrimination within the bargains struck in collective negotiations. The severity of this risk is underscored in relation to collective bargaining and equality by the fact that equality of bargaining power between employers and unions is the theoretical justification for state legitimation of bargains struck by the parties to govern their

[8] Decent Work, op. cit.

[9] This terminology is meant to capture the fact that although women as a group are at least half of the world's population, their participation in the formally-recognized labour force and access to collective bargaining are more limited. They are not the paradigmatic "worker" that fordism imagined, an analysis that is developed further in Part 1. Throughout the text, we draw interchangeably on a range of vocabulary to describe members of the groups captured by Convention No. 11: "traditionally or historically disadvantaged groups", "equality seeking groups", or more specifically in relation to specific grounds of discrimination, language like "racialized communities", terminology that emphasizes that race is a social construct, and that members of historically disadvantaged racial communities may in fact be a societal majority. The language of "racialized communities" has been coined by Professor Joanne St. Lewis of the University of Ottawa (Common Law Section) in her Report to the Canadian Bar Association on Racism in the Legal Profession. Each terminology has limits, as the conditions of discrimination vary tremendously worldwide. We have therefore privileged language that is as inclusive as possible, where generalizations seem appropriate, and have drawn upon examples both to illustrate the validity of the generalization and, more importantly, to indicate some of their necessary limits.

workplace relations. Despite this risk, Part 2 overwhelmingly concludes that collective bargaining, whose rationale is deeply rooted in notions of social justice, egalitarianism, democratic participation, and freedom, holds great potential to enhance equality. Indeed, this paper points to a myriad of concrete examples of how the negotiating process has been marshalled to promote equality in workplace relations. It recognizes, however, that to fulfil the equality mandate, collective bargaining must be grounded in a demonstrable commitment on the part of the social partners to promote equality, a commitment that is evidenced not only through the substantive provisions of agreements, but also through the manner in which "representation" itself is constructed, and in which bargaining takes place.

To the extent that the state privileges collective bargaining as the vehicle for private ordering of workplace relationships, it has a cardinal role to play in ensuring that collective bargaining enhances rather than impedes equality concerns. Indeed, collective bargaining is sometimes erroneously conceptualized as an example of "pure" private ordering, beyond the regulatory reach of the state. Yet Part 3 builds on the robust industrial relations literature that problematizes the public-private dichotomy, by emphasizing the fundamentally pluralist nature of collective labour relations through which state enabling mechanisms permit the social partners to create the law that governs their workplace. Equality demands a regulatory environment for collective bargaining that reduces the barriers to access to collective bargaining, both by adopting broadly inclusive and democratic bargaining models and fixing a floor of decent working conditions and minimum wage-setting procedures no group can bargain, irrespective of their limited bargaining power. Equality further demands a regulatory environment that sets parameters to prohibit collectively agreed upon bargains that would impede equality. Yet equality is not to be understood as the "public" dimension of a fundamentally "private" negotiating relationship. Rather, equality and collective bargaining both hold the potential to thrive when state regulatory frameworks (nationally, trans-nationally and internationally) set equality goals, and craft a robust role for collective bargaining's democratic participation to serve as a vehicle to realize them. And in that interface between the private and public ordering, the ILO has a crucial role to play.

Part 1: Unequal access to collective bargaining as an equality challenge

Introduction

The premise of this Part is that unequal access to collective bargaining is an equality challenge. This decidedly broad approach to equality draws upon the deep egalitarianism that characterizes the quest for social justice within the world of work. It also focuses on the purpose of protection against discrimination,[10] to affirm the equal worth and dignity of all human beings and more specifically to ensure that the fundamental character of equality, recognized within the ILO's normative universe and beyond, is a reality in working peoples' lives.[11] The approach is moreover compelled by the constitutional mandate of the ILO and its normative system to include "all workers".[12] There is a profound equality challenge surrounding access to collective bargaining, one that the Declaration calls on the ILO and its constituency to address.

To affirm that collective bargaining mechanisms can both hamper and enhance equality is not necessarily to affirm that collective bargaining mechanisms are explicitly exclusionary. Although in some cases collective bargaining has been used as a majoritarian device to engage in direct discrimination against minority groups,[13] the thrust of the unequal access claim is about systemic discrimination– that is, discrimination that is embedded in social and institutional practices, policies or rules.[14] Simply put, in the design and application of machinery to give effect to the fundamental principle and right to collective bargaining, there were forgotten, overlooked or quite simply excluded categories rendered invisible to collective labour relations because of they did not fall within the range of the dominant paradigm. As that dominant paradigm continued to shift, moreover, the asymmetries deepened as the vehicles to render collective bargaining effective failed even to capture the increasingly plural workplace realities. And, as one looks closer at the work, workers and workplaces that are excluded from the actual scope of collective bargaining, the picture of exclusion becomes a greater equality concern: those workers tend also to be members of groups that have traditionally faced disadvantage on the basis of race, gender, disability and other new and old prohibited grounds of discrimination. The equality challenge is deeper still.

But as this explanation suggests, the inclusion challenge is not only inherent to an effective understanding of the meaning of the elimination of discrimination in respect of employment

[10] This purposive approach is mandated by Art. 31 of the Vienna Convention on the Law of Treaties Between States and International Organizations, or Between International Organizations, - Mar. 21, 1986, 25 I.L.M. 543 (1986).

[11] See also Standing G., *Beyond the New Paternalism: Basic Security as Equality* (London, Verso, 2002), p. 196 affirming that "[a]ll modern theories of justice begin with the premise that everyone should be treated as equal in some respect. The essence of the claim in this book is that the Good Society would be one in which freedom, security and self-control would be part of the equalisandum (that pursued as the bundle of social needs to be equalised as far as possible)."

[12] See ILO Constitution, op. cit. and Decent Work, op. cit.

[13] See *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192 (1944) on which the duty of fair representation was built. This issue is explored further in Part 2.

[14] See ILO, *Equality in Employment and Occupation*, International Labour Conference, 1996. Though usually associated with indirect forms of discrimination, resulting from the negative effects of an apparently neutral rule, practice or policy, systemic discrimination may implicate direct discrimination in some cases, where the latter is widespread, and so pervasive as to be invisible. This has often been the case with sexual and racial harassment in the workplace, until it has been explicitly recognized as a form of discriminatory action. This may also be considered the case with pay inequities for work of comparable value in occupational categories that are "gendered" or "racialized".

and occupation. It is also inherent to a full understanding the meaning of the effective recognition of the right to collective bargaining. For the effective recognition of the right to collective bargaining to be interpreted meaningfully within the framework of the Declaration, the linkage challenge posed by the words "effective recognition" must be recognized. It suggests, we argue, that effective recognition of the right to collective bargaining needs to be assessed, not only in its ability to provide gains to some limited categories of workers in a given labour market, particularly when those workers are in relative terms dominant members of a society's labour force. Rather, the words "effective recognition" cannot but include the realization that to be effective, collective bargaining mechanisms must grapple with the need creatively to encompass all categories of workers, and more particularly those workers who have faced historical disadvantage of the kind that Convention No. 111 strives to eliminate.

1. On the meaning of the effective recognition of the right to collective bargaining: an inherent commitment to equality

It is with good reason that the ILO – in its Constitution, 1998 Declaration, and leading Convention No. 98 – links the freedom of association with the effective recognition of the right to bargain collectively. Effective collective bargaining is embedded in a robust conception of freedom of association, one that reaffirms the need to ensure that democratic governance infuses working peoples' lived experience. As an element of dignity at work and a cardinal vehicle through which dignity is promoted, it reflects both the process and the opportunity of freedom, integral to the cross-cutting goal of development.[15] To link freedom of association with effective access to collective bargaining is not only to recognize rights and freedoms; it is also to give participants the means through which to make their needs known, and to do so in a way that enables the social partners to seek to meet those needs, within the workplace and beyond. This empowerment capacity of freedom of association and the right to bargain collectively is part and parcel of a broad conception of freedoms, one that recognizes that "protection" cannot simply be conferred on social actors; rather, those actors have a cardinal role to play in articulating their own needs. Like other political rights, freedom of association and collective bargaining rights are themselves "not only pivotal in inducing social responses to economic needs, they are also central to the conceptualization of economic needs themselves."[16]

There is also an element of pragmatism in the link between freedom of association and collective bargaining; in other words, for the freedom of association to be fully meaningful, its exercise must be enhanced to ensure real participation in matters that affect workers' lives. The participation entails ensuring that there are mechanisms for voice within the workplace and the broader world of work. The effective recognition of the right to bargain collectively encompasses the recognition that a complex and varying combination of state enabling action is needed, to ensure that appropriate facilitative regulatory frameworks are in place, and, seemingly paradoxically that there is also freedom from state intervention, to ensure that workers and employers can negotiate the conditions that govern them.

[15] See Sen, op. cit. at p. 17 ("Both processes and opportunities have importance of their own, and each aspect relates to seeing development as freedom."); See also Langille, op. cit.
[16] Sen, op. cit., at p. 154.

Despite the conceptual and pragmatic links between freedom of association and collective bargaining, it remains crucial to recall that "the philosophical basis of the right to bargain collectively is not found in trade union membership, but rather in workers' subordination to management through the employment relationship."[17] The state permits, indeed facilitates this subordination, but seeks to mediate it through labour market regulation. Collective bargaining and broader social dialogue systems provide the foundation on which the relationship between those labour market actors is built, a foundation that seeks to infuse equity into the work relationship.

For these reasons, the broad definition of collective bargaining found within the ILO's normative structure[18] is entirely consonant with ensuring that workers have a say in the decisions that matter to them; accordingly, the ILO has applied the principle "in an uncompromisingly broad manner, albeit one that recognizes a wide diversity of industrial relations systems."[19] Indeed, in its recognition that the kind of participation to which collective bargaining aspires does not end at the workplace, the ILO has also championed the companion notion of "social dialogue",[20] embracing participation by tripartite and tripartite-plus constituencies in a broad range of economic and social policy-making activities, notably at the national, trans-national and international levels. The pragmatic justification for social dialogue rests on a commitment to ensuring participation by representative stakeholders in the broad range of governance structures that affect the labour market, with the aim of promoting social justice. As Anne Trebilcock has aptly noted, tripartism is rooted in "the acceptance of societal pluralism."[21]

The ILO articulation of the fundamental freedom within the broad framework of promotion of "social dialogue" illustrates the extent to which the ILO is committed not to a particular regulatory vehicle, but rather to ensuring that the underlying democratic participation principle by workers through their freely chosen workers' representatives is safeguarded. For, the wide diversity of industrial relations systems reflects, among other factors, the wide diversity of legal traditions and regulatory frameworks around the world.[22] Their relatively successful reception and implementation similarly mirror the relative effectiveness with which broader regulatory frameworks were received, particularly in developing countries and transition

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[17] Blackett A., "Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct", in *Indiana Journal of Global Legal Studies*, Vol. 8, 2001, p. 40, at p. 419. See Supiot A., "Déréglementation des relations de travail et autoréglementation de l'entreprise", in *Droit Social*, Vol. 3, Mar. 1989, p. 195, at p. 204. See also Betten L., *The Employment Contract in Transforming Labour Relations*, (The Hague: Kluwer Law International, 1995), p. 7 (challenging the appropriateness of a relatively narrow understanding of "personal subordination" as the contemporary rationale for certain employment protections like the unfair termination of the contract, and favouring a more robust notion of "economic dependency").

[18] According to Convention No. 98, Collective Bargaining includes:
all negotiations which take place between an employer, a group of employers or one or more employers' organizations, on the one hand, and one or more workers' organizations, on the other for:
determining working conditions and terms of employment; and/or
regulating relations between employers and workers; and/or
regulating relations between employers or their organizations and a worker's organization or workers' organizations.

[19] Blackett A., "Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation", in *Columbia Human Rights. Law Review,* Vol. 31, 1999, p. 1, at p. 15.

[20] See generally Trebilcock A., "Tripartite Consultation and Cooperation in National-Level Economic and Social Policy-Making: An Overview," in Trebilcock A. et al, *Towards Social Dialogue: Tripartite Cooperation In National Economic and Social Policy-Making* (Geneva, ILO, 1994), p. 1.

[21] Ibid., at p. 7. By the same token, Trebilcock is careful to add that "a lack of autonomy can kill genuine tripartite participation." (Ibid. at p. 8).

[22] On the latter, see generally Glenn H.P., *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 2000).

economies. Yet in the area of labour regulation, there is an added dimension. To the extent that regulatory mechanisms for the effective recognition of collective bargaining are largely premised on the existence of a widely industrialized economic environment, transplantation of those models to parts of the world where industrialization is largely aspirational virtually ensures an uneasy coexistence. The mechanisms need not only to be adjusted to the legal, political, and socio-cultural contexts; the mechanisms need also fit the mode of organization of the labour markets in question. For these reasons and more, systems that may provide effective recognition of collective bargaining in their country of origin where industrialization is deep may provide weak recognition of collective bargaining where industrialization is thin.

This problem is of no small concern to developing countries, as well as to some of the more fragile transition economies. The particularly limited formal sector economic participation severely restricts the scope of workplaces to which collective bargaining can optimally apply. It is not surprising, therefore, that collective bargaining tends to be concentrated in the public and para-public sectors of these economies. How to extend the benefits of fundamental principles and rights at work generally, and collective bargaining in particular, to workers in the amorphous "informal" economy of developing (and increasingly industrialized) countries is a vexing question, necessarily beyond the scope of this paper. It is a subject under serious global analysis by the ILO[23] and a matter for the crucial technical assistance on labour relations law reform and the promotion of social dialogue by the ILO.[24] This paper simply posits that the inability of traditional mechanisms that recognize the right to collective bargaining to consider and reach the majority of workers in developing countries illustrates a crucial asymmetry that equality of treatment would require it to address. Its effectiveness is inherently compromised.

2. The exclusionary implications of the fordist paradigm

The majority of collective bargaining systems that were developed and refined over the 20th Century seek primarily to respond to the regulatory challenges of particular types of workplaces, workplaces in which industrial production flourished. Collective bargaining mechanisms tend to include relative degrees of recognition of the often constitutionally-enshrined freedom of association, including protection against reprisals for participation in trade unions. Those recognitions tend to be buttressed by mechanisms to ensure that collective

[23] See the ongoing ILO work on the Protection of Workers, addressing atypical contractual arrangements. See also creating joint inter-institutional initiatives between STEP/ILO and WIEGO put in place to promote greater understanding of the social protection of women in the informal sector. See http://www.wiego.org/main/areas3.html.

[24] As the ILO recognizes:

Labour legislation that is responsive to contemporary economic and social challenges can fulfil three crucial governance roles:

it can establish a legal framework that facilitates productive individual and collective employment relationships and consistent, expeditious and reliable outcomes resulting from these relationships;

it can serve as an important vehicle for workplace democracy by providing a framework for employers, workers and their representatives to interact with each other at the workplace;

it can represent a clear ongoing reminder and guarantee of fundamental principles and rights at work which have received broad social acceptance through national legislative processes and can establish the processes through which these principles and rights may be enforced.

In its involvement in the labour law reform process, the Office holds the basic tenet that where labour legislation is appropriately formulated to achieve the above mentioned goals, it can not only promote social justice, but also positively affect economic performance and contribute to social stability and the reduction of social conflict.

See *Labour Law Guidelines*, Chapter 1, available online through the IFP Dialogue website at www.ilo.org.

bargaining is legally-recognized (in voluntarist traditions, by dislodging the common law presumption that they are illegal). The recognition may occur at any number of levels, and shift with the form of production from the enterprise level, the industry level, the national level, and more recently (and exceptionally) at the transnational or regional level.[25] The dominant collective bargaining systems that have developed, be they premised on decentralized collective bargaining focusing on democratic participation at the level of the individual workplace or enterprise, or more centralized structures that tend to stress broader notions of industrial citizenship in social policy,[26] are commonly captured within the framework of the Fordist paradigm.

The broad contours of the traditional fordist account are well known;[27] certainly, the many conceptual and practical divergences between countries and theoretical divergences in the formulation of fordist accounts are beyond the scope of this paper. Fordism functioned in an era of mass production in large workplaces, which spurred on an industrial model of employment. Fordism combines with it Taylorist scientific management approaches, leading to industrial de-skilling as components of any given production process could be broken down into individual repetitive tasks that most labourers could perform; their execution could be timed and monitored by employers along an assembly line. Since employers and workers were likely to be based in a given factory located within the same country for which production was destined, the workers were essentially also the consumers. Consequently, there was incentive for employers to pay workers good, rising wages, to enable them in turn to buy the products that they produced. They also needed leisure time so that they could exercise their purchasing power, and consume the goods they bought. These workplace gains were consolidated with the macroeconomic alignment between Maynard Keynes' encouragement to governments to spend in the creation of a welfare state through which liberal economic policies could be embedded in society.[28]

It is widely and increasingly acknowledged that even at the height of industrialization, models built around fordism could not capture the full range of workplace organization. Basic regulatory mechanisms, particularly in the Wagner Act tradition, simply excluded categories of workers from legislation recognizing the freedom of association and the effective right to bargain collectively. Employment in agricultural and domestic settings was routinely excluded, on the assumption that those kinds of work "naturally" fell outside of the industrial model, sometimes quite literally because of the absence of an industrial "workplace". This "natural" exclusion in some ways parallels the exclusion in practice of small workplaces, which have traditionally been quite difficult to organize,[29] and in which many historically marginalized groups have tended to work. More telling indeed is the remaining inability of many excluded categories to make effective use of their freedom of association and right to bargain collectively when it is granted by legislative mechanisms that merely include them, without turning attention to the specificities of their workplace organization. Specific

[25] For a helpful discussion of these developments, see Moreau M.-A., "Mondialisation et droit social: Quelques observations sur les évolutions juridiques", in Re*vue Internationale de Droit Economique*, Vol. 16, 2002, p. 383, at pp. 391-392.
[26] See discussion below in Part 3.
[27] For a discussion of the tripod of fordism from the regulation school account, see Lipietz A., "Post-Fordism and Democracy" (transl.) in Amin A., *Post-Fordism: A Reader,* p. 339, at pp. 341-342 (Oxford: Basil Blackwell, 1994).
[28] Polanyi K., *The Great Transformation* (Boston: Beacon Press, 1944) and Ruggie J.G., "International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order," in *International Organization,* Vol. 36, 1982, p. 379.
[29] See Olney S., *Unions in a Changing World – Problems and Prospects in Selected Industrialized Countries* (ILO: Geneva, 1996).

regulation, which addresses the structural reasons for their exclusion from effective means to bargain collectively, is warranted.[30]

Collective bargaining systems, like the broader regulatory and distributive systems that surrounded them, were also essentially "national" in scope. They assumed the nation-state and state sovereignty, and operated within those confines. Even as accumulation rapidly exceeded the consumption capacities of citizens of any given country, and trade in goods and foreign direct investment became essential to sustain the mode of production, sovereign national borders were jealously guarded to protect workers in industrialized countries from migrant labourers prepared to accept less favourable working conditions. Their access to collective bargaining was often restricted because of their limited access to jobs. The prevalence of occupational segregation for immigrant and racial, ethnic and religious minority workers into formal workplaces with low levels of organization and the informal economy meant that access to collective bargaining was particularly limited.

The other side of coin of the "national" scope of collective bargaining systems is that productive relations that took place outside of a particular nation state were understood to fall outside of the distributional range for which social partners in a given country should concern themselves. Collective bargaining, along with protective legislation, preserved and enriched gains within a given state, not beyond. The national scope of distributive justice, despite classic justifications based on citizenship rights to share in the fruit of the productive participation of members and to exclude non-members,[31] increasingly failed to capture the reality of relationships of production that crisscrossed national borders, necessarily de-linking itself from consumption.

