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## Chapter 8

# Life-long-learning as an Individual Social Right

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### 8.1 INTRODUCTION

This contribution argues that the notion of ‘employability’ leads to a change in the labour law