Certainly, fordism also held within it many fictions, fictions that have resulted in a number of *de facto* exclusions from the effective coverage and exercise of collective bargaining rights. One was that women did not have to work because men were the breadwinners for the family. Even though women worked outside of their homes long before, throughout, and since the height of fordism, their workforce participation was often under low-wage, precarious conditions, a reserve labour force compensating when men were not available.[32] There was no need, according to the fiction, to pay women a family wage, as men were the breadwinners. In other cases, particularly that of women and men from historically-disadvantaged groups in society, workforce participation was in ghettoized occupations understood as their proper sphere.[33]. Women were also penalized to the extent that social benefits were often tied to

[30] See Blackett A., *Making Domestic Work Visible: The Case for Specific Regulation* (Geneva: ILO, 1998).

[31] The classic assumption of a national scope of many distributive justice claims is increasingly contested in academic literature. See notably Young I.M., *Inclusion and Democracy* (Oxford, Oxford University Press, 2000), pp. 236-243 (noting that "[t]he position that obligations of justice are limited to co-nationals is often taken to legitimize rejection of redistributive policies perceived to benefit groups with whom many citizens do not identify." (at p. 243) and arguing instead that "With cosmopolitans I argue against the widespread belief that obligations of justice extend only to co-nationals or only members of the same nation-state. Especially under contemporary conditions of global interdependence, obligations of justice extend globally." (at p. 236))

[32] However, as Jennifer Curtin appropriately observes, "[w]hen craft unionism gave way to industry unionism, the latter lacking the structural bias toward exclusionism; this allowed for the organisation of large numbers of women, although they were not recruited as women." *Women and Trade Unions – A Comparative Perspective* (Aldershot, Ashgate, 1999) at p. 21. See also Rubery J., Figueiredo H., Grimshaw D. and Smith M., "Adaptability: Households, Gender and Working Time" (August 2001).
Available at http://europa.eu.int/comm/employment_social/empl&esf/adap_rubery.pdf (contending that changes in household organization must be understood as part of the transformation in European labour markets).

[33] For a particularly poignant discussion of this phenomenon, deconstructing the dominant approach to the "feminization of poverty" see Malveaux J., "The Political Economy of Black Women" in Jennings J. (ed.), *Race, Politics and Economic Development: Community Perspectives* (London: Verso, 1992), p. 33.

employment, so the male breadwinner also held the rights to social safety nets, including retirement pension plan. Fordism, in its preoccupation with "production", excluded women's reproductive work, as well as the associated 'non-productive' work in the home, assumed by its "invaluable" character to be a labour of love without worth on the labour market. That women (and some men) from historically disadvantaged groups have been called upon to perform this undervalued labour – historically through slavery or indentured servitude, currently through restrictive migration schemes or bonded labour – reinforces the inadequate valuation of this sphere of work.[34] That domestic work is one of the traditional "exclusions" from many collective bargaining systems is a testament to the depth of the dichotomy.[35] These exclusions, coupled more structural limits to women's participation even when they are unionized, compound the exclusionary effects.[36]

Another fiction of fordism was the presumed homogeneous society. Traditional fordist accounts failed to acknowledge labour market segmentation of racial, ethnic and religious minority workers, as well as immigrant workers within industrialized societies who were often relegated to the less desirable, comparatively low status jobs. Certainly fordism's egalitarian focus on scientific management – emphasizing transparency in job classifications, requirements and pay levels – supported the contention that collective bargaining was amenable to general non-discrimination principles. In some contexts, it provided (admittedly limited and uneasy) access by racial minority groups to the waged labour market and to unionization, although this access was insufficient to prevent racial and related forms of discrimination once employment with access to collective bargaining had been achieved.[37] Their minority status in society and within many industries, as well as their segmentation within less desirable occupational categories and industries is reflected in (and reflective of) their limited relative bargaining power.

In yet other primarily developing countries, issues of racial, ethnic, religious (and in some cases linguistic) equality are deeply linked to struggles against colonial control over economic and political life.[38] Many trade unions emerged as central social actors in newly independent states, playing a leading role in promoting broad structural societal change to reverse the deeply-entrenched racial occupational segmentation of the societies-at-large. However,

[34] See Gaitskell D., Kimble J., Maconachie M. and Unterhalter E., "Class, race and gender: Domestic workers in South Africa", in *Review of African Political Economy*, Vol. 27/28, 1984, p. 91.

[35] See Blackett, *Making Domestic Work Visible,* op. cit, at pp. 12-15. See also Vega Ruiz M.L., "Relación laboral al servicio del hogar familiar en América Latina", in 3 *RELASUR*, Montevideo, 1994, p. 35.

[36] See generally Lester G., "Toward the Feminization of Collective Bargaining Law", in *McGill Law Journal*, Vol. 36, 1991, p. 1181. But see Swinton K., "Accommodating Equality in the Unionized Workplace", in *Osgoode Hall Law Journal*, Vol. 33, 1995, p. 703 at p. 727 (challenging the perception that adversarial approaches to collective bargaining are necessarily barriers to access for women, by remarking on the degree to which women have embraced collective bargaining in its traditional form, particularly in middle-class occupations that are predominantly female in many countries, like nursing and elementary school teaching). See also Lord Wedderburn, "Consultation and Collective Bargaining in Europe: Success or Ideology", in *Industrial Law Journal*, Vol. 26, 1997, p. 1 at p. 7 (emphasizing the importance of contract administration, or co-regulation, after an agreement has been reached, whether by aggressive or more cooperative means).

[37] See generally Jones M. "The Black Underclass as Systemic Phenomenon", in Jennings (ed.), *Race, Politics and Economic Development,* op. cit., p. 53; see also Marable M., "The Crisis of the Black Working Class, An Economic and Historical Analysis," in *Science and Society*, Summer 1982, p. 156 (adding that the crisis is exacerbated by the fact that many African American workers occupied those jobs most likely to be eliminated with greater technological innovation and outsourcing of labour).

[38] See for e.g. Bolles A.L:, *We Paid Our Dues – Women Trade Union Leaders of the Caribbean* (Washington, DC, Howard University Press, 1996) (affirming that the history of Caribbean trade unionism is closely linked to the struggle for independence).

attention to the ways that racial, ethnic and religious heterogeneity among nationals[39] may influence employment and collective bargaining access has been sparse.

Probably because of the conceptual difficulties associated with racism, discrimination on the basis of ethnicity and religion, and the relative lack of power of members of historically disadvantaged groups in some countries to influence collective bargaining, social partners have experienced difficulty identifying ways by which collective bargaining can contribute to the eradication of systemic racial inequality. There has lamentably been a dearth of material analyzing the interconnections between these categories of discrimination and collective bargaining.[40] Although it is valuable to analyze and comment on new forms of discrimination, it is crucial to continue to theorize and provide concrete guidance to constituents to ensure that old pernicious categories, like racial discrimination, are grappled with.[41]

Fordism also assumed away other divergences from the "norm". Thus, job applicants with disabilities were simply not hired; accommodation was a much later notion. Workers who developed workplace disabilities might simply face termination after prolonged absences from work;[42] only gradually would they become entitled to receive some limited compensation, through long term disability pay and to some extent accommodation through supple approaches to otherwise rigid seniority systems and job classifications. Workdays were structured around production schedules organized in shifts; although those shifts recognized dominant norms (like Sundays off in societies in the Christian tradition), religious accommodations for members outside of the dominant societal groups were not readily recognized or conferred. In its emphasis on transparency through "colour-blind" seniority and merit based job classifications, fordist hiring, promotion and disciplinary practices held the idealized potential to foster greater racial and ethnic integration rather than accentuating divergences. Yet the reasons why workers from the dominant social groups may benefit disproportionately from these facially neutral rules are many. As Katherine Swinton aptly notes in her discussion of seniority as constructive discrimination in some workplaces: there may have been past discrimination by employers against women or minorities; hostile working environments, including harassment, may cause minorities to leave or discourage them from applying; traditional views about appropriate roles for women may have channelled them into certain jobs, such as clerical work, and away from others; the employment of many women will have been interrupted while they raised children and some racial minorities may have shorter workplace attachment because they are recent immigrants.[43]

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[39] For a leading account in the emerging international development law literature, see Chua A., "Markets, Democracy and Ethnicity: Toward a New Paradigm for Law and Development", in *Yale Law Journal*, Vol. 108, 1998, p. 1.

[40] The ILO has played a leading role in the fight against racism, notably through its position of principle vis-à-vis apartheid South Africa and its constructive role in facilitating deep transitions through the construction of labour regulatory mechanisms for the post-apartheid context. It should continue to take up the initiative to provide focused insight into the vexing question of how the social partners can be assisted to recognize, admit, confront and challenge racial, ethnic and religious discrimination to promote racial, ethnic and religious equality in the use of collective bargaining mechanisms. While attention to particular categories of certain atypical or informal sector workers e.g. *A Resource Kit for Trade Unions – Promoting Gender Equality* (Geneva: ILO Gender Promotion Programme, 2002), Booklet No. 5, *Organizing in Diversity*, may indirectly address some of these concerns, more targeted analysis and attention to discrimination against these historically disadvantaged groups is urgently needed.

[41] We are indebted to Joanne St. Lewis, Faculty of Law (Common Law Section), University of Ottawa, for this insight. See in this regard the important ILO work on affirmative action by Hodges-Aeberhard J., recently "Affirmative Action in Employment: Recent Court Approaches to a Difficult Concept", in *International Labour Review*, Vol. 138, 1999, p. 247; and Hodges-Aeberhard J. and Raskin C. (eds.), *Affirmative Action in the Employment of Ethnic Minorities and Persons with Disabilities* (Geneva, ILO, 1997).

[42] See Swinton, op. cit., at p. 728.

[43] See ibid., at p. 737.

In particular, systemic discrimination leading to labour market segregation and exclusion in some cases made it relatively easy to exclude workers from racialized communities from effective collective bargaining that recognized their rights and interests.[44] And, while the dynamics of discrimination on the basis of racial, ethnic and religious distinctions necessarily differ depending on geopolitical context because the differences are socially constructed, their manifestations are pervasive and entrenched in labour market discrimination.

When we analyze these elements of fordism's exclusions through the lens of equality, it becomes striking that the categories of work that have tended historically to be excluded, expressly or implicitly, are categories in which the workers are from the enumerated grounds of discrimination isolated within Convention No. 111.[45] We have noted above that domestic workers are predominantly women from racial and other minority backgrounds;[46] to exclude domestic work from the reach of collective bargaining has a dramatically disparate impact on these particularly vulnerable categories of women. Similarly, agricultural workers notably in industrialized countries are disproportionately racial minority and foreign workers;[47] therefore their exclusion from collective bargaining legislation has a disparate impact in terms of race, national and ethnic origin. Increasingly, informal economy participants, atypical (including part time work) or precarious contractual workers (including home work), and workers facing occupational segmentation into areas with low participation rates are predominantly women, racial, ethnic and religious minority workers, immigrants and others for whom "nationality" becomes a concern, workers with disabilities, as well as young people.[48]

Even if all of the express exclusions to collective bargaining regimes that were present at their origins or that developed with post-fordism were eradicated, however, we would not solve the problem of inequitable access to collective bargaining. This is the case because access to trade unionism and collective bargaining is much more difficult in certain sectors of the economy. An important explanation for the difficulty of unionizing certain sectors of the economy is the inadequacy of bargaining power of workers in those sectors. Even if unions manage to secure a foothold within a particular workplace or industry and begin collective bargaining, they are often met with a second layer of resistance. If the union cannot achieve any significant gains through collective bargaining, it will find that its support gradually withers away. Indeed, and notably in the United States, unions have faced decertification because of their inability to engage in effective collective bargaining.

Where the legal and socio-economic realities of certain kinds of work render collective organization difficult and where workers lack sufficient bargaining power,[49] despite their

[44] These themes are discussed in further depth in Parts 2 and 3.

[45] See Zeytinoglu I.U. and Khasiala Muteshi J., "Gender, Race and Class Dimensions of Nonstandard Work", in *Relations industrielles*, Vol. 55, 2000, p. 133 at p. 141 (discussing the gender, race and class dimensions of nonstandard work).

[46] Ibid.

[47] For a recent case examining the exclusion of agricultural workers from collective bargaining, see *Dunmore* v. *Ontario (Attorney General)* Neutral Citation 2001 S.C.C. 94. Available online through a keyword search at www.canlii.org.

[48] Young workers from historically disadvantaged racial groups are particularly vulnerable. See Wrench J., Rea A. and Ouali N. (eds.), *Migrants, Ethnic Minorities and the Labour Market: Integration and Exclusion in Europe* (New York, St. Martin's Press in association with the Centre for Research in Ethnic Relations, University of Warwick, 1999). In relation to the United States, see also Jennings K., "Understanding the Persisting Crisis of Black Youth Unemployment", in Jennings (ed.), *Race, Politics, and Economic Development*, op. cit., p. 151.

[49] Inadequate bargaining power is a complex phenomenon. In part, it is linked to the type of work and employment. Highly skilled workers who are in high demand in the labour market have significantly greater bargaining power. Low skilled workers in sectors of high unemployment are much more readily replaced and have

collective organization, collective bargaining reveals its partiality as a solution to equity at work. Indeed collective bargaining may even accentuate the gap between workers with effective bargaining power and those without it. The intersection between unequal access, broadly understood, and the structural exclusions of equality-seeking groups that are caused by unequal access render it a challenge to the choices of collective bargaining frameworks that are made.

These exclusions cannot but call into question whether collective bargaining is effectively recognized. It is our assertion that the term "effective" must be understood in a way that is sensitive to the interface between fundamental principles and rights at work. In other words, collective bargaining mechanisms cannot be considered to be effective if they structurally exclude from access to collective bargaining those disadvantaged workers to whom Convention No. 111 guarantees equality. The effectiveness challenge is to some extent a challenge to the traditional justifications that privilege particular forms of collective bargaining frameworks over others.

This assertion includes within it the assumption that collective bargaining models are not societal "givens", on the basis of which reforms to include equality-seeking groups need to be made. Rather, it suggests that the systems themselves need to be assessed in terms of their capacity to promote or restrict equality. As will be illustrated in Part 3, they are not equality-neutral. For this reason, even though all systems encounter difficulties because of their starting premises about the nature of work, some systems (or mechanisms within them) may be more amenable than others to embracing democratic approaches to legislative extension that ensures coverage by groups that would otherwise have difficulty to organize into unions or to represent themselves in collective bargaining. The differences may also in many ways be reflective of the specific domestic or regional contexts within which the regulatory initiatives are taking place to adapt the system to the realities of the particular labour market.

3. Economic restructuring and the deepened collective bargaining - equality gap

Economic restructuring raises challenges for the interface between collective bargaining and equality that, although not entirely new, cannot as readily be ignored as in the past. The difficulties of access to collective bargaining that have pervaded many parts of the developing world and that structurally disenfranchised groups in industrialized societies have faced are being extended in industrialized and newly industrialized economies to the mainstream "core" of workers. As Manuela Tomei has cogently argued in her description of the "new heterogeneity of informality",

> Neither 'atypical' forms of employment nor the 'informal' sector can be viewed as residual categories anymore; they are rather integral to the overall development dynamics. Quality of employment varies along a continuum which does not follow the dichotomy formal/informal. Not all jobs in the informal sector are necessarily of poor quality nor do all formal sector jobs qualify as good jobs. Insecurity of tenure, job precarity and irregularity, lack of

significantly less bargaining power. However, one's skill level and location in the labour market is not the only determinant of bargaining power. The legal framework and procedures for collective bargaining can dramatically affect bargaining power. Thus, bargaining power is determined partly by the labour market (including demand and supply of labour in particular sectors of the economy) (labour market segmentation). It is also determined by the constellation of legal protections and provisions that structure collective bargaining in a particular jurisdiction.

> or limited social protection are increasingly common features of formal activites as well.[50]

Those traditionally-organized workers find it increasingly difficult to resist downward pressures on their negotiated gains. Their labour rights attained in part through collective bargaining and broader social dialogue are increasingly considered to be anti-competitive costs inefficiently allocated through the monopolistic behaviour of illegitimately-favoured interest groups.[51] Despite limited labour relations reform initiatives, the basic fordist premises of collective bargaining systems have not been comprehensively revisited. Failure to counter-act those downward pressures may exacerbate discrimination and lead equality-promotion concerns to fall by the wayside, particularly in negotiating contexts.

One cardinal example of these changes that largely but not exclusively affects industrialized and newly industrialized countries is the shift away from "production" itself toward a deeply expanded service economy with technology-driven economic growth (and, as has more recently been acknowledged, contraction). The rapid, continuous development and proliferation of new technology have yielded dramatic changes to the nature and organization of work.[52] More workers are as a result thought to hold a level of responsibility and control that limits their right to organize under some domestic labour laws. The breakdown of rigid job classifications with fixed, clearly identifiable job requirements has yielded to an environment where multi-skilling, teamwork and "life-long learning" are increasingly expected.[53] Life-long learning in particular tends to suggest ongoing training and to some extent career changes not exclusively for the pure virtue of self-enlightenment, but rather to ensure that workers are sufficiently flexible to maintain "employability".[54] These changes complicate the character of the economic inclusions, and shake up conventional understandings of the paradigmatic worker. As Olney has noted:

> [a]s more people handle information and fewer deal with goods, work shifts from manufacturing to services, and the boundary between blue-and white-collar workers, supervisors and subordinates, becomes blurred. Technology allows work to be decentralized, and has motivated or at least supported the increase in small firms and small work units[…] Such fragmentation renders traditional union organization approaches ineffective.[55]

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[50] Tomei M., "Freedom of Association, Collective Bargaining and Informalization of Employment: Some Issues" (Geneva, ILO, 1999) available online at www.ilo.org/declaration. See also Lamarche L., *Perspectives occidentales du droit international des droits économiques de la personne* (Bruxelles, Bruylant, 1995), p. 126 ("Nous estimons qu'il convient de se pencher sur cette question d'un point de vue occidental. Car, ultime paradoxe, plus que jamais, 'homme occidental situé' a besoin de garanties offertes par les droits anciens, dont, plus particulièrement, celles offertes par les droits économiques lies au travail de l'OIT et du *Pacte sur les droits économiques*.")

[51] For an analysis of this development in the Latin American context, see Bronstein A., "Labour Law Reform in Latin America: Between State Protection and Flexibility", in *International Labour Review*, Vol. 136, 1997, p. 5.

[52] See Radé C., Nouvelles technologies de l'information et de la communication et nouvelles formes de subordination, in Droit Social, Vol. 1, 2002, p. 26; see also Ozaki M. (ed.), Negotiating Flexibility (Geneva, ILO, 1999) at pp. 33-34.

[53] For an illuminating analysis of these trends, see Barenberg M., "Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production", in *Columbia Law Review*, Vol. 94, 1994, p. 753, 881ff. It is noteworthy, however, that according to Negotiating Flexibility, as of 1999, despite difficulties characterizing the proliferation of some of these practices, "practices such as multi-skilling and teamwork are not yet widespread". Op. cit., at pp. 41-43.

[54] See Standing, op. cit., at pp. 166-167.

[55] See Olney at al., op. cit. at p. 41.

These changes reduce the ability to rely on fixed, seemingly objective criteria to determine "merit". They leave more room for more apparently subjective criteria to infuse hiring and promotion practices, while making the ability to fit within a particular dominant cultural norm more explicit. These newly experienced "requirements" may hold adverse equality effects.

Territorial borders cease to matter in the ways that they did under the emergence of fordism, but play a crucial new role, notably in the development of clusters of particular economic activity and an intricate web of niche-based service relationships.[56] For example, offshore data processors from regions of the English-speaking Caribbean where educational levels are relatively high but wages are relatively low and telemarketers from relatively economically-depressed regions in Eastern Canada can work remotely. In both cases they are primarily women working atypical, irregular hours in some cases from home, in some cases in de-facto free trade zones, deliver their "virtual" services to the powerful US market. This kind of proliferation of atypical, contingent, "invisible" forms of work within the expansive transnational service economy has led to great regulatory and organizational difficulties. These decidedly post-fordist work models collide with fordist regulatory regimes and traditional organizational strategies. They are difficult to fold into the framework of conventional collective bargaining action.

Even the cornerstone notion of "production", initially most amenable to the mid- 20th Century collective bargaining account, has changed so dramatically that the fordist assumptions fail to apply. Broadly characterized as the new international division of labour, flexible systems of accumulation have developed through which corporations out-source production to different producers and component assemblers around the world.[57] That flurry of fragile micro and small enterprises intricately linked to a complex web of supply networks is the new, dynamic source of employment along the global production chain that further complicate the informal sector-formal sector divide in much of the developing world.[58] The accounts of exploitative labour practices in some of those workplaces are legion; the much feared but empirically unverified assumption of a race to the bottom has in itself fostered a form of regulatory chill that defies more rigorous analysis.[59] The regulatory challenge to applying enforceable, socially just rules across territorial boundaries to individual workplaces, thereby linking plants around the world with distant multinational enterprises and the consuming public is formidable, and all the more daunting when it comes to ensuring that in the process, those new regulatory initiatives do not

[56] For particularly illuminating discussions of these relationships, that link the development financial of centres and the range of service industries (including the cosmopolitan development of niches in the provision of a range of ethnic foods) see generally Sassen S., *Losing Control? Sovereignty in an Age of Globalization* (New York, Columbia University Press, 1996); Sassen S., *Globalization and Its Discontents: Essays on the New Mobility of People and Money* (New York, New Press, 1998).

[57] See Harvey D., *The Conditions of Postmodernity* (London, Basil Blackwell, 1989) (analyzing the shift from Fordism to flexible accumulation in an account that emphasizes the importance of space and time to this shift).

[58] See Sabel C., O'Rourke D. and Fung A., *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace* (May 2, 2000) Columbia Law School, The Center for Law and Economic Studies, Working Paper No. 185; Columbia Law School, Public Law and Legal Theory Research Paper Group, Paper No. 21. Available at http://www.law.columbia.edu/law-economicstudies/papers/wp185.pdf

[59] See most recently Kucera D., "Core Labour Standards and Foreign Direct Investment", in *International Labour Review*, Vol. 141, 2002, p. 31. See also OECD, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, 1996, pp. 80-82 (finding a mutually supportive relationship between successful trade liberalization and improved freedom of association rights). Barenberg M., "Federalism and American Labor Law: Toward a Critical Mapping of the 'Social Dumping' Question", in Pernice I. (ed.), *Harmonization of Legislation in Federal Systems* (New York, Juris Publisher, 1996), p. 93, pp. 117-118; Paul J.R., "Free Trade, Regulatory Competition and the Autonomous Market Fallacy", in *Columbia Journal of European Law*, Vol. 1, 1995, p. 29, at p. 30; Trebilcock M.J. and Howse R., *The Regulation of International Trade* (London, Routledge, 2d ed., 1999), p. 445.

"run the risk of supplanting rather than buttressing democratic participation in the workplace."[60]

In the increasingly post-fordist economy, many "flexibility"-oriented changes have occurred in management and ownership structures in the public and para-public sectors.[61] Indeed as is aptly noted in *Negotiating Flexibility*, "the flexibilization of employment contracts in the public sector preceded the rapid spread in the 1990s of flexible employment in the private sector"[62] even though the public sector reforms were initiated based on "an imagined vision of the private sector."[63] These changes have been particularly prevalent in many of developing and least developed countries that underwent structural adjustment measures focused largely on ensuring flexibility in the formal sector, itself quite small.[64] The changes have tended to carry with them a reduced capacity for workers to engage in collective bargaining in sectors that have had traditionally high and relatively effective exercises of collective bargaining. Many democratic governments in developing and industrialized market economies have tried to lead by example by implementing far-reaching employment equity mechanisms to provide workplace opportunities for disadvantaged groups in their societies; since members of those groups tend to be the last hired, they are often the first to lose their employment in the face of contracting out and other flexible employment practices.[65] The equality challenge is therefore deepened and complicated.

This is not to suggest that privatization and new public management strategies are invariably problematic from the perspective of non-discrimination in respect of employment and occupation and the effective right of access to collective bargaining. Indeed, for generations democratic governments have drawn heavily upon government procurements schemes to attach employment-equity goals to private contractors bidding for government contracts; equity objectives could theoretically be developed to attach to some more contemporary forms of contracting. Yet the transition from secure unionized workforces to more individualized, precarious forms of employment[66] is at the crux of the unequal access challenge. That challenge is further exacerbated to the extent that those who lose stable unionized employment

[60] See Blackett, Global Governance, op. cit., at pp. 420-421.

[61] For a useful overview of these changes in the public services of many countries, see Ozaki (ed.), op. cit., at pp. 8-10. See also Yemin E., "Labour Relations in the Public Service: A Comparative Overview", in *International Labour Review*, Vol. 132, 1993, p. 476.

[62] Ozaki (ed.), op. cit., at p. 8.

[63] Ibid. The authors conclude that "In flexibility debates, perception – and not reality – may sometimes be the determinant of people's behaviour." Ibid.

[64] See generally Lachaud J.-P. (ed.), *Pauvreté et marché du travail urbain en Afrique subsaharienne: analyse comparative* (Geneva, International Institute for Labour Studies, 1994).

[65] See e.g. Swinton, op. cit. (discussing the short-lived Canada (Ontario) experience with public and private sector employment equity legislation which, despite objections from equality-seeking groups, was adopted only after it was amended to include seniority protection with respect to layoffs and recalls in addition to hiring and promotion).

[66] See Spyropoulos G., "Le droit du travail à la recherché de nouveaux objectifs", in *Droit social*, Vol. 4, 2002, p. 391, at p. 392:

Le cadre juridique traditionnel de la relation individuelle de travail est en train d'éclater sous nos yeux et le travail salarié, protégé par le droit du travail, perd de plus en plus de terrain, notamment en raison de la montée du chômage et du sous-emploi, mais aussi en raison du développement – souvent en dehors des filets protecteurs du droit du travail – de différentes formes "nouvelles" ou "atypiques" de travail.[…] La principale conséquence de cette évolution est l'effritement progressif du statut du travail salarié, l'isolement croissant du travailleur et l'apparition de plus en plus fréquente, entre le travail salarié et le travail indépendant, de situations hybrides de travail dont il n'est pas sur si elles relevant des règles du droit du travail.

to contractors are more likely to be from the traditionally marginalized groups recognized by Convention No. 111.[67]

The contracting-out issue provides poignant examples of why the unequal access impacts are not system-neutral. Industrial relations systems that restrict the scope or time of collective bargaining over these issues may contribute to the loss of collective bargaining rights in these sectors. Systems that increase information requirements and require consultation and negotiations over restructuring may reduce the impact of these changes. Meanwhile, certain other approaches to privatization may have direct effects on workers' access to collective bargaining machinery through standard workforce access. For example, initiatives to privatize a panoply of equality enhancing public services, such as affordable childcare, may actually complicate workforce access for workers with family responsibilities, and minimize their effective ability to participate meaningfully in workplace governance, through collective bargaining.

Conclusion

We agree with the assertion that "[a] culture of democracy and dialogue cannot be improvised."[68] Rather, if it is acknowledged that collective bargaining mechanisms are not equality-neutral, then their unequal access needs to be addressed in a proactive fashion.[69] Those proactive engagements implicate all of the tripartite actors, and a broader mix of civil society participants when they are particularly representative of some of the most marginalized groups of workers, and emerging workplace relationships. They entail thinking beyond old categories, and beyond traditional territorial boundaries. They require the development of new, overlapping, or complementary approaches to ensure that the right to collective bargaining is effectively recognized through the promotion of equal access. The ILO has a crucial role to play in fostering the emergence of new forms of regulatory initiatives that reinforce the capacity of tripartite plus[70] constituencies both to adapt to these changes and to influence them, in part by developing regional structures of enforcement in emerging mechanisms and to foster trans-national collective relations in a manner that includes – rather than excludes – collective actors.

[67] One striking example is noted with respect to office cleaning industry. As Zeytinoglu and Khasiala Muteshi observe, "gender, race and class privileges are shaping the core and the periphery of the internal labour market"; on the one hand, "less privileged, low status, non-unionized, racially and ethnically divided subcontracted female office cleaners working the night shift; and the more privileged, unionized carpet cleaners, who were men and rarely ever racial minorities, who worked the better paid day shift." Op. cit.
[68] See Tomei, op. cit.
[69] See Young, op. cit., at p. 52 (arguing that "the norm of inclusion is … also a powerful means for criticizing the legitimacy of nominally democratic processes and decisions.")
[70] See Trebilcock A., op. cit., at pp. 9, 29, 35, and 44.

Part 2: Negotiating equality at work

Introduction

In Part 1, we argued that inequitable access to collective bargaining is a human rights issue that implicates systemic discrimination against historically disadvantaged groups in the workplace. Inequitable access is problematic not simply because collective bargaining provides a means of worker voice and democratic participation in governance at work, but also because it generally secures greater substantive fairness and re-distributive justice in working conditions and wages. Both are critical to the project of advancing equality at work. Furthermore, as noted in the Report by the ILO-ICFTU, *The Role of Trade Unions in Promoting Gender Equality*, "[t]he current inadequacies of equality legislation and its enforcement in many countries underscore even more the potential of collective bargaining to address equality of opportunity and treatment within the terms and conditions of employment."[71]

At the outset, it is important to contest what we believe is a misleading dichotomy found in the literature on collective bargaining and equality rights. It is sometimes suggested that collective *bargaining* is about industrial and economic issues; whereas, human rights and equality are about social issues.[72] Human rights issues are to be addressed through legislative reform; economic issues are the appropriate focus of collective bargaining.[73] Increasingly, however, the conceptual divide between the economic and the social is being collapsed and the integral connection between the two emphasized.[74] While legislative reform to advance human rights protection is essential, particularly given the limited scope of unionization, in our view, legislation should reinforce rather than undermine the role of collective bargaining in the human rights domain. Moreover, human rights issues implicate basic economic concerns, such as wages, restructuring, contracting out, the rise of atypical work, job security, workplace benefits, working conditions – issues at the heart of traditional collective bargaining agendas. All of these economic issues have deep implications for equality at work. Similarly, so-called social issues, such as family-related leave, recruitment and training opportunities, non-discrimination and protection from harassment at work, have significant economic implications.

Another potential limitation of collective bargaining as a means for advancing equality is the scope of collective bargaining. In many industries and workplaces, collective bargaining has not extended to employment issues that are central to equality and non-discrimination (i.e. recruitment, promotion and training).[75] Collective bargaining in some countries tends to focus on wages and employment benefits rather than on the organization of work *per se.* There have been divisive debates about management rights and the appropriate scope of collective

[71] ILO-ICFTU, *The Role of Trade Unions in Promoting Gender Equality and Protecting Vulnerable Women Workers:* first report of the ILO-ICFTU survey (Geneva, ILO Gender Promotion Programme, 1999), at p. 29.
[72] Jennifer Curtin discusses this dichotomy in *Women and Trade Unions*, op. cit., at p. 22, (noting that "collective bargaining has tended to be limited in focus, with women's demands for equal pay or child care being defined as social issues requiring legal action.")
[73] Some scholars suggest that this bifurcation has resulted in a failure of the labour movement to engage in collective bargaining with respect to discrimination issues. See, for e.g., Curtin, ibid; Kumar P. and Murray G., "Canadian Union Strategies in the Context of Change", in *Labor Studies Journal*, (Winter 2002), p. 1, at p. 14: "equity and gender issues are either legally mandated or perceived by Canadians as social-policy issues and therefore considered to be part of a public-policy agenda, as opposed to a bargaining agenda." See also, discussion, *infra,* Part 3.
[74] Langille, op. cit.
[75] Colling T. and Dickens L., *Equality Bargaining – Why Not?* Equal Opportunities Commission Research Series (London, HMSO, 1989), at p. 3.

bargaining.[76] Does collective bargaining simply replace the individual contract of employment or does it usher in a fundamental shift in how all work-related decisions are made, constituting a form of co-determination – a new constitutional framework for the workplace – a new workplace rule of law? While it may be descriptively accurate to suggest that collective bargaining has been limited in scope and focused on economic remuneration and benefits issues, such an observation is by no means normatively conclusive.[77] Collective bargaining has the potential to address all aspects of life at work, including the full panoply of issues at the heart of equality at work. As a mechanism for worker participation in a wide range of issues affecting working people's lives and a means for advancing fairness, respect and well-being, collective bargaining is directly relevant to equality at work.

In this Part, we examine some of the challenges of the pursuit of equality through collective bargaining. Our objective is not to provide an exhaustive review of equality-related collective agreement provisions.[78] Rather we explore some of the underlying procedural and substantive issues that are critical to advancing equality through collective bargaining. We begin, therefore, by discussing the tension between majority interests and minority rights in the collective bargaining context. We then review a number of procedural mechanisms for ensuring that historically disadvantaged groups participate in the collective bargaining process to make it a more inclusive form of democratic worker participation. Turning to the substantive components of negotiating equality rights, we highlight a growing commitment within the labour movement to advance equality at work. An articulated commitment to non-discrimination and equality in a collective agreement, however, raises the critical question of how we understand and define equality rights at work. To respond to this question, we outline a framework for identifying and remedying inequality at work that endorses a robust, transformative and substantive vision of equality. We conclude by discussing how the framework applies to a selective range of equality issues pertinent to collective bargaining.

[76] Langille B. and Macklem P., "Beyond Belief: Labour Law's Duty to Bargain", in *Queen's Law Journal*, Vol. 13, 1988, p. 62.

[77] For a critique of the contractualist focus of trade unions, see Collins H., "Market Power, Bureaucratic Power, and the Contract of Employment", in *Industrial Law Journal*, Vol. 15, 1986, p. 1.

[78] Excellent guidebooks on collective bargaining and equality have already been written: see, for e.g., A Resource Kit for Trade Unions, op. cit. (see, in particular, *Booklet 2 – Promoting Gender Equality through Collective Bargaining*, Booklet 3 - *The Issues and Guidelines for Gender Equality Bargaining*); Olney S. et al., op. cit.; Wiggins C., *Disability Provisions in Collective Agreements in Canada*, Canadian Labour Congress, Research Paper # 17, November 2000; Australian Department of Industrial Relations, *Women and Workplace Bargaining – Checklist for Equity in Workplace Bargaining* (Equal Pay Unit, Dept. of Industrial Relations); Canadian Labour Congress – *Women, "Bargaining for Equality"* www.clc-ctc.ca/woman/bargntc.html.

1. *The tension between majority interests and minority rights*

Collective bargaining tends to reflect the priorities and needs of the dominant worker(s) in a particular workplace or industry.[79] In some instances, the problem is one of omission or a failure to include on the collective bargaining agenda issues of concern to workers from underrepresented groups (i.e. women, racial or religious minorities). In other instances, direct conflicts emerge between existing provisions in collective agreements and the need for accommodation and attentiveness to human rights concerns. There are clear historical examples of trade unions "utilising the ideology of racism and actively colluding with employers to restrict the job opportunities" of racial and ethnic minority workers.[80] In the face of unemployment and layoffs, trade unions have sometimes endorsed deeply racist and exclusionary anti-immigration policies.[81] Similarly when women workers were viewed as a threat to the employment opportunities of male workers, the family wage and separate spheres ideologies were embraced by the male-dominated trade unions to limit employment opportunities for women workers.[82] Despite the diversification of many workplaces, collective bargaining priorities have not always been revised, resulting in conflicts between traditional trade union demands and the needs of workers who do not correspond to the traditional profile. Paradoxically, therefore, collective bargaining has been both part of the problem and part of the solution to inequality and discrimination at work.

Debates around equality rights versus seniority illustrate the potential risks of majoritarianism. The allocation of workplace benefits and opportunities based on seniority was originally premised on the idea that the approach would advance fairness, protect against favouritism or arbitrary managerial decision-making, and ultimately benefit everyone equally because each

[79] In assessing the majority versus minority rights tension in collective bargaining, it is important to remember that, due to the deeply segregated nature of labour markets, the majority within a particular workplace or industry may well constitute an historically disadvantaged group. In many work contexts, it is the majority that is socially and economically dispossessed. The collective bargaining framework may also affect minority and majority status. For example, in decentralized enterprise level bargaining, given labour market segregation, societal minorities may constitute a workplace majority. On the other hand, in more centralized bargaining, there may be a sufficient number of individuals from a minority group to create an effective voice for minority rights. On the equal employment implications of collective bargaining structures, see discussion, *infra*, Part 3.

[80] Virdee S., "Organised Labour and the Black Worker in England: A Critical Analysis of Postwar Trends", in Wets J. (ed.), *Cultural Diversity in Trade Unions – A Challenge to Class Identity?* (Aldershot, Ashgate, 2000), p. 207 at p. 210.

[81] For a discussion of the European situation, see, for e.g., Rea, Wrench and Ouali, "Introduction: Discrimination and Diversity" in Wrench et al. (eds.), op. cit. at p. 14. See also, "Introduction: Squaring the Circle? Trade Unions Torn between Class Solidarity and Regional and Cultural Identities in Western Europe", in Wets J. (ed.), op. cit., p. 1 at p. 8; Pasture P. and Verberckmoes J. (eds.), *Working Class Internationalism and the Appeal of National Identity: Historical Dilemmas and Current Debates on Western Europe* (Oxford/New York, Berg, 1998).

[82] In the US context, see Crain M., "Feminizing Unions: Challenging the Gendered Structure of Wage Labor", in *Michigan Law Review*, Vol. 89, 1989, p. 1155 (documenting the historical antipathy of the labour movement to women's presence in the labour force, given the family wage ideology and belief that women workers would undercut male wages and undermine family stability). Crain concludes that "unions have failed to fulfill their promise to represent the interests of female workers in the workplace. Instead, women's interests have been subordinated to those of male union members, while unions have appropriated female support in the struggle against capital." (Ibid. at p. 1169). See also, Crain M., "Feminism, Labor, and Power", in *Southern California Law Review,* Vol. 65, 1992, p. 1819; Briskin L. and Patricia McDermott (eds.), *Women Challenging Unions – Feminism, Democracy and Militancy* (Toronto, Univ. of Toronto Press, 1993); Curtin, *Women and Trade Unions,* op. cit.

employee would eventually amass seniority over the years.[83] The application of seniority rules in the modern economic context, however, does not always advance fairness and equality for women and minority groups for at least one important reason. There is not equal access to employment, and as a result, women and minority workers often have considerably less seniority than non-minority male workers. Thus, seniority often accentuates the effects of past exclusion and reinforces the privileges of "insiders" – privileges that too often have been built upon the discriminatory exclusion of "outsiders."[84] Critiquing seniority, however, appears to open the door to greater managerial discretion in allocating jobs, benefits and promotions. It is important therefore to critique the discriminatory effects of seniority, while developing creative alternatives that respect the positive non-arbitrary attributes of seniority systems. One interesting provision in a collective agreement negotiated by the Canadian Automobile Workers Union provides an exception to the application of seniority provisions to facilitate job opportunities for physically challenged employees.[85] The union has expressly recognized the need to accommodate individuals with disabilities, even if it means a deviation from strict seniority. Nevertheless, the clause retains seniority in most situations, making exceptions only when countervailing human rights concerns so demand.[86]

The risk of a conflict between majority interests and minority rights is sometimes seen as a parallel to the divide between individual and collective rights. Equality rights are conceptualized in terms of individual rights while collective bargaining is seen as a mechanism for the pursuit of collective or social goals.[87] Struggles to end discrimination in the workplace collectively have been hampered by this bifurcation according to some scholars who suggest that civil rights laws have focused on individual rights while labour laws have advanced collective rights.[88] The analytical cogency of the distinction is questionable. Particularly with respect to discrimination, it is the group-based dimension of the unfair treatment that brings it under the rubric of equality rights. While often advanced by individuals, it is intimately connected to group rights. Moreover, a growing literature on equality rights emphasizes the systemic and relational aspects of discrimination.[89] Rather than locating problems of exclusion or discrimination in the individuals who do not adhere to the socially constructed dominant norm, inequality is linked to the social and institutional consequences of difference. Equality therefore requires institutional change in a way that potentially transforms and enriches the lives of the both the minority and the majority. Finally, while trade unions have not always advanced women's or minority rights in the workplace, they have done so on a number of occasions. Indeed, in some contexts, such as pay equity or comparable worth, human rights

[83] For a review of equality and seniority, see Swinton, op. cit. Swinton notes that in some cases, seniority reinforces equality rights by ensuring, for example accommodation for elderly employees in the workplace, or disability benefits linked to disabilities that tend to arise as one ages. See also, Sheppard C., "Affirmative Action in Times of Recession: The Dilemma of Seniority-based Layoffs", in *University of Toronto Faculty of Law Review*, Vol. 42, 1984, p. 1.

[84] See Williams P.J., *The Alchemy of Race and Rights – Diary of a Law Professor* (Cambridge, MA, Harvard Univ. Press, 1991), at p. 101.

[85] Wiggins, op. cit., at p. 33.

[86] For an example where seniority is favoured over workplace accommodation of an employee with a disability, see *US Airways, Inc.* v. *Barnett*, 29 April 2002 (USSCt). The US Supreme Court concluded that human rights law protecting against discrimination on the basis of disability did not generally require accommodation of employees with disabilities when to do so would undermine established seniority rules. The individual seeking such accommodation is required to prove that special circumstances justify interfering with seniority systems.

[87] Sen A., ILO Address, 87th Session, 1-17, 15 June 1999 at p. 5 (available at www.ilo.org). See also Sen A., "Work and Rights", in *Intenrnational Labour Review*, Vol. 139, 2000, p. 119.

[88] Yates M.D. and Mason P.L., "Organizing African Americans: Some Legal Dimensions", in Mason P.L. (ed.), *African Americans, Labor and Society – Organizing for a New Agenda* (Detroit, Wayne State University Press, 2001) at pp. 97-98.

[89] One of the most influential texts articulating a "social relations" approach to equality, is Minow M., *Making All the Difference – Inclusion, Exclusion and American Law* (Ithaca, Cornell University Press, 1990).

protection and enforcement would be virtually non-existent in the absence of trade union advocacy and the collective pursuit of human rights claims.

2. *Inclusive democracy: consultation and participation of equality seeking groups in the collective bargaining process*

One of the key responses to the historical omission of the concerns and needs of historically disadvantaged minority groups from collective bargaining agendas is to ensure their inclusion in the collective bargaining process. For collective bargaining to enhance equality, individuals from historically disadvantaged and excluded groups must be consulted regarding their needs and interests and be represented at the bargaining table. In this regard, it is helpful to learn from the important research done on gender equality and collective bargaining, which consistently highlights the need to include women workers in the collective bargaining process.[90] For example, the *ILO Resource Kit for Trade Unions on Promoting Gender Equality* emphasizes that in preparing for collective bargaining, it is important to "[e]nsure the active participation of women, seek their views and make sure their voices are heard."[91]

Equitable representation within union decision-making structures and equality-enhancing union policies are repeatedly identified as critical prerequisites to advancing equality through collective bargaining.[92] Recognizing the need to ensure the participation of historically disadvantaged and excluded groups as a first step to advancing equality validates the experiential knowledge and insights of those who live the realities of exclusion and discrimination. It is an essential dimension of respect, which lies at the heart of equality. It also means that collective bargaining can be an inclusive mechanism for enhancing the democratic participation of all workers, not simply those who represent the majority in a particular industry or enterprise.[93]

Historically disadvantaged groups have not always been encouraged to claim their rights while voicing their specific need and interests because of the fear that they would undermine a common front of worker solidarity. Some have argued that "identity politics"[94] risks

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[90] See Curtin J., "Engendering Union Democracy: Comparing Sweden and Australia", in Sverke M. (ed.), *The Future of Trade Unionism, International Perspectives on Emerging Union Structures* (Aldershot, Ashgate, 1997) at p. 203, where she provides examples of changes in trade union practices in Sweden to facilitate the participation of women, (i.e. providing child care at meetings).

[91] Op. cit., *Booklet 2*, at p. 13.

[92] See Curtin, *Women and Trade Union*, op. cit. at p. 26; Bercusson B. and Dickens L., *Equal Opportunities and Collective Bargaining in Europe 1. Defining the Issues* (Dublin, European Foundation for the Improvement of Living and Working Conditions, 1998).

[93] On the importance of inclusive democracy, see Young, op. cit.

[94] See Young, ibid. who criticizes the tendency to reduce the claims of equality-seeking groups to "identity politics", arguing instead as follows:

The specificity of group difference out of which these movements arise is best conceptualized through a relational logic, rather than the substantive logic assumed in most notions of group identity. The primary form of social difference to which the movements respond, moreover, is structural difference, which may build on but is not reducible to cultural differences of gender, ethnicity, or religion. Social structures often position people unequally in processes of power, resource allocation, or discursive hegemony. Claims of justice made from specific social group positions expose the consequences of such relationships of power or opportunity.

undermining unified class-based perspectives.[95] Others have suggested that the integration of trade union representatives in national policy-making has too often been "predicated upon the homogenisation of the heterogeneous demands of workers."[96] Despite these concerns, there has been a growing recognition that diverse interests and needs within the labour movement deserve to be articulated and addressed.[97] Indeed, some have argued that rather than undermining solidarity, it is by recognizing diversity that solidarity can be strengthened:[98]

> If articulation of difference is encouraged, rather than suppressed, trade unions might become more encompassing of women and other groups and would be able to facilitate a process whereby different groups of workers recognise their common interests.[99]

Effective participation is instrumental to understanding the nature of inequality and for identifying creative solutions that can be advanced through the collective bargaining process.

Beyond the need to consult with individuals and groups who experience discrimination, research on gender equality and trade unions emphasizes the importance of training individuals from under-represented groups to participate in trade union activities and collective bargaining.[100] Again, the insights from the gender domain are pertinent to other groups. Democratic participation in trade union activities and in workplace issues requires educating individuals about how to be effective citizens of the workplace and the union. Without direct training and education, participation can remain out of reach for many women and minorities.

Furthermore, including representatives on negotiating teams and as leaders in the collective bargaining process ensures that the needs and concerns of minority groups are not marginalized in the collective bargaining process. Sometimes it is useful to have a representative of a minority community who is able to consult effectively with his or her group and make known their specific concerns and needs. Beyond such representation, however, it is important to ensure that diversity is reflected in those who are elected to represent the workers more generally. In this regard, contesting dominant conceptions of leadership is an important dimension of equality. For a woman from a religious minority group or racialialized community, or a man with a disability, to represent the workers at large rather than simply their particular group contests in stark and visible terms the dominant worker norm.[101]

Questions of representation of diverse interests and groups are no doubt complex. How do we define various groups? To what extent can individuals from groups historically subject to exclusion and disadvantage at work represent group interests? Identity or membership in a particular group does not necessarily mean that one holds the same values or ideas as others in the particular group.[102] How do we guard against problems of tokenism and the legitimation of

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[95] See Glasbeek H. and Fudge J., "The Politics of Rights: A Politics with Little Class", in *Social and Legal Studies,* Vol. 1, 1992, p. 45.
[96] See Curtin, *Women and Trade Unions*, op. cit., at p. 23.
[97] See, for e.g., *A Resource Kit for Trade Unions*, op. cit. *Booklet 5 – Organising in Diversity*, where it is suggested at p. 11 that: "Unions can encourage and teach their most vulnerable members to adopt a "name, blame and claim" approach to violation of a basic right or discrimination."
[98] See Harris A., "Race and Essentialism in Feminist Legal Theory," in *Stanford Law Review*, Vol. 42, 1980, p. 581 (emphasizing the idea of solidarity as a bridge across difference).
[99] Curtin, *Women and Trade Unions*, op. cit., at p. 24.
[100] For an excellent discussion of the importance of training for effective participation, see Australian Department of Industrial Relations, op. cit.
[101] Crenshaw K., "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", in *The University of Chicago Legal Forum*, 1989, p. 139 (contesting judicial refusal to accept black women workers as representatives of all workers in class action suits).
[102] Phillips A., *Engendering Democracy* (University Park, Pennsylvania State University Press, 1991).

inequality through an unequal structure of group representation?[103] Moreover, consultation and participation are only effective if there is a receptive and capable audience willing to listen to perspectives and voices that are usually silenced or marginalized and to take them seriously.[104]

Ensuring that the interests of historically disadvantaged groups are not traded off in the heat of collective bargaining is an additional challenge.[105] Human rights legislation can play a significant role in this regard, by setting a non-negotiable floor of human rights protection, which both employers and unions must respect. Collective bargaining can then focus on how best to implement human rights guarantees, rather than requiring the parties to bargain about what should be non-negotiable -- respect for the rights of equality-seeking groups.

3. Equality and the content of collective agreements

Equality, though widely endorsed, is difficult to define. Whereas formal conceptions of equality focus on equal treatment of all individuals regardless of group affiliation(s), more recently the idea of substantive equality has emerged. Substantive equality recognizes that sometimes equality requires that individual and group differences be accommodated to secure equality of outcomes. To assume that the workplace is composed of undifferentiated individuals risks reinforcing the legitimacy of rules and standards that have been shaped to meet the needs and capacities of the dominant worker. An inclusive workplace must be responsive to the diverse needs and approaches of historically excluded and underrepresented social groups.

Rather than endeavouring to enumerate in detail the vast range of collective agreement provisions conducive to equality, we seek to provide a framework for thinking about how to advance substantive equality through collective bargaining – a framework that is flexible enough to respond to myriad and diverse circumstances, and informed by a comparative review of innovative collective agreement provisions.[106] It is possible to highlight three key dimensions of the pursuit of substantive equality through collective bargaining. These include:

1. Commitment to advancing equality at work
2. Identifying inequality
   - (i) Consultation and research
   - (ii) Ongoing mechanisms for identification and monitoring
3. Remedying Inequality
   - (i) General provisions on equality rights
   - (ii) Changing policies, practices and rules: eliminating barriers and challenging unstated norms

[103] See, for e.g., Mahon R., "Canadian Public Policy: the Unequal Structure of Representation", in Panitch L. (ed.), *The Canadian State – Political Economy and Political Power* (Toronto and Buffalo, University of Toronto Press, 1977), p. 165.

[104] See Sheppard C. and Westphal S., "Narratives, Law and the Relational Context: Exploring Stories of Violence in Young Women's Lives", in *Wisconsin Women's Law Journal*, Vol. 15, 2000, p. 335, at pp. 345-346.

[105] Trade unions generally have a duty of fair representation of all of the workers they represent and yet such legal duties tend to be raised in the context of grievance proceeding and have not been a significant restraint on the content of collective bargaining. See discussion, *infra*, Part 3.

[106] See Bercusson and Dickens, op. cit., at p. 31, (noting that "it is important to be sensitive to national diversity and to the potentially double-edged nature of some provisions….The approach therefore is to move to a higher level of abstraction, indicating key categories for consideration in analysing agreements.")

(iii) Accommodating differences: consultation, participation, diffusion of costs and a culture of inclusion

(iv) Developing special group-based initiatives.[107]

Critical to these three key dimensions is the idea that the pursuit of substantive equality engages employers, unions and workers in a process of institutional and social transformation, requiring a fundamental rethinking of the world of work to make it more welcoming of diversity. Collective bargaining for equality rights is not simply a matter of grafting an anti-discrimination clause or policy onto an unchanged and unchallenged status quo. Such an approach provides assistance only to a small number of historically excluded individuals who can emulate the ways of being and doing of the dominant groups in society. It is fundamentally an assimilationist approach demanding no more than that likes be treated alike and does not embrace a commitment to including those who are different – those who require that the work norms and standards change to accommodate their inclusion. Collective bargaining about equality contains enormous potential for advancing a transformative approach because by definition it brings greater democracy and participation to the determination of workplace rules, policies and standards. And yet, more radical transformation is not always easy to accomplish through collective bargaining because of its adversarial aspects and given the resistance to changing policies or practices that represent hard-won historical gains, despite the fact that they are no longer conducive to an inclusive workplace.

3.1. Commitment to equality

For equality to be advanced through the collective bargaining process, it is essential that trade unions and employers be committed to seeking it. Trade unions at different historical moments and in particular local contexts, have not consistently aligned their interests and commitments with women and minority groups.[108] Nevertheless, trade unions are taking up issues of equality and according them higher priority at the bargaining table. Gender equality has been a particular focus of trade union concern. Various strategies have been adopted to promote collective bargaining that is attentive to gender equality. These include ensuring that women are included on collective bargaining teams, that women workers are consulted on their needs and priorities, and that the union is committed to promoting gender equality through collective bargaining.[109] Whereas racial inequality has deep historical roots and has caused devastating harm, trade unions have only recently begun to articulate anti-racist policy statements that endorse solidarity across racial, ethnic and religious differences.[110]

Moreover, in recent years, collective bargaining has been relied upon to advance the equality rights of social groups that were not traditionally protected by anti-discrimination laws. The private ordering dimensions of collective bargaining are particularly important for these groups because they provide a pathway to change and reform in the absence of legal and legislative

[107] For further elaboration of various dimensions of the pursuit of substantive equality, see Colleen Sheppard, "Social and Structural Sources of Inequality at Work: Insights from the Canadian Experience", Policy Paper, prepared for the ILO Technical Meeting on Equality at Work: Concepts and Policy Responses in a Changing World, Geneva, 29-30 May 2002.
[108] See Rea, Wrench and Ouali (eds.), op. cit.
[109] See ILO-ICFTU Survey, op. cit.
[110] See CLC, *Bargaining for Equality*, CLC Women's Symposium, at p. 4. Available at www.clc-ctc.ca/woman/bargain4.html.

reform.[111] For example, there is a growing body of scholarship that endeavours "to document and compare, across nations, the actions taken by organized labor in relation to sexual diversity issues."[112] Innovations in the area of disability rights have also been advanced by trade unions.[113] Disability issues are complex and diverse, implicating issues such as: workplace-related illnesses and injuries, occupational health and safety, HIV and AIDS, access to employment for individuals with physical or mental disabilities etc.[114]

With respect to trade union commitment to equality issues, two observations deserve mention. First, research suggests that when trade unions accord high priority to equality-related concerns in negotiations, there is a much greater likelihood that they will be achieved. A recent study concluded that "newer items are unlikely to be achieved unless they are high-priority items. It would appear that policy does make a difference and that there is real scope for pro-active policy stances."[115] Secondly, trade union commitments to equality are challenged by an external environment characterized by "increased domestic and international competition and new management strategies" for cost cutting, including closures and mergers, downsizing, outsourcing, contracting out, use of temporary and part-time workers and privatization.[116] It has been suggested that equality risks being accorded much less importance during periods of economic recession, restructuring and insecurity.[117]

Beyond trade union commitment to equality, it is important to emphasize that the employer's level of commitment is also critical. Achieving equality through collective bargaining is greatly enhanced when both parties are committed to it. Moreover, it is important to identify the equality impacts of managerial strategies in the face of intensified global competition. They often have human rights implications because of their disparate impact on vulnerable and socially disadvantaged groups. Although the costs of equality are sometimes raised as an obstacle to change by employers, it is increasingly being recognized that the costs of inequality are enormous.

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[111] See Sweeney J.J. "The Growing Alliance", in Krupat K. and McCreery P. (eds.), *Out at Work – Building a Gay-Labor Alliance* (Minneapolis, University of Minnesota Press, 2001) (on the United States experience), p. 24 at p. 29. As noted in the CLC—Human Rights Policy Statement on Sexual Orientation, 1994 www.clc-ctc.ca/human-rights/sexualorientation.html, in addition to collective bargaining, trade unions should be active in litigation and law reform to advance gay, lesbian and bisexual rights.

[112] Hunt G., *Laboring for Rights: Unions and Sexual Diversity Across Nations* (Philadelphia, Temple University Press, 1999) at p. 1 (addresses Canada, US, South Pacific, Australia, South Africa, Europe); see also Krupat and McCreery, op. cit.; CLC—Human Rights Policy Statement on Sexual Orientation, op. cit.

[113] For an excellent overview of disability rights and collective bargaining, see Wiggins, op. cit. at p. 26: "To gain equality for workers with disabilities, bargaining priorities need to focus on accommodating the requirements of these workers to gain employment, to fulfill the requirements of the job once they are employed, and to have opportunities for advancement in their profession."

[114] See, generally, Wiggins, ibid. Whereas equality rights for individuals with physical disabilities are being recognized, greater stigma appears to persist with respect to equality rights for individuals with mental disabilities at work. As noted in the US S*urgeon General's Report on Mental Health,* 1999: "Stigmatization of people with mental disorders has persisted throughout history. It is manifested by bias, distrust, stereotyping, fear, embarrassment, anger, and/or avoidance. Stigma leads others to avoid living, socializing or working with, renting to, or employing people with mental disorders.... It reduces patients' access to resources and opportunities (e.g., housing, jobs) and leads to low self-esteem, isolation, and hopelessness.... In its most overt and egregious form, stigma results in outright discrimination and abuse. More tragically, it deprives people of their dignity and interferes with their full participation in society...".

[115] Kumar and Murray, op. cit., at p. 24.

[116] Ibid. at 5.

[117] As Rea A., Wrench J. and Ouali N. have remarked: "When workers' general employment rights are undermined, when their protective organisations are disempowered, and when they work in a permanent state of extreme insecurity, equal opportunities protection becomes a low priority." Op. cit. at p. 14.

3.2. Identifying inequality and discrimination

3.2.1. Consultation and research

The process of preparing for collective bargaining by both unions and employers and the setting of bargaining demands and priorities should include an assessment of existing problems of inequality and discrimination. As outlined above, inclusive strategies for consultation and participation of historically excluded and disadvantaged groups are essential to identifying and defining problems of inequality. In addition, technical expertise is sometimes critical for discerning patterns of inequality and systemic discrimination (e.g. pay equity).[118] The collective expertise of trade unions as well as that of human resource departments is important when the identification of inequality requires an analysis of the systemic and statistical patterns of exclusion.

There are some significant challenges to the identification of discrimination. With respect to direct discrimination, there are some instances in which inequitable differential treatment is clearly a source of discrimination (i.e. exclusion of same sex couples from family benefits). In those cases, equality requires that the union negotiate for equal treatment (e.g. same sex family benefits). Sometimes, however, the problems of exclusion are so extreme that there is no representation of excluded groups within an organization such that even blatant problems of inequity are overlooked and left unidentified and unchallenged. At other times, problems of proof may arise. When is an individual's exclusion from the workplace linked to his or her membership in a particular group or groups and when is it simply based on his or her individual attributes? Trade unions can play an important role in tracking experiences of exclusion and identifying group-based patterns of exclusion.

Indirect discrimination is often even more complex. In some cases, the unequal effects of a facially neutral policy will be clear, particularly where the resulting exclusion or harm affects all members of a particular group (i.e. a religious minority or individuals with a specific disability). In other cases, the disparate impact is based on a statistically-significant disparity, rather than an absolute exclusion. Cases of indirect discrimination on the basis of race or gender are often based on such a statistical preponderance. Not all women or racial minority employees are affected. Still, adjudicators have recognized the discriminatory dimensions of standards, policies or practices that have such disparate effects. While in legal adjudication, it is often necessary to elaborate on technical questions of statistical significance, such statistical precision is not required in the collective bargaining context. Problems and solutions can be identified without excessive concern with statistical predominance.[119] It is nonetheless important to name particular problems of indirect discrimination or inequality in terms of racism, sexism, able-bodyism, heterosexism.

Collective agreement provisions regarding, for example, seniority, part time work, contracting out, workplace schedules, or occupational pay scales, do not expressly discriminate against any historically disadvantaged group and yet it is possible to identify very significant equality

[118] To ascertain whether one is being paid equally for work of equal value requires workplace data regarding wage rates and job evaluation analyses. Individually, a worker is not in a position to know whether he or she is being paid fairly pursuant to comparable worth principles. While there is greater transparency in the unionized context regarding wage and salary levels, discerning patterns of inequality requires a comprehensive and systemic analysis of pay levels and work skills, responsibilities, and working conditions.

[119] Even in the adjudicative context, some commentators have emphasized that there is almost always both a qualitiative and quantitative dimension to disparate impact discrimination: see Pothier D., "″M″Aider, Mayday, Section 15 of the Charter in Distress", in *National Journal of Constitutional Law*, 1996, p. 295.

issues with respect to each one because of the disparate impact such provisions have on historically excluded and disadvantaged groups. It is important therefore for trade unions to grapple with the equality implications of the rise of atypical work.[120]

3.2.2. Ongoing mechanisms for identification and monitoring

Beyond identifying problems of inequality to be remedied through specific collective bargaining provisions, it is important to negotiate specific provisions that provide mechanisms for the ongoing identification of inequality and discrimination. One important mechanism for addressing problems that arise during the course of the collective agreement, or problems that do not implicate policies or rules per se, but the fair application and interpretation of existing rules, is a general anti-discrimination clause. Similarly a policy and complaints procedure for harassment problems is also important. Both are discussed further below.

Ongoing mechanisms to identify more systemic and policy problems of inequality in industrial relations systems that provide only a limited timeframe for collective bargaining should also be put in place. In some collective agreements, equity, accommodation or human rights committees are established including management and worker representatives to monitor existing equality initiatives, identify new problems and recommend policy and workplace changes. Monitoring has been identified as a critical component of effective equality policies.[121] There is a growing literature on the equality implications of workplace democracy and continued debate about ensuring that industrial democracy and collective bargaining reinforce rather than undermine each other. Some research suggests that worker democracy initiatives are in fact more likely to develop in unionized workplaces; earlier research had sometimes linked industrial democracy and quality of work initiatives with efforts to discourage unionization.[122] As discussed below, legislative initiatives to advance equality, in the domains of pay equity and employment equity, often extend an important implementation and monitoring role to trade unions, as an autonomous voice of workers.[123]

3.3. Remeding inequality and discrimination

3.3.1 General provisions on equality rights

Anti-discrimination clauses in collective agreements

An important starting point for implementing equality at work is inclusion in the collective agreement of a basic commitment to equality and non-discrimination. Increasingly, collective agreements contain general non-discrimination clauses, which prohibit discrimination in the

[120] See discussion, above in Part 1. See also Tomei, op. cit.; *Resource Kit for Trade Unions*, op. cit., *Booklet 4*.
[121] See Dickens L., *Equal Opportunities and Collective Bargaining in Europe 4. Illuminating the Process* (Dublin, European Foundation for the Improvement of Living and Working Conditions, 1998), at pp. 14-16.
[122] See, for e.g., Frohlich D. and Pekruhl U., Direct Participation and Organisational Change – Fashionable but Misunderstood? An Analysis of Recent Research in Europe, Japan and the USA (Dublin, European Foundation for the Improvement of Living and Working Conditions, 1996).
[123] See infra, Part 3.

workplace on the basis of a number of enumerated grounds.[124] These clauses are significant because of the consensus they affirm regarding the general normative importance of equality at work. To the extent that the collective agreement represents the "rule of law" – the constitutional framework – for the workplace – it is essential that equality be included as a foundational normative principle. Equality rights clauses may also serve as interpretive aids to other provisions in the collective agreement. In the face of ambiguity or potentially contradictory provisions in the collective agreement, an anti-discrimination clause may reinforce interpretations that are consistent with equality.

Anti-discrimination clauses vary with respect to which grounds are enumerated for protection. They may mirror existing human rights legislation, incorporate human rights standards by reference or go beyond the statutory protections (which is critically important where legal protections provided by law are inadequate). While equality clauses often articulate discrete group-based grounds of discrimination, individual identities often transcend singular grounds,[125] and solidarity may be enhanced through an integrated approach that does not conceptualize equality-enhancing provisions as special treatment for particular groups. It is important, nonetheless, to be attentive to the specificity of particular experiences of inequality and to name those inequalities in group-based terms when necessary.[126]

An assessment of different collective bargaining provisions on protected grounds of discrimination reveals the importance of the social and historical context. Different types of discrimination have occurred depending on the national and local political, sociological and economic realities. For example, it is noteworthy in countries struggling to overcome the effects of colonialism, trade union movements have been active in national political struggles.[127] In such contexts, discrimination on the basis of political beliefs and affiliation may be of critical importance and appear as key dimensions of anti-discrimination clauses.[128] In other countries, gender-based discrimination may be the focus of anti-discrimination clauses and initiatives. Trade union acknowledgement of other inequalities, such as discrimination against gay and lesbian employees may also vary significantly depending on the national context.

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[124] For a review of anti-discrimination clauses in collective agreements, see Jolidon G., "La lutte contre la discrimination dans l'emploi et la profession par le biais des conventions collectives du travail (CCT), (ILO, Programme focal pour la promotion de la Déclaration", julliet 2001 (on file with authors). See also, CLC, *Bargaining for Equality*, op. cit.; *Resource Kit for Trade Unions*, *Booklet 5*, op. cit. at p. 6.

[125] Bannerji H., *Thinking Through: Essays on Feminism, Marxism and Anti-Racism* (Toronto, Women's Press, 1995) at p. 121 (discussing scholarship on intersectionality and clarifying the interaction between gender, race and class, all of which act in a manner that is "mutually constructing or reinforcing").

[126] See Alcoff L., "Cultural Feminism versus Poststructuralism: The Identity Crisis in Feminist Theory", in *SIGNS*, Vol. 13, 1988, p. 404 (discussing concept of positionality). As noted in the *Resource Kit for Trade Unions*, op. cit, *Booklet No. 5*, at 11, individuals experiencing inequality should be encouraged to: "Name the discriminatory action for what it is, e.g. Sexism, racism or homophobia. A worker's fundamental right cannot be claimed unless it is recognized as a right, which has been wrongly violated. "Naming" is the recognition that an experience has been injurious or wrong."

[127] As Marva Phillips comments with respect to the Caribbean labour movement: "The group of persons who worked as slaves and indentured labor are the forebears of the trade union movement. … The history of the Caribbean trade union movement is, then, closely linked with the struggle of the region's people for self government." Bolles, op. cit., at xiv in *Forward* by Phillips M.A.

[128] See, for e.g., Convention collective du travail du secteur bâtiments et travaux publics de la république gabonaise, octobre 1983:Art. 6.1: Les parties contractantes reconnaissent la liberté d'opinion ainsi que le droit d'adhérer librement à un syndicat professionnel constitué conformément aux dispositions légales et réglementaires. Art. 6.2: En vue de garantir cette liberté et de permettre le libre exercice de ce droit, les employeurs s'engagent:… à ne pas tenir compte des opinions politiques ou philosophiques, des croyances et pratiques religieuses, des origines sociale, raciale, nationale, tribale ou autres des travailleurs.

What remains central is that collective agreement provisions on equality rights endorse a robust and substantive vision of equality. Some specific reference to an expansive definition of discrimination, covering direct, indirect and systemic discrimination, as well as an endorsement of the principle of individual and group accommodation, are important components of an equality clause in a collective agreement.[129]

The inclusion of a general anti-discrimination clause in a collective agreement is particularly significant in terms of enforcement of human rights guarantees. As an integral part of the collective agreement, any alleged problems of discrimination may be subject to the grievance procedure and potentially arbitration. Indeed, there is a burgeoning arbitral jurisprudence interpreting basic human rights guarantees included in collective agreements. Often workers are much more inclined to file a grievance regarding discrimination than to initiate a human rights complaint or commence a civil suit alleging discrimination. Thus, access to the grievance procedure can greatly enhance access to justice in the human rights domain.[130]

While the grievance arbitration process can facilitate access to justice in the human rights domain, it should not be the sole avenue for redress for a few important reasons. Firstly, the individual who has experienced the discrimination does not always control the grievance arbitration process. Sometimes, a union may decide not to pursue a human rights complaint against the wishes of an individual. While legislated duties of fair representation may provide some measure of protection against arbitrary union decision-making, an individual should have the option of pursuing other avenues of redress (e.g. human rights complaints).[131] Secondly, arbitrators may not always have sufficient human rights expertise to resolve some of the difficult and complex issues raised in discrimination cases. More specialized human rights tribunals may be better equipped to deal with problems of inequality at work.

Collective agreement provisions prohibiting harassment

A second important general equality rights provision concerns harassment in the workplace. Harassment may be understood as a form of discrimination. It is therefore implicitly covered by general anti-discrimination clauses. Nevertheless, it is helpful to include a specific provision prohibiting harassment in the workplace. While most analysis and discussion of harassment at work began in the context of sexual harassment, harassment can occur with respect to many of the other grounds of discrimination, including race, sexual orientation, disability, age, religion, political affiliation or a combination of grounds (i.e. sex and race). The emergence of psychological harassment or abusive behaviour by supervisors against subordinates, is also attracting increased attention because of the harm and havoc it causes in individual's lives. Harassment often results in exclusion from the workplace (discharge, constructive discharge, or sick leave or short term disability leave).[132]

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[129] On the broad scope of such clauses, see, for e.g. *Resource Kit for Trade Unions*, op. cit., *Booklet No. 5* at 6.

[130] Vallée G., Le droit à l`égalité: les tribunaux d'arbitrage et le Tribunal des droits de la personne (Montréal, Éditions Thémis, 2001).

[131] Ibid. See also Beatty D., "Ideology, Politics and Unionism", in Swan K. and Swinton K. (eds.), *Studies in Labour Law* (Toronto, Butterworths, 1983), p. 299.

[132] See generally Hodges-Aeberhard J., "Sexual Harassment in Employment: Recent Judicial and Arbitral Trends, in *International Labour Review*, Vol. 135, 1996 p. 499.

Human rights legislation has increasingly explicitly recognized sexual harassment, and in some limited contexts other types of harassment at work.[133] Employers along with trade unions have developed sexual harassment policies and internal enforcement and disciplinary mechanisms for dealing with alleged harassment.[134] Sometimes the internal policies are more informal than the grievance procedure, potentially resulting in quicker relief.[135] If the harasser is disciplined and is a member of the union, however, he or she may invoke the grievance procedure to contest the discipline. In such cases, unions must also address potential conflict of interest concerns if both the victim and the alleged harasser are represented by the same union.

Although problems of harassment are often conceptualized as individual in nature, emanating from an individual perpetrator, who has crossed the line between acceptable social interaction and harassment, it is useful to rethink harassment from a more systemic and structural perspective.[136] Individuals tend to harass others in the context of workplace cultures that endorse discriminatory attitudes and acts towards women and minority groups.[137] Harassment is also much more likely to occur when there is structural vulnerability that renders redress more difficult (i.e. isolation, unaccountable managerial discretion).[138] Adopting a more structural and systemic analysis of the phenomenon of harassment means that responses implicate broader concerns about equality at work.

Proactive employment equity or affirmative action initiatives

A third general equality rights provision that may be negotiated is the establishment of an employment equity or affirmative action program. Employment equity or affirmative action provisions go beyond providing a mechanism for retroactive redress to a problem of discrimination, which is a key objective anti-discrimination and anti-harassment clauses. Instead, they focus on proactive initiatives to advance equity at work. While affirmative action is often association with group-based preferential treatment in hiring and promotions, including the use of quotas in certain circumstances, we prefer to adopt a broader definition that understands employment equity/affirmative action simply as proactive policies aimed at identifying and eradicating systemic inequalities at work. Collective agreement provisions on affirmative action and employment equity have tended to be negotiated in response to, or in tandem with, legislative reform mandating proactive equity policies.[139] We discuss these

[133] See e.g. Internationale des Services Publics, *Les femmes dans le service publique: Afrique* (Lomé, 15-17 avril 1991) at p. 11, noting that in Zambia, sexual harassment legislation is strict, and sanctions are relatively severe. Collective agreements further define the procedures to be followed for a complaint to be filed.

[134] See for example the Confederation of South African Trade Unions (COSATU), Sexual Harassment Code of Conduct, adopted at EXCO, May 1995, p. 2, in which COSATU declares that it "will ensure that its affiliates negotiate a sexual harassment code and procedure with employers to show its commitment to fighting sexual harassment in the workplace."

[135] For a critical discussion of the potential risk of more informal procedures, see Sturm S., *Second Generation Employment Discrimination: A Structural Approach*, in *Columbia Law Review*, Vol. 101, 2001, p. 458 at p. 538.

[136] Sheppard C., "Systemic Inequality and Workplace Culture: Challenging the Institutionalization of Sexual Harassment ", in *Canadian Labour and Employment Law Journal*, Vol. 3, 1995, p. 249.

[137] See Schultz V., "Sexual Harassment", in Baltes P.B. and Smelser N.J. (eds.), *International Encyclopedia of the Social and Behavioral Science,* 2001 (arguing that the attention to define sexual harassment in relation to sexualized workplace behaviour may neglect equally pernicious, exclusionary workplace behaviour, and could be used to persecute less mainstream workers, for e.g. on the basis of sexual orientation.)

[138] For a very clear example of institutionalized vulnerablity to sexual harassment, see Silvera M., *Silenced - Talks with Working Class Caribbean Women about their Lives and Struggles as Domestic Workers in Canada* (Toronto, Sister Vision, 2nd ed., 1989) (documenting sexual abuse of domestic live-in workers at pp. 55-58 and 84-86).

[139] See Dickens, *Illuminating the Process*, op. cit., at p. xi: "the influence of law is stronger where the emphasis is on positive measures to promote equality rather than simply non-discrimination".

initiatives further in Part 3. Suffice it to state at this point that as a mechanism to advance and to monitor substantive equality at work, the inclusion of employment equity or affirmative action provisions in collective agreements is important. To the extent that employment equity often focuses on recruitment, training, and promotion, domains sometimes considered to be within the sole control and prerogative of management, its inclusion on collective bargaining agendas expands the traditional parameters of worker participation.

3.3.2. Changing policies, practices and rules: eliminating barriers and challenging unstated norms

While the inclusion of non-discrimination and anti-harassment clauses is important, such clauses often replicate a complaints-driven model of human rights enforcement. They are interpreted and applied in the face of an individual complaint or grievance regarding a discrete situation of alleged discrimination or harassment. It is essential for individuals to have their rights affirmed in this way, and yet more is needed. As noted above, employment equity/affirmative action programs provide one mechanism for the proactive pursuit of equality. Collective bargaining can also be used as a mechanism for changing in a proactive and systemic way identified problems of discrimination. It should not be necessary for individuals to go through the often long and arduous individual complaint channels or grievance procedure to see effective human rights change.

Once a problem of discrimination or inequality is identified, it is important to clarify the source or sources of the problem – to understand the nature of the barriers to equality. Because exclusion still results in some cases from overt discrimination based on negative group stereotypes and unfair differential treatment, treating all individuals the same may sometimes be precisely what is needed to advance substantive equality. In other contexts, however, the unstated bias and exclusionary effects of apparently neutral standards or treatment must be identified and remedied through the revision of workplace policies and practices or through the accommodation of individuals and groups whose lives do not mirror those of the dominant social groups of a particular work environment.

To the extent that it is possible to link the problems of exclusion or harm with apparently neutral standards, policies, rules or procedures, the necessity of retaining such standards, policies or rules should be assessed. Pursuant to human rights standards that are emerging in many jurisdictions, only bona fide occupational requirements or qualifications, designed in good faith and necessary for the safe and effective accomplishment of the work in question, should withstand human rights scrutiny. If possible, inequitable rules, policies or standards should be revised, changed, or eliminated for everyone – eradicating at the same time, their discriminatory effects. Changing the institutional status quo in this way is central to a transformative approach to equality and should inform the content of collective bargaining demands. We have selected three examples to illustrate how collective bargaining for equality engages trade unions and employers in a process of identification and revision of exclusionary or discriminatory workplace rules and policies.

Pay equity

Wages have traditionally been at the very heart of collective bargaining. They are not surprisingly also at the heart of equality rights at work. Inequality has historically been linked

to discriminatory pay for certain groups of workers. Sometimes pay inequities are linked to unequal pay for the same work. Historically, women and children were often paid a lower wage for doing the same work as men. Most of these overt pay inequities have been eradicated, facilitated in part through human rights and employment standards legislation mandating equal pay for equal work. In some instances, they persist. For example, employees with physical and mental disabilities are still subject to overt pay inequities and wage rates below the minimum wage for other workers in some jurisdictions.[140] One basic concern for collective bargaining for equality, therefore is to ensure equal pay for equal work.

More complex, but equally important to the pursuit of equality through collective bargaining, are problems of pay inequity linked to segregation in the labour market and the undervaluing of work traditionally done by groups subject to discrimination. It is increasingly acknowledged that pay equity should also ensure that equal pay is accorded to work of equal or comparable value, evaluated in terms of skill, effort, responsibility and working conditions. Trade unions have endeavoured to address such pay inequities at the bargaining table.[141] As discussed in Part 3, legislative initiatives on pay equity have had an important impact on how, when and whether equal pay for work of equal value is addressed in collective bargaining. The effectiveness of such legislative initiatives is often linked to their implementation within a unionized context.

Family-related benefits

Workplace benefits are often accorded to individual workers and related family members. Such is the case for example with respect to health and insurance benefits, family leave provisions (i.e. bereavement leave, parental leave, family care leave). In many collective agreements, the definition of family was based on traditional, heterosexual family norms and gay and lesbian families found themselves excluded from the family-related benefits provisions in collective agreements. The discriminatory effects of these exclusions are increasingly being raised. To advance equality rights for gay and lesbian workers, therefore, family-related benefits provisions need to be sufficiently inclusive to embrace non-traditional family relationships.[142] In this case, therefore, equality means treating traditional and non-traditional family relationships equally.

Atypical work

Unlike the above example, where inequality is borne of explicit exclusion from a workplace benefits scheme, sometimes inequality *issues* stem from what appear to be facially neutral policies or practices. As outlined above, in such contexts, discrimination results from the unequal effects of apparently neutral policies or practices on socially disadvantaged groups in society. Such is the case with respect to numerous employment policies that affect the most

[140] In some jurisdictions, "sheltered workshops" allow employers to hire individuals with disabilities below the statutory minimum wage. The wages may or may not be complemented by government subsidies. See Wiggins, op. cit.; Visier L., "Sheltered Employment for Persons with Disabilities", in *International Labour Review*, Vol. 137, 1998, p. 347.

[141] See generally Eyraud F., "Equal Pay: An International Overview", in Eyraud F. (ed.), *Equal Pay Protection in Industrialised Market Economies: In Search of Greater Effectiveness* (Geneva, ILO, 1993), p. 1.

[142] The treatment accorded to family leave provisions and the extent to which less traditional families are recognized in collective agreements will vary depending on the cultural and religious context. On the connection between tradition specific principles of Islam and equality rights, see Shaheed Z., "Decent Work and Fundamental Principles and Rights at Work with Particular Reference to Islam", (ILO Working Paper, draft on file with the authors).

vulnerable groups in the labour force.[143] Developing an effective collective bargaining strategy to deal with the rise in atypical work requires that trade unions extend whenever possible the working conditions and benefits of permanent employees to non-permanent workers through inclusive approaches to collective bargaining.[144]

3.3.3. Accommodating differences

A second strategy for redressing problems of inequality is the accommodation of group-based differences where changing the broader rule or policy for everyone is not possible or desirable. Accommodation should only be relied upon once an assessment of a more general policy change has been made. Three examples are highlighted below: the accommodation of religious minorities; the accommodation of employees with significant family responsibilities; and the accommodation of individuals with physical or mental disabilities.

Accommodating religious minorities

Equality rights for individuals from religious minorities have been articulated as claims for the accommodation of difference. Most prominently, work schedules and dress codes tend to reflect majoritarian religious beliefs and practices. Accordingly, they can have a negative and disparate impact on individuals from religious minorities, resulting in exclusion, psychological and economic harm. In such contexts, equality entails the right to be treated differently to make possible inclusion in the workplace and adherence to religious beliefs and practices. While trade unions have sometimes resisted such accommodation, claiming the primacy of seniority-based scheduling for example, human rights laws have increasingly made clear that trade unions have a legal duty not to impede the accommodation to advance human rights. Religious equality may also embody the right not to conform to majoritarian religious practices or norms. Sometimes, individuals who are not affiliated with the dominant religion in a workplace or whose lifestyle is unacceptable to the dominant religion, are subjected to discrimination and exclusion.[145] In this regard, ensuring protection against discrimination on the basis of religious beliefs is important.[146]

Accommodating workers with family responsibilities

Although not exclusively of concern to women, given the importance of paternal and parental benefits, women continue to be burdened disproportionately by inadequate family benefits. In its survey of collective bargaining and gender issues, the ILO-ICFTU found that "issues related to maternity (breast feeding, paternity leave, special rights for pregnant women, child care and

[143] See discussion above in Part 1. See generally, Zeytinoglu and Khasiala Muteshi, op. cit.

[144] See CLC, *Bargaining for Equality*, op. cit. Ensuring access to effective collective bargaining is an essential prerequisite to addressing the needs of the growing numbers of "atypical workers"; see discussion above in Part 1.

[145] This may particularly be the case for gay, lesbian and bisexual workers, workers in common law marriages, or divorced workers.

[146] In some contexts, religious identity may have political ramifications, notably in contexts where there is not a clear divide between religion and the state. In such contexts, protection against discrimination on the basis of religion may overlap with protections against discrimination on the basis of political beliefs.

parental leave) were rated as the most frequent issues for inclusion in agreements."[147] Making it normal for an employee to combine work and family responsibilities by changing the institutional status quo on issues such as hours of work, is critical. However, special accommodation of family responsibilities may also be an important dimension of equality at work. For example, providing breastfeeding breaks for nursing mothers, relocation of pregnant employees facing occupational health hazards, maternity and parental leave, are essential forms of accommodation that make possible the safe and effective combination of work and family responsibilities.[148]

Accommodating workers with disabilities

There has been a growing recognition that discrimination on the basis of disability results from the social consequences of a disability rather than from the actual mental or physical differences themselves.[149] Accordingly, the structural and systemic sources of disability discrimination have been identified as key sources of discrimination that should be revised whenever possible. In some instances, however, individual accommodation is required to make possible access to work. For example, an employee with a sight or hearing impairment may require special office equipment to palliate the effects of his or her disability. While unions have sought to enhance employment opportunities and workplace accommodation, there has been resistance when accommodation requires a deviation from traditional seniority or other workplace rules.[150]

3.3.4. Developing special group-based initiatives

A final dimension of a framework for substantive equality requires consideration of the need for special group-based initiatives or preferences. Whereas such measures are sometimes considered the most radical equality initiatives, in our view they are much less transformative because they do not entail the actual change of workplace policies or standards. Instead they accord individuals from groups that are have been discriminated against in the past and present limited preferential access to jobs or opportunities to an unchallenged institutional status quo. They may ultimately prompt institutional change if a sufficient number of individuals from historically excluded groups are hired to create a "critical mass" in the workplace.[151] Their needs, concerns and differences may then begin to impact on the work environment to displace the hegemony of the dominant norms and approaches of the past.

While preferential hiring and promotion policies are often justified by looking to patterns of historical exclusion, often the continued effects of prejudice and discrimination are overlooked. An important example is race. In industrialized countries, racism has resulted in extreme exclusion of racial minorities from the most privileged sectors of the labour market over an

[147] ILO-ICFTU, op. cit., at p. 31.
[148] See CLC, Bargaining for Equality, op. cit.
[149] See Pothier D., "Miles to Go: Some Personal Reflections on the Social Construction of Disability", in *Dalhousie Law Journal*, Vol. 14, 1992, p. 526. See also Legault L., *L'intégration au travail des personnes ayant des incapacités* (Montréal, Wilson and Lafleur, 1996), at pp. 5-9.
[150] See discussion, above in Section A of this Part.
[151] A "critical mass" of an historically excluded group requires a sufficient number of individuals to ensure that their interests, needs, and differences can be articulated and addressed in a particular institutional context. It counters the marginalization and isolation that individuals may otherwise encounter.

extended historical period.[152] Immigration policy has also reinforced racial inequities by promoting the entry of racial minorities, often from developing countries, to assume occupational roles in some of the lowest paying and most marginalized sectors of the economy.[153] The immigration status of migrating workers is often precarious (e.g. seasonal agricultural workers, domestic workers). The remedy for race-based discrimination often seems to entail simply equal treatment and race neutral policies. Any yet the entrenched effects of past discrimination, the depth of ideologies of white supremacy and the realities of *continued* conscious and unconscious racism,[154] mean that more proactive racial justice policies are still necessary in many contexts.[155]

Conclusion

There is much potential within collective agreements to promote equality. Creative bargains struck in a context-sensitive fashion can greatly enhance the promotion of equality. And yet, collective bargaining has not always advanced equality rights. As noted above, there may be a problem of certain issues not being raised or accorded sufficient priority at the bargaining table because they are of greatest importance to a minority of workers. Secondly, there may be a problem of certain collective agreement provisions being in conflict with the equality rights of women or minority groups. Thirdly, particularly in a climate of economic uncertainty, there is a risk of protecting "insiders" at the expense of "outsiders", who have been and continue to be denied equal employment opportunities. Finally, because the effectiveness of collective bargaining is affected by the national and international legal regulatory frameworks and by labour market power, some of the most vulnerable unionized workers may lack sufficient bargaining power to advance equality objectives through the collective bargaining process. Providing basic labour standards and equality rights in law buttresses the bargaining power of workers; in other words, if the law already recognizes workplace equality principles, then negotiations can be directed to focus on the modalities of achieving equality at work. It is therefore to the interplay between negotiating and legislating for equality at work that we now turn.

[152] See Wets, op. cit.

[153] See Virdee, op. cit., at p. 209 (noting that "despite the heterogeneous class structure of the migrating populations, they came to overwhelmingly occupy a position at the bottom of the British class structure, undertaking work of an unskilled or semiskilled nature…. The Caribbeans worked in the service industries such as transport, health and hotels while the Indians and Pakistanis found themselves in factories, foundries and textile mills"(citations omitted).

[154] See Charles R. Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism", in *Stanford Law Review*, Vol. 39, 1987, p. 317.

[155] Racism also affects the treatment of indigenous populations. In some instances, assimilationist government policies and externally-controlled economic development have undermined the traditional work and economic well-being of indigenous communities. Unlike the mainstreaming assumptions of most affirmative action, equity for indigenous peoples may require respect for non-integration into mainstream economic institutions and the implementation of policies designed to reinforce *traditional* economic activities and work. While traditional collective bargaining may not be too pertinent to the negotiation of special measures to ensure the survival and flourishing of indigenous communities, including the potential rejection of employer-employee economic relations, it is nevertheless important to note the conceptual difference between special measures designed to expedite integration of historically excluded social groups, and special measures designed to protect against the assimilation of historically separate social groups.

Part 3: The interplay between state labour regulatory initiatives and the promotion of equality through collective bargaining

Introduction

Part 2 explored the interface between collective bargaining and equality, by assessing the extent to which the parties to collective labour relations can arrive at bargains that enhance – rather than impede – the realization of equality at work. It implicitly recognizes that collective bargaining can provide a particularly effective way to promote equality in a manner that is sensitive to the structural and economic exigencies of the employment relationship.

Part 3 seeks to situate collective bargaining experience within a broader regulatory framework, to explore the conditions under which bargaining for equality can most effectively be promoted. It elucidates two regulatory requirements within which collective bargaining for equality can take place: first, enabling legislation is needed, to ensure that barriers to access to collective bargaining are minimized, and more facilitative measures are put in place. This speaks both to the need for broadly inclusive and democratic bargaining models as well as floors of decent working conditions and minimum wage-setting procedures below which no group can bargain, irrespective of their limited bargaining power. Second, prohibitive legislation is needed, to ensure that collectively agreed upon bargains that would impede equality are not reinforced by the state. But equality demands more than blanket prohibitions on certain forms of action; legislation mandating reasonable workplace accommodation and proactive initiatives like pay equity and employment equity helps to ensure that systemic discrimination against equality-seeking groups is effectively eradicated. Regulatory frameworks that favour equitable, democratic participation of all workers without distinction in workplace governance are the cornerstones of a mutually reinforcing role for equality and collective bargaining across national, transnational and international governance levels.

1. Legislative engagement with the collective bargaining process

1.1. Collective bargaining legislation

The starting premise is that collective bargaining regimes are not equality neutral; consequently, equality impacts of collective bargaining warrant attention. This contextualization is crucial, particularly in an environment in which private economic ordering is often considered to be a privileged form of regulatory action, including within the workplace. Collective bargaining has at a theoretical level been considered to fit this paradigm, by promoting the freedom of contract and reinforcing bargains between the parties. It has of course been less favourably viewed to the extent that it stands in the way of the individually-negotiated contract of employment, in its attempt to enshrine a protective dimension to restrict unequal bargaining power.[156] There have also been calls to restrict the impact of collective bargaining, notably in the light of inflationary or other macroeconomic pressures.[157]

[156] For a discussion of these diverging perspectives in the French context, see Verdier J.-M., "Aspects de l'évolution du droit du travail en France dans le cadre des mutations technologiques et économiques", in Bellace J.R. and Rood M.G., *Labour Law at the Crossroads: Changing Employment Relationships* (The Hague, Kluwer Law International, 1997), p. 217. According to Verdier, "deux logiques se trouvaient ainsi combinées: une logique contractuelle, égalitaire et marchande, fondée sur l'échange de la force de travail contre un salaire, et une

Certainly, labour law and labour relations scholarship has to varying degrees challenged the perception that collective bargaining can be understood as a purely private mode of regulation. There is heightened awareness of the relationship between an enabling state regulatory role and the ability of the social partners to engage in the effective exercise of collective bargaining. In voluntarist traditions,[158] the state is generally conceived as leaving "freedom" to the unions and employers to settle amongst themselves (primarily and increasingly at the enterprise level); this approach often yields a minimal state approach to labour relations (increasingly through active "reregulation" of the labour market to remove legislative protections. But if the legislature adopts a posture of absolute restraint, not only will workers be subjected to anti-union practices in their attempt to avail themselves of their freedom of association and right to bargain collectively. If a jurisdiction also consider that strike action constitutes a breach of the contract of employment at common law, then regulatory action is necessary to ensure that at a minimum, the right to organize, to bargain collectively, and to strike are in fact legal and meaningful.[159] More robust forms of state engagement have of course emerged over time, in different legal traditions and different places. In traditions that place a premium on "democratic-choice" (closely aligned with and sometimes considered to be the same as voluntarism), some attention is given to ensuring that workers do in fact have real choices. For this reason, for example, Canadian labour law has adapted the Wagner Act tradition comprising union certification, labour board protection against unfair labour practices and grievance arbitration.[160] It has added a range of supplementary regulatory mechanisms to facilitate unionization, notably the acceptance of card signatures to determine a majority for union certification, first contract arbitration, and the Rand formula for dues check-off requiring all members of the bargaining unit to pay dues, irrespective of whether they are union members.[161] In citizenship-based traditions, strong participation by the "social partners" in tripartite decision-making is favoured. Indeed, "[c]ollective bargaining has always been used in these [primarily continental European] countries as a means of working out ways in which legislation is applied, and adjusting it to the specific circumstances prevailing in the various sectors and enterprises."[162] With a reduction in multi-sector national-level negotiating, a greater role has been crafted for sectoral negotiations within which framework agreements are adopted to facilitate enterprise-level bargaining.[163] Certainly, international labour standards have instead sought to ensure that the state provide a facilitative framework to promote collective bargaining while deepening its impact. While there has been understandable concern that the state might step in to restrain the substance of collective bargaining in a manner that

logique statutaire prenant en compte les spécificités de la personne du salarié, en particulier sa situation de subordination, donc d'infériorité, avec le risqué d'exploitation qu'il s'agissait de conjurer, logique fondamentalement protectrice du salarié".

[157] See Windmuller J.P., Collective Bargaining in Industralized Market Economies (Geneva, ILO, 1987), p. 144.

[158] See the pioneering work in the 1930s and 1940s on voluntarist collective bargaining in the UK by Otto Kahn-Freund. See generally Kahn-Freund O. (ed.), *Labour Relations and the Law* (London, Stevens, 1965).

[159] See e.g. Breen Creighton W., "The ILO and Protection of Freedom of Association in the UK", in Ewing K.D., Gearty C. and Hepple B. (eds.), *Human Rights and Labour Law: Essays for Paul O'Higgins* (London, Mansell, 1994).

[160] For a powerful discussion of the Wagner Act model with suggestions for an alternative regulative ideal focusing on "egalitarian deliberation" in the US context, see Barenberg M., "The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation", in *Harvard Law Review*, Vol. 106, 1993, p. 1379.

[161] See Arthurs H. et al., *Labour Law and Industrial Relations in Canada* (Deventer, Netherlands, Kluwer, 4th ed., 1993); Weiler P., *Governing the Workplace: The Future of Labor and Employment Law* (Cambridge, MA, Harvard U. Press, 1990).

[162] See Ozaki (ed.), op. cit. at 74-75.

[163] See Vaughan-Whitehead D., "Wage Bargaining in Europe: Continuity and Change", in *Social Europe*, supplement 2/90, 1990 (arguing that sectoral bargaining has gained in importance precisely because of the rise in enterprise-level bargaining in the 1980s).

curtails negotiated benefits, there is reason to encourage legislatively-established parameters put in place to facilitate (rather than supplant) bargaining for equality and the participation in collective bargaining by equality-seeking groups.

Much has been written about the comparative advantages of particular collective bargaining regimes in different countries;[164] indeed, a detailed discussion is beyond the scope of this paper. None the less, the twin assumption that both equality and collective bargaining are in some (albeit distinct) senses "private"[165] matters may have stood in the way of more pointed analyses of the enabling role of the state in relation to equality. But neither should regulation on equality, secured in many countries through constitutional and international human rights fora and judicial enforcement leading ultimately to legislative change,[166] be understood as the "public" dimension of a fundamentally "private" negotiating relationship.[167] Collective bargaining for equality usefully complicates this dichotomy, by suggesting that there is an important role for private actors to play, within carefully crafted state regulatory frameworks, to ensure that equality is realized.[168] The focus of this Part, therefore, is on the distinct equality dimensions of the choice of collective bargaining regime.

The choice both of collective bargaining regime and specific labour relations mechanisms within given regimes affects the availability and effectiveness of equality bargaining. For example, some labour relations scholars have affirmed that centralized wage bargaining, more prevalent in countries within the citizenship-based, social partnership models of collective relations, plays a particularly significant role in undermining wage differentials, notably in relation to gender.[169] In contrast, decentralized wage bargaining systems, increasingly prevalent in labour relations systems that are voluntarist or that focus on a democratic choice model of collective relations, tend to accentuate enterprise specific concerns of productivity or efficiency to the detriment of cost-of-living indexation of wages and broader "solidaristic"[170] strategies. They run the risk of exacerbating pay differentials. According to Jennifer Curtin:

> Decentralised collective bargaining can be problematic for women's wages, since dominant groups are able to protect their differentials leaving other workers with less industrial muscle, including women, at the bottom of the wages hierarchy.[171]

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[164] In the ILO see Olney et al., op. cit., at pp. 35-36; Trebilcock A., op. cit.; Windmuller, op. cit.

[165] See the discussion above in Part 2.

[166] See generally Sheppard C., *Litigating the Relationship between Equity and Equality*, Study Paper, Ontario Law Reform Commission, 1992.

[167] See e.g. Jennifer Curtin, who notes that "collective bargaining has tended to be limited in focus, with women's demands for equal pay or child care being defined as social issues requiring legal action. Legislative strategies have often been placed in contrast with the strategy of collective bargaining, since the former may interfere in what is seen as the domain of trade union." Curtin, *Women and Trade Unions*, op. cit. at 22. See also the discussion above in Part II.

[168] In this sense, we agree with Political Theorist Iris Marion Young:

[d]espite the vital role of civil society in promoting inclusion, expression, and critique for deeper democracy, I argue against those who suggest that civil society serves as a preferred alternative to the state today for promoting democracy and social justice. State institutions have unique capacities for co-ordination, regulation, and administration on a large scale that well-functioning democracy cannot do without.[…][A] strengthening of both is necessary to deepen democracy and undermine injustice, especially that deriving from private economic power. Each social aspect – state, economy, and civil society – can both limit and support the others.

Op. cit. at p. 156.

[169] See in particular Curtin, *Women and Trade Unions*, op. cit., at p. 22.

[170] See Ozaki (ed.), op. cit., at 118 (defining "solidaristic policies" as "policies behind which there is a global concept and which ensure a certain degree of solidarity in the solutions to the problems dealt with, thereby minimizing inequalities and social exclusion".)

[171] Curtin, *Woman and Trade Unions,* op. cit. See also, Judy Fudge, op. cit. for an analysis of the equality implications of bargaining unit structures on bargaining power, notably on pay, in the North American context. For example, if we take the airline industry, a bargaining unit composed exclusively of pilots will have greater

Moreover, there has been a marked trend toward greater decentralization of pay determination,[172] influenced in large part by a desire to promote labour market flexibility. This trend holds the potential to exacerbate these differences.

Of course, collective bargaining systems are in many cases hybrid; this hybridity can mitigate the impact of some structures, by superimposing others. For example, in systems that allow central bargaining to set minima and maxima, sectoral level wage bargaining for actual wage increase levels may mediate these differentials. Also, it bears noting that the hybridity of industrial relations systems includes the growing influence of trans-national regulatory structures, as well as of international norms and comparative experiences.[173] So on the issue of wage disparities, the development within European Community law of the inherently proactive notion of equal pay for work of equal value has served as a counterbalancing force, offering distinct means within which to challenge the development of pay differentials within the European Union. Similar developments at the national level in jurisdictions like Canada (Ontario) and Canada (Québec), which apply both to the public and private sectors, can also counteract some of the wage effects of occupational segregation and limited bargaining power in these traditionally decentralized wage bargaining jurisdictions.[174]

In some countries, particular forms of negotiated annualization of working time and other innovations in hours of work may raise equality challenges. Predictable, longer working days with shorter fulltime work weeks and constant wages[175] may under some conditions be favoured by those who have family responsibilities. In other cases, shorter working hours each day without pay reductions may decrease costs for employers by reducing sick leave (notably stress-related) and turnover (hence recruitment costs);[176] these forms of restructuring may also enable workers with family responsibilities to reconcile better the demands on their time without sacrificing pay through recourse to part time work. For example, where working hours are calculated on an annual basis, in some cases as a result of industry-level collective agreements, workers may be asked to work a large (but still limited) number of hours during one week when there is intensive production demand, but fewer hours during slower weeks. Weekly pay may be stabilized in order to provide some income security to the worker, while

bargaining power than a unit composed of ticket counter personnel. If pilots and ticket counter personnel are included in the same bargaining unit, the bargaining power of ticket counter personnel is enhanced.

[172] See Spyropoulos, op. cit., at p. 393 ("L'expérience des vingt dernières années montre, en effet, que la négociation décentralisée au niveau de l'entreprise mène souvent à des concessions réciproques des deux parties et non, comme par le passé, à la satisfaction exclusive des revendications des travailleurs. En revanche, la decentralization a entraîné le renforcement des instances de representation du personnel dans l'entreprise."); Ozaki (ed.), op. cit., at pp. 25, 69, 73 (noting against the dominant ideological current that "some governments have been able to achieve a degree of economic growth and macroeconomic stability by actively supporting centralized collective bargaining").

[173] See e.g. Bercusson B., "Globalizing Labour Law: Transnational Private Regulation and Countervailing Actors in European Labour Law", in Teubner G. (ed.), *Global Law without a State* (Aldershot, Dartmouth Gower, 1997), p. 138 (arguing that "the symbiosis of national labour law systems and EU labour law is both important and complex, with major dissonances between them at certain periods, and variations between Member States in terms of their interaction with EU labour law. Our understanding of this complexity can be enhanced by adopting an approach to European labour law which looks *beyond* the interaction between Member States and EU institutions."). See also Laborde J.-P., "Conflits collectifs et conflits de lois: Entre réalité et métaphore", in *Droit Social*, Vol. 7-8, 2001, p. 715.

[174] See discussion of Pay Equity below in Section 1.3. of this Part.

[175] See Ozaki (ed.), op. cit., at p. 27 (citing the example of the Netherlands); see also France's Aubry Law, 1998, which in an attempt to reduce job loss, shifted the standard work week from 39 to 35 hours in 2000. Ibid. at pp. 125-140.

[176] See the case of Volvo, cited in Ozaki (ed.), op. cit., at p. 137.

avoiding overtime pay for the employer.[177] Approaches to annualization of wages and other creative working time initiatives may be considered to be valuable so long as the hours fall within minimum national standards and international minimum working week norms. These vehicles may also enhance equality-promoting flexibility during difficult economic times in the workplace context; for example, some creative working time practices may reduce the number of layoffs, thereby preventing the members of traditionally disadvantaged groups (including younger workers) who were the "last hired" from being the "first fired". However, and also from an equality perspective, annualization in particular runs the risk of causing a certain amount of hardship for workers with child care, elder care or other family responsibilities who need to juggle regular work hours with hours at home. Research on the impact of these measures on workers with family responsibilities (who in most contemporary societies remain primarily women) is warranted; participation by those workers in the elaboration of these norms at the national, industry and enterprise levels in the ways advocated in Part 2 should be encouraged.

The duty of fair representation, a feature of Wagner Act industrial relations systems that exist in the United States, Canada, and the Philippines, offers another example of how a particular system may enhance or restrict bargaining for equality. It is worthwhile to recall the duty developed in the United States as an intermediate solution, when a railway union refused black workers the right to become members of the union, and sought to enter into a collective agreement that would bargain away their rights in favour of the white bargaining unit majority (minority unions within this system were not permitted to be formed). The Court imposed upon the union the duty to represent the workers fairly; tellingly, however, the Supreme Court stopped short of requiring the union to admit black workers as members. The workers therefore had a right to be represented, yet their democratic participation rights in the union and in broader workplace governance were categorically denied.[178]

In the more contemporary framework, the duty of fair representation has increasingly been called upon to ensure that women and minority groups are not further disadvantaged when they bring anti-discrimination claims against their co-workers and fellow bargaining unit members. While the duty of fair representation has been used largely on individuals who have grievances against the employer, it has been raised in the context of negotiations to assess the fairness of the trade-offs a union may make, as the *Steele* decision illustrates. A concrete manifestation of the union's duty of fair representation in the context of an employee grievance would arise with a sexual or racial harassment complaint. Since this kind of complaint would likely require a trade union to represent more than one bargaining unit member, the duty of fair representation would generally require the trade union to ensure that both parties receive impartial and separate representation. It bears recalling, however, that the duty of fair representation is a relatively circumscribed device, imposing obligations on the trade union when disciplinary sanctions are levied, particularly in the case of job loss, or limited elements of contract negotiation.

Other collective bargaining mechanisms that have been thought to be equality-enhancing may none the less raise equality challenges. Consider for example the case of the legislative extension of collective agreements. On the one hand, legislative extension has permitted a wide range of categories of workers who may fall outside of traditional workplace assumptions to organize, by ensuring that contract terms are extended to the entire industry.[179] These workers

[177] See primarily the example of Italy, but also the examples of France, the Netherlands and Argentina cited in Ozaki (ed.), op. cit., at p. 27.
[178] See *Steele*, op. cit.
[179] See Windmuller, op. cit., at p. 157.

may overwhelmingly be women and members of other historically disadvantaged groups.[180] The protective dimension of this kind of negotiated "specific regulation"[181] that is sensitive to the particular workplace context cannot be denied. But the act of extension itself raises real challenges to the ability to promote democratic participation. The free-rider dimension of this problem has received considerable attention, as it removes some of the material incentive for workers covered by the extended agreement to join a union.[182] Of comparable concern is the possibility that deep consultation with the workers in the particular industry may diminish, leading to a de facto representation gap despite coverage and a corresponding inability effectively to understand and defend workers' equality concerns. As concerns collective bargaining, therefore, it is crucial to think about its equality-enhancing value not only in terms of its protective role, but also more robustly in terms of its capacity to foster meaningful, participatory dialogue, by enfranchising collectivities of workers. This is the empowerment function of collective bargaining, or the ability of workers to take control of their workplace destiny. In this light, carefully crafted approaches to juridical extension and more recent proposals to adopt broad-based bargaining schemes[183] hold deep equality potential. For that potential to be harnessed, greater attention needs to be given to the ways that equality seeking groups can participate actively and fluidly in the construction of the regimes and in the elaboration of the extended contractual terms.[184]

1.2. Minimum standards legislation

This Part has hypothesized about the collective bargaining impact of industrial relations regimes on equality, and has argued for equality promotion to be a key factor in determining the effectiveness of a collective bargaining system. The impact of the choice of industrial relations system on the interface between collective bargaining and equality is an area in which further study would be welcomed. The ILO has an important role to play as a pioneer of comparative and international research on this topic. Yet to assess the regulatory role of the state in promoting collective bargaining for equality, more than collective bargaining legislation matters. The capacity to eliminate discrimination and promote equality is deeply influenced by the other legislative mechanisms, including those on minimum working conditions.

Legislation setting a floor of decent working conditions, including minimum wage laws, restrictions on hours of work, minimum rest periods, as well as occupational safety and health legislative systems, serve a crucial equality role. The existence of these laws and accompanying inspection/ enforcement systems confirms that certain matters should not be left to bargains struck by the parties; those bargains are presumed to be inherently inequitable. We therefore reaffirm the importance of legislation on minimum working conditions for the promotion of equality, while noting that challenges to its legitimacy in the 1980s and 1990s

[180] See for e.g. the juridical extension of legislation applicable to domestic workers in France, as discussed in Blackett, *Making Domestic Work Visible*, op. cit.
[181] Ibid.
[182] See Windmuller, op. cit., at p. 7.
[183] See e.g. Vosko L., Temporary Work: The Gendered Rise of a Precarious Employment Relationship (Toronto, University of Toronto Press, 2000).
[184] See Lyon-Caen G. and Pélissier J., *Droit du travail* (Paris, Dalloz, 1990) (noting that judges tend to interpret extended agreements in a manner consistent with regulation rather than contract); Windmuller op. cit., at p. 135 (noting that the classification of this mechanism as a formerly private agreement is transformed into a kind of "industrial common law").

have not as readily withstood more contemporary recognition that dignity demands that all workers have access to decent work.[185]

It is worth noting in this regard the overlap that sometimes exists between minimum standards and specific human rights legislation, for example in the area of anti-discrimination measures during pregnancy, and maternity leave. In our opinion, the role played by this type of legislation is not entirely captured by the term "prohibitive". It is certainly true that at one level, labour standards and/or human rights legislation that offers robust privacy protection and as a result prohibits pre-employment and routine mandatory workplace testing for HIV/AIDs is effectively prohibitive in nature, and overlaps in important ways with human rights prohibitions by proactively avoiding discriminatory reprisals. But legislation on working conditions has a broader, enabling role by raising the bargaining floor; this is particularly useful for those categories of workers whose bargaining power is most limited, as discussed in Part 2. That is, workers who face occupational segregation into jobs considered to be low skilled and for which there may be a surplus of workers, often from historically disadvantaged communities, may be least well placed to bargain for equality. Legislated minima seek to ensure that they do not make "unconscionable" labour market bargains,[186] or that bargains are enforced against those workers who should not be permitted to enter into an employment contract (notably minors). Drawing again on the example of HIV/AIDS, the strong privacy rights protection may then enable the parties to put HIV/AIDS on the bargaining table, providing incentive for the parties to devise more effective, compassionate and dynamic approaches to addressing the workplace dimensions of the HIV/AIDS epidemic. The constructive legislative approach curtails destructive, "punitive" approaches to HIV/AIDS that further inhibit the productive capacity of the workplace actors; it seeks instead to mobilize tripartite plus workplace actors to ensure that they use the vehicle of collective bargaining to devise constructive policies and codes of conduct to deal creatively with this particularly pressing problem.[187] Appropriately crafted minimum standards, if they are truly floors,[188] enable parties to seek further improvements on conditions and to focus ideally on more resourceful measures, tailored to the specific nature of their work, as illustrated in Part 2.

It is possible, however, for labour standards legislation to have adverse equality consequences. For example, if legislation provides excessively generous protection for workers, well above international and comparative examples, that legislation will invariably serve as a disincentive for employers to hire women. One classic example of this phenomenon is legislation that provides women with strikingly long periods of maternity leave well above international and comparative levels, while requiring the employer to assume the full costs. This kind of

[185] It is certainly true that throughout the 1980s and early 1990s, US neo-liberal models fell more readily within the dominant paradigm than more protective standards regulation in continental Europe; however, this perspective is increasingly challenged. There has certainly been a current that considers that minimum wage legislation in particular restricts low-skilled job creation in the formal sector, which arguably then hurts the very workers the legislation seeks to protect. This has notably led to sub-minimum wages in some countries to protect youth employment. However, there are robust examples that challenge the negative link between minimum wages and job creation, leading the authors to conclude that "establishing a minimum wage does not necessarily constitute an obstacle to enhancing pay flexibility. Much seems to depend on the level at which the minimum wage is fixed, the context in which the system is introduced and applied, and whether there are special provisions made for certain groups of workers." See Ozaki (ed.), op. cit., pp. 2, 16-19, 69-72. We add that the ILO's "decent work" challenge should necessarily be a part of the equation.

[186] See e.g. Fernandez J.C., "The Principles of Labour Law in Argentina: The Principle of Indemnity", in Bellace and Rood, op. cit., at pp. 70-71 (commenting on the principle of non-renunciation of rights in Argentina which ensures certain minima and seeks to protect against poorly-struck contracts.)

[187] See ILO, ILOAIDS Meeting Report: Consultation Workshop on HIV/AIDS and the World of Work: Key Issues and Conclusions, Geneva, 16-17 October 2000.

[188] See Standing, op. cit. (comment on the contemporary difficulties with minimum wage standards).

legislation may well be understood not to promote women's workforce entry, but rather to dissuade employers from hiring women of child-bearing age altogether. Similarly collective agreements that replicate this kind of regulation can have the same kind of equality-inhibiting effect. Participation by workers from historically disadvantaged groups in the negotiation of workplace agreements is a crucial element to avoid the replication of this kind of problem.

Minimum standards legislation may have been modelled on international labour standards arising out of particular historical and geographical contexts; those legislative initiatives restricted women from engaging in certain forms of work, notably night work, in order to protect them from a mix of physical peril and moral taboos. While at the outset the needed protection provided by legislation on night work for women[189] may have outweighed this concern, regulatory choices that are fundamentally paternalistic run the risk of restricting rather than enhancing meaningful equality over time. Yet a more contemporary rights-based focus need not necessarily entail uncritically assuming that all women should be required to perform the same work at the same time as all men, no matter the conditions and context. Instead, it focuses on the broader objective of assuring decent working conditions for all workers, through gender-inclusive regulation of work hours and occupational safety and health concerns. It also seeks to adopt gender-sensitive approaches to some of the persisting equity concerns that may have been raised in defence of night work restrictions for women: notably, ensuring that women can effectively assume childcare responsibilities in the home. Yet there are different ways to regulate, to ensure that women are not saddled with greater social burdens, without reinforcing stereotypical assumptions about women's roles. Contemporary normative activity, that focuses on the promotion of Equal Opportunity for Workers with Family Responsibilities, be they men or women, provides scope to ensure that workers who leave the workplace to begin the "second shift" at home are in fact accommodated at the workplace; that accommodation may mean not having to work during the night, when young children or other dependants may need their assistance. Collective bargaining that builds on this kind of regulatory action to provide complementary schemes, to seek benefits such as childcare facilities at or near the workplace, family or undeclared leave provisions, or reductions in the standard work week may all enhance equality.

1.3. Human rights legislation

Through its support for proactive equality measures to frame collective bargaining, the state is recognizing that its support for collective bargaining is based at least in part on its capacity to be fully inclusive of all social groups. Human rights legislation that draws on the vehicle of collective bargaining to promote equality goals validates the centrality of democratic participation, and marshals the specific insights that only the workplace actors can bring to the specificity of their workplace to the benefit of equality. This approach seeks to deepen the capacity of previously excluded workers to participate actively in their workplace governance, recognizing that "a public is always better if more of its members have more developed capacities than fewer."[190] In this light, political theorist Iris Marion Young appropriately posits the following:

> If democratic communication is not simply deliberation among gentlemen who already share basic understandings, […] but is often a struggle among society's members to have their interests, experiences, and opinions recognized by others, and a struggle to

[189] On the importance of reaffirming the protective role of the state in labour relations law generally, by bringing a broad range of atypical work relationships within the purview of labour law, Spyropoulos, op. cit., at p. 399.
[190] See Young, op. cit, at p. 80.

> persuade others of the justice of their claims, then a theory of communicative democracy should reflect on the normative meaning of all the communicative interaction brought to such struggles.[191]

Negotiating for equality with equality-seeking groups is bound to be more complicated and challenging than negotiations on so-called bread and butter issues between habitual negotiating partners; on the other hand, it holds the potential to enhance the real effectiveness of the collective bargaining process.

Legal protection securing equality rights appears to enhance the likelihood that equality will be addressed in collective bargaining. Research suggests that a legal framework in support of equality rights is often a necessary precondition to getting "social partners to address equality issues in bargaining."[192] In turn, the effective enforcement and "implementation of legislative measures [in favour of human rights] may often depend on supporting institutions and policies which are derived from a collective framework."[193] Social partners can play an important role in ensuring access to justice in the face of discrimination, exclusion and inequality.

General equality rights and anti-discrimination protection

Constitutional and international human rights guarantees against discrimination focus on the role of the state in interfering with, or failing to promote, equality. With respect to explicit exclusions from collective bargaining regimes, it is predominantly the inadequacy of state regulatory responses that is at issue. Collective bargaining legislation, therefore, in many countries, is subject to constitutional scrutiny and must comply with constitutional equality rights guarantees.[194]

Statutory human rights provisions are the most prevalent means of protecting individuals and groups against discrimination at work. The most common legislative approach to anti-discrimination accords individuals a right not to be discriminated against in employment and provides them with retroactive legal recourse in the face of discrimination at work. Human rights protection against discrimination at work is generally extended to those groups in society that have historically been excluded or subjected to discriminatory treatment. Many human rights documents enumerate specific grounds of discrimination, such as race, national or ethnic origin, colour, sex, religion, age, civil status, and political affiliation. More recently, new grounds of discrimination have been recognized in some human rights laws, including, for example, physical and mental disability, sexual orientation and social condition. As highlighted in Part 2, increasingly trade unions and employers are including general anti-discrimination clauses within collective agreements. One of the most important ramifications of the inclusion

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[191] Ibid.

[192] Dickens, *Illuminating the Process*, op. cit., at p. xi (documenting research on Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Netherlands, Portugal, Spain, Sweden, UK).

[193] Curtin, *Women and Trade Unions*, op. cit., at p. 23.

[194] On its face, collective bargaining legislation does not generally directly discriminate against any groups traditionally protected by human rights guarantees. For example, one tends not to find overt use of race-based or sex-based exclusions or categorizations. However, as explored in Part 1, it is necessary to delve deeper into the categories and definitions used in collective bargaining legislation to uncover problems of inequality and discrimination. In jurisdictions where constitutional review is not available, supervisory mechanisms linked to international human rights commitments may prove to be a particularly important vehicle for helping to ensure that collective bargaining laws are consistent with equality rights.

of non-discrimination clauses is more effective human rights enforcement. Employees can utilize the grievance procedure to make human rights claims.

Anti-discrimination clauses also set important limits on the parameters of collective bargaining and freedom of contract. Where private ordering outcomes deviate from human rights norms secured in legislation, the latter take precedence over the former.[195] In other words, discriminatory collective agreement provisions are prohibited by human rights legislation and may be challenged on such grounds. Indeed, seniority provisions have been challenged as discriminatory pursuant to human rights legislative guarantees.[196]

As important as statutory human rights complaints provisions may be, human rights advocates have long argued that after-the-fact human rights implementation, based on individual or group-based complaints of discrimination, is insufficient to redress the pervasive and systemic problems of inequality at work. In response, legislators have explored more proactive approaches to securing equality at work, mandating the establishment of employment equity/affirmative action programs, and pay equity schemes. While both operate regardless of whether a workplace is unionized, in many cases, these statutory developments set out an integral role for trade unions in securing effective implementation. Moreover, without an independent voice for workers, their implementation risks being much less effective.

There are certainly cases in which market forces can of themselves favour equality-enhancing bargains. For example, in countries with full employment, employers may be particularly keen to attract women, and as a result to provide measures to foster women's workforce access, including anti-harassment policies, childcare facilities, and generous maternity leave entitlements. In other cases, market demand in certain niche areas, like telecommunications services, may encourage employers to seek workers with excellent foreign language skills; this may lead those employers to adopt equality affirming policies to attract and promote members of the concerned ethnic groups.[197] While the initiatives should be encouraged and integrated into collective bargaining experiences, there are several risks associated with relying exclusively on these initiatives to the exclusion of broader regulatory frameworks. First, they overlook the broader question of bargaining power, favouring those workers whose structural labour market position and skills sets enable them to exercise a certain amount of bargaining control. The equality gains are therefore distributed unevenly across economic sectors. Second, the durability of the gains in times of economic recession or crisis is increasingly challenged. The risk that disadvantaged groups are seen as a "reserve" category of labour subjected to less favourable treatment in times of high unemployment warrants attention. Third, certain categories of historically disadvantaged groups have more difficulty than others overcoming stereotypical assumptions about their workplace capacity. Finally, the need for proactive human rights legislation becomes particularly acute when private sector actors have not voluntarily taken up the initiative.[198]

[195] Anti-discrimination laws generally apply to both employers and trade unions; although the allocation of liability can raise vexing concerns.

[196] Some human rights statutes explicitly exempt seniority from the reach of anti-discrimination guarantees: See, for e.g., *Americans with Disabilities Act*, 42 U.S.C. 12,101-12,213 (1990).

[197] See John Wrench, *Employers and Anti-Discrimination Measures in Europe: Good Practices and Bad Faith*, in Wrench, Rea and Ouali (eds.), op. cit., at p. 231 (citing the example of Sweden's public telecommunications service that has adopted a plan for ethnic equality along a business efficiency rationale, focusing on a knowledge of foreign languages.)

[198] Ibid. at p. 231 (remarking that there is a dearth of examples of employer initiatied anti-racism measures in the private sector in Sweden).

Affirmative action/employment equity

In some jurisdictions, governments have introduced mandatory proactive equality initiatives to redress historical and continuing exclusions and discrimination at work. Proactive programs require the assessment of barriers to equality in the workplace, the revision of discriminatory standards and practices and in some cases special group-based preferences to expedite the attainment of equality. Collective bargaining therefore takes place against a regulatory backdrop requiring positive action on equality in the workplace.[199] This means that equality is a mandatory item on the workplace agenda. Accordingly, trade unions and employers must assess the equality implications of their positions and demands at the bargaining table. Ensuring a place for equality on the collective bargaining agenda is of utmost importance. Equality issues cannot be relegated to the next round of negotiations.

A second important implication of affirmative action/employment equity legislation is its institutionalization of some degree of worker participation in the pursuit of equality. Integrating proactive equity initiatives into the collective bargaining process allows for a "bottom-up" approach to the institutional change that equality demands.[200] Requirements for consulting and including workers on employment equity committees are often written into the legislative framework.[201] While these worker participation dimensions of legislated equity schemes are applicable to both the unionized and non-unionized workplace, a trade union presence helps to ensure that worker participation is autonomous and not captured by the structural power imbalances of the employer-employee relationship.

It is also worth noting in passing that government procurements legislation has been used in many countries to promote more equitable hiring and promotion practices, or to sanction grant or licence holders who are found guilty of engaging in racial or other forms of discrimination.[202] These proactive human rights approaches have in some countries played an important role in ensuring that historically disenfranchised groups gain labour market access.

Pay equity

Recognition of the systemic and discriminatory undervaluing of work traditionally done by women and other historically disadvantaged groups[203] in the paid labour force has prompted

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[199] See Dickens, *Illuminating the Process*, op. cit., at p. xi (noting that "the influence of law is stronger where the emphasis is on positive measures to promote equality rather than simply non-discrimination; where specific action by the social partners (whether procedural or substantive) is mandated and positive action promoted, rather than just encouraged; where provisions are enacted which provide for the monitoring of such action, and where there are sanctions in cases of non-action or rewards for action.") See also, ILO, *Review of Annual Reports,* op. cit., at p. 34.

[200] Dickens, *Illuminating the Process*, op. cit., at 43 (critiquing "top-down" legislative interventions or unilateral employer initiatives as inadequate for human rights implementation). For a discussion of the importance of "bottom-up" approaches to equity in the workplace, see Colleen Sheppard and Westphal S., "Equity and the University: Learning from Women's Experience", in *Canadian Journal of Women and the Law*, Vol. 5, 1992, p. 5.

[201] See, for e.g., Government of Australia, *Negotiating Equity: Affirmative Action in Entreprise Bargaining* (Canberra, Australian Government Publishing Service, 1994); Government of Australia, *Women and Workplace Bargaining: Checklist for Equity in Workplace Bargaining: for Workplaces Negotiating a Workplace Agreement* (Australia, Department of Industrial Relations, 1994).

[202] Ibid.

[203] We noted that although Convention No. 100 refers specifically to gender, Convention No. 111 extends the principle to all groups covered by it.

the emergence of pay equity legislative initiatives.[204] These legislative schemes demand that a proactive approach to sex-based pay inequities be developed to secure equal pay for work of equal value or work of comparable worth. As outlined above, collective bargaining has traditionally addressed pay levels. Indeed, the struggle to improve the wages of working people has been at the heart of collective bargaining. How then does pay equity intersect with collective bargaining? Does pay equity legislation enhance or conflict with the traditional role that unions have played in securing better wages?

Pay equity has generally been endorsed by trade unions and legislative initiatives have been relied upon to bolster union bargaining power on the need to secure pay equity in wages. Similar to minimum standards legislation, the existence of legislated pay equity requirements changes the starting point of collective negotiations. Pay equity is a legislated requirement; collective bargaining, therefore, must address how to achieve it rather than whether it is a necessary objective.

The complexities of pay equity are a challenge for regulators and for employers and trade unions. Comparable worth contests market-based wage determination in a world governed by market ideology. It challenges labour market inequities, which are often deeply linked to social, religious and cultural norms. It is rendered even more complex where employers innovate with profit sharing schemes to supplement traditional employment remuneration.
The limitations of pay equity initiatives have also been highlighted. In general, it addresses horizontal economic inequities, but not vertical inequities.[205] It has been developed to address gender-based inequities, but has not been extended to other systemic pay inequities.[206]

Moreover, trade unions have articulated a number of criticisms about the effects of pay equity schemes. There has been a concern that workers may risk seeing historical gains undermined by complex arguments regarding the value of particular jobs. The very task of ascertaining the worth of particular jobs has been critiqued as an intrusion by management and human resources experts into workers' lives. The struggle for fair wages becomes technocratized because of the need for sophisticated job evaluation schemes and complex statistical analysis to ascertain whether pay levels are discriminatory.[207] Implementation is rendered more difficult where job segregation is industry or workplace-wide, because of the lack of a male comparator. Large public sector workplaces, with a diverse range of job categories, appear to provide the best context for pay equity implementation. Further difficulties with pay equity are linked to the impact of structural adjustments in the economy, which are eroding the wages and benefits of the male norm upon which pay equity schemes are premised. Despite these challenges, given the regulatory initiatives in some countries, it remains critical for trade unions to play an active role, rather than leaving pay equity determinations to management. And as in the case of employment equity, the effectiveness of the enforcement of pay equity norms is greatly enhanced by independent worker representation.

[204] See Eyraud et al., op. cit.; Morley Gunderson, Comparable Worth and Gender Discrimination: An International Perspective (Geneva, ILO, 1992).
[205] See critique by Evans S. and Nelson B., *Wage Justice: Comparable Worth and the Paradox of Technocratic Reform* (Chicago, University of Chicago Press, 1989), at p. 12. See also Fudge J. and McDermott P., *Just Wages – A Feminist Assessment of Pay Equity* (Toronto, University of Toronto Press, 1991).
[206] See Scales-Trent J., "Comparable Worth: Is this a Theory for Black Workers?", in *Harvard Civil Liberties and Civil Rights.Law Review*, Vol. 24, 1984, p. 51.
[207] See Evans and Nelson, op. cit., at p. 13.

2. *Retreat of the State in labour regulation? Access to justice and the institutional infrastructure for equality*

We have argued in Section 1 that the regulatory infrastructure to ensure effective collective bargaining is not equality neutral. Despite the inherent pluralism of labour relations law, rooted in the ability of the parties to collective bargaining to make the laws that govern their workplace relations,[208] a range of state regulatory action is crucial to ensure both the viability of equality and the viability of collective bargaining. This Section therefore considers the impact of a retreating state on the effectiveness of collective bargaining in the promotion of equality. It recognizes that the unravelling of welfare-state based policies in industrialized and developing countries in the 1980s and 1990s, accompanied by a preference for minimum state intervention, have challenged received wisdom about the potential facilitative role of state regulation to promote equality. The "threat of exit" by footloose employers may prevent states from taking a more proactive regulatory role, "re-regulating" instead to attract foreign direct investment and to encourage multinational enterprises (MNEs) to stay. As Jean-Philippe Robé has argued in relation to MNEs:

> With the internationalization of the economy, the deterritorialized enterprises can play a certain game by making various state systems compete, and this gives them a considerable advantage in making sure that positive norms and institutions are adopted in a manner conforming with their own interests, because there is no political structure of representation of the common interest challenged at the global level.[209]

That the existing normative structure of labour law, even at the international level, directs its attentions first and foremost to states and state action, rather than directly to the action of MNEs, underscores the limited effectiveness of traditional labour relations law.

If traditional labour relations law is increasingly ineffective, then the reliance on traditional labour relations law to promote equality is at least equally destabilized. That the workforce changes chronicled in Part 1 are accompanied by "increasing concentrations of poverty and long-term unemployment, [yielding a] growing racialisation or ethnicisation of poverty and exclusion"[210] further complicates the equality challenge. To look into the face of exclusion and see the historically disadvantaged groups that Convention No. 111 seeks to protect compels careful rethinking of the structures of collective representation and negotiation. In keeping with their character as fundamental principles and rights at work, these vehicles must be reconceived to enable them to counter, rather than reinforce, societal inequality.

We are persuaded, in this sense, that the Section 2 story needs not be relentlessly bleak. Not only has labour law always been in a state of flux,[211] seeking greater responsiveness to social,

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[208] As eminent labour law scholar Harry Arthurs explains:

This is not to argue that collective bargaining – or any of the other regimes – necessarily operated in total isolation from the state. In various societies, at various times, collective bargaining has been tolerated, encouraged, licensed, regulated, or co-opted by the state. But the most distinctive feature of collective bargaining is not its nexus with the state; rather it is that collective bargaining relies upon employers and workers to generate and enforce the norms which govern workplace behaviour.

"Labor Law Without the State?", in *University of Toronto Law Journal*, Vol. 46, 1996, p. 1 at p. 3.

[209] See Robé J.-P., Multinational Enterprises: The Constitution of a Pluralistic Legal Order, in Teubner G. (ed.), op. cit., at pp. 70-71.

[210] See Wrench, Rea and Ouali (eds.), op. cit. at p. 6.

[211] See Spyropoulos G., op. cit., at p. 391; Durand P., *Traité de droit du travail*, Vol. 1, 214ff (Paris, Dalloz, 1947) ("droit inachevé").

technological and economic conditions.[212] The encouraging tendency in the current decade is in fact the rethinking of the minimal state "liberalization theology,"[213] in favour of a more robust, carefully-tailored approach to ensuring the effectiveness of targeted, constructive state regulatory involvement for the promotion of an integrated approach to social policy and economic development.[214] This approach includes promising possibilities – including at the trans-national level[215] – for the interface between the effective recognition of collective bargaining and the promotion of equality. In conceptualizing and operationalizing the latter shift, the ILO has a crucial role to play.

Given the robust reaffirmation of freedom of association and the effective recognition of the right to bargain collectively in the ILO Declaration, we are inclined to accept the proposition that the notion of collective labour relations is not in and of itself directly challenged, (at least not at a theoretical level) so much as that its effectiveness in an increasingly trans-national economic context is seriously called into question.[216] Yet some of the recent empirical literature suggests that in some countries, when equality-enhancing concessions and workplace changes are accorded high priority by unions, the unions are relatively successful at advancing those equality priorities through collective bargaining.[217] What then is the potential that taking up the equality challenge can enhance the effectiveness of traditional industrial relations law and practice, in part by broadening its representational base and strengthening the legitimate democratic claim?

Recently, original scholarship[218] in the area of employment discrimination law has attempted to tackle the ways that dynamic "regulatory" approaches[219] can help to eradicate manifestations of systemic workplace bias, exclusionary employment practices (including glass ceilings[220]) and harassment that are particularly prevalent in multi-skilled, teamwork focused contexts in which mentoring[221] and other informal procedures are important factors for promotion. This work documents enterprise-level attempts to foster compliance through the articulation of policies and the development of a culture of interactive problem solving. If somewhat controversial to the extent that they may supersede hard rule-enforcement approaches through judicial or quasi-judicial enforcement mechanisms,[222] they are nevertheless of growing interest in their ability to bring on board a number of newer potentially constructive workplace participants (like

[212] Spyropolous, op. cit. at p. 391.
[213] Pierre Sauvé of the OECD has coined this expression, to capture the often fervent yet increasingly challenged belief in the saving power of the Washington Consensus.
[214] For a well-received analysis of the Washington Consensus and the policy shift of international financial and trade institutions, see Birdsall N. and de la Torre A., *Washington Contentious: Economic Policies for Social Equity in Latin America* (Washington DC: Carnegie Endowment for International Peace and Inter-American Dialogue, 2001), p. 4.
[215] See Moreau, Mondialisation et droit social, op. cit., at p. 385; Moreau M.-A. et Trudeau G., "Les normes de droit du travail confrontées à l'évolution de l'économie: nouveaux enjeux pour l'espace social regional", in *Journal de droit international privé*, mai 2000, p. 915.
[216] Moreau, op. cit, at p. 394 (theorizing the crisis in the collective dimension of labour law).
[217] See for example in the Canadian context, the important recent study by Kumar and Murray, op. cit., at p. 20.
[218] See Sturm, op. cit.
[219] Sturm is careful to resist fully privatized models, insisting on the relationship between state-enforced rule-making and regulatory action "closer to the normative line". Ibidem at pp. 563-564.
[220] For an excellent study of this issue as it applies to women in managerial positions, see Wirth L., *Breaking through the Glass-Ceiling: Women in Management* (Geneva, ILO, 2001).
[221] On some of the difficulties associated with mentoring across diversity see Blackett A., "Mentoring the Other: Cultural Pluralist Approaches to Access to Justice", in *International Journal of the Legal Profession*, Vol. 8, 2001, p. 275.
[222] For an important critique see Bisom-Rapp S., "An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law", in *Berkeley Journal of Employment and Labor L*aw, Vol. 22, 2001, p. 1.

specialized workplace diversity trainers) to assist in promoting meaningful compliance with non-discrimination principles. There is real potential for trade unions to lead by example on these more localized approaches to workplace governance for equality, to negotiate the terms of the policies, assist with the training and the choice of trainers, while ensuring that the mechanisms are in fact responsive to the concerns of unionized workers while preserving their legal rights and recourses.

Another part of the story on the future interface between collective bargaining and equality is projected to involve the possible emergence of sites for social dialogue at newer governance levels.[223] To the extent that they are complementary to collective bargaining,[224] they should be harnessed also to promote equality. For example, works councils within the European Union[225] and comparable forms of labour-management representation (e.g. in Japan and the Republic of Korea)[226] may to some extent be harnessed to promote the representation of traditionally-marginalized groups in workplace management.[227] These outcomes may be increasingly mandated, as the EU increasingly extends its equality of treatment provisions beyond sex discrimination[228] to all discrimination based on race, ethnic origin, religion or conviction, disability, age and sexual orientation.[229] Yet attempts to do so must first grapple with the realization that liberal trade has tended to place a premium on promoting greater market flexibility to promote economic competitiveness.[230] Recent, widely embraced theoretical approaches that seek to integrate the social and the economic[231] need to infuse efforts to harness trans-national initiatives, fostering sophisticated approaches to equality promotion in the face of economic competitiveness. This approach is part and parcel of ensuring that the growing trend toward trans-national regulatory regimes does not weaken negotiated equality protections. Greater advances in collective bargaining and comparable approaches that promote equality through democratic workplace participation across different governance levels may reduce the reliance on unilateral initiatives, like codes of corporate conduct.[232]

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[223] We note the following conclusion:
Collective bargaining tends to be more effective in enhancing labour market flexibility when decentralized bargaining is supported by mechanisms of coordination at a higher level. These mechanisms of coordination may be either formal, and effective, centralized bargaining or informal coordination among different enterprises or industries. Governments can play an important role in promoting such coordination.
Ozaki (ed.), op. cit., at p.149.

[224] See Wedderburn, op. cit., at p. 26-34.

[225] EU Directive 94/45.

[226] This role is to date quite limited, and is the subject of some controversy, necessarily beyond the scope of this paper. Some countries (e.g. the Netherlands) have been better able than others to ensure an effective demarcation between works councils and collective bargaining. For a brief discussion of these tensions, see Ozaki (ed.), op. cit. at pp.111-113; Spyropoulos, op. cit., at p. 396 (noting that the absence of a sufficient legal framework for collective bargaining in MNEs remains a serious obstacle).

[227] See e.g. Bercusson, op. cit., at p. 153 (commenting, albeit without specific attention to traditionally-excluded groups, on the critical issue of legitimacy through representativeness that arises when EU institutions seek to involve actors in workplace governance).

[228] See Hoppe T., "La protection contre la discrimination sexuelle à l'embauche en Europe", in *Revue de droit international et de droit comparé*, Vol. 79, 2002, p. 32.

[229] See Treaty of Amsterdam, Article 13 and EU Directive 78/00 of 27 November 2000. See also Bell M., "Article 13 EC: The European Commission's Anti-Discrimination Proposals", in *Industrial Law Journal*, Vol. 29, 2000, p. 79; Waddington L., "Article 13 EC: Setting Priorities in the Proposal for a Horizontal Employment Directive", in *Industrial Law Journal*, Vol. 29, 2000, p. 176; Whittle R., "Disability Discrimination and the Amsterdam Treaty (European Union)", in *European Law Review,* Vol. 23, 1998, p. 50.

[230] See Lord Wedderburn, op. cit., pp. 5-6 (contending that "European market law just does not allow for major adjustments in favour of workers' social interests.")

[231] See discussion above of Amartya Sen's work in the Introduction and Part 1 of this paper.

[232] See Blackett, Global Governance, op. cit., at pp. 419-420.

To the trans-national shift we add the important role that government actors can play[233] in ensuring broad, inclusive representation in the various "higher" level representational structures. In this light, we note the resurgence of interest in participation by trade unions and other civil society actors in new regional integration initiatives, in attempts to develop the often embryonic social dimensions that exist in trans-national governance constructs.[234]
The affirmation that governments support collective bargaining by facilitating the development of "advisory, informational and educational"[235] services is all the more compelling in relation to equality.

Conclusion

Part of the reason why this paper contests the retreat of the state thesis on the interface between collective bargaining and equality is because it foresees an important role for the ILO. Focused attention by the premier international institution on international labour standards on how to support the social partners directly, and to enhance government's capacity to promote these activities – would provide a welcome, unique contribution to the promotion of equality and collective bargaining. This support certainly includes research and analytical support, notably on the emerging patterns of collective bargaining and broader social dialogue especially at emerging governance sites, their advantages and their limits. But over and above documentation and analysis, there is a clear normative role that can be played by the ILO. Training and other forms of technical assistance focusing on how the social partners can effectively participate in and shape emerging workplace governance are crucial. Much as the ILO's engagements with crafting a social dimension in Mercosur (through the effective Relasur project) illustrate,[236] targeted ILO action can help to shape the direction of globalization-related changes, holding actors accountable to the requirements of a decent work agenda and providing them with the capacity to meet it.

We have argued throughout this paper that the fundamental principles and rights at work are a cardinal aspect of this relationship. To be given their full meaning, they must be understood not only autonomously, but in their relationship to each other. We have contended that collective bargaining is "effectively" recognized when it is responsive to the unequal access challenge. We have argued that equality can enhance the effectiveness of collective bargaining, and encourage the ILO to continue to play a leading role in assessing and promoting the interface through greater research and action on this theme. Theorizing and operationalizing the interplay between these and other fundamental principles and rights at work will bind them together, illustrating the mutually-reinforcing potential of each. Together, they promote a vision in an increasingly integrated world that sees a robust defence of the social in the economic as central to sustainable development.

[233] For a challenge to the retreat of the state thesis, see Blackett A., "Globalization and its Ambiguities", in *Columbia Journal of Transnational Law*, Vol. 37, 1998, p. 57.
[234] See ILO Regional Office for Africa, ILO Africa Newsletter No. 11 Dossier Social Dialogue (appraising the development of participatory mechanisms within different regional arrangements like SADC); on the FTAA and sub-regional groupings in the American hemisphere, see Blackett A., "Toward Social Regionalism in the Americas" (2002, publication forthcoming).
[235] Windmuller, op. cit. at p. 157.
[236] See generally Ciudad Reyes A., The Social Dimensions of Regional Integration in the Americas (Lima, ILO, 2001).

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http://europa.eu.int/pol/equopp/index_en.htm (Equal opportunities information from the European Union)
http://www.womenlobby.org/ (European Women's Lobby - The European Women's Lobby (EWL) is the largest co-ordinating body of national and European non-governmental women's organisations in the 15 Member States. The EWL's goal is to eliminate all forms of discrimination against women and to serve as a link between political decision-makers and women's organisations at EU level)
http://www.eoc.org.hk (Hong Kong: Equal Opportunity Commission)
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List of the working papers of the InFocus programme to promote the Declaration

No. 1 Bonded labour in Pakistan, by Aly Ercelawn and Muhammad Nauman, June 2001.

No. 2 A perspective plan to eliminate forced labour in India, by L. Mishra, July 2001.

No. 3 *Défis et opportunités pour la Déclaration au Bénin,* by Bertin C. Amoussou, August 2001.

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No. 5 *Égalité de rémunération au Mali,* by Dominique Meurs, August 2001.

No. 6 *Défis et opportunités pour la Déclaration au Burkina Faso*, by Seydou Konate, September 2001.

No. 7 Child labour in the Russian Federation, by Svetlana Stephenson, June 2002.

No. 8 Intersecting risks: HIV/AIDS and Child Labour, by Bill Rau, June 2002.

No. 9 *Los principios y derechos fundamentales en el trabajo: su valor, su viabilidad, su incidencia y su importancia como elementos de progreso económico y de justicia social* (Fundamental principles and rights at work: Value, viability, incidence and importance as elements for economic progress and social justice) by María Luz Vega Ruiz and Daniel Martínez, July 2002.

No. 10 The Links between Collective Bargaining and Equality, by A. Blackett and C. Sheppard, September 2002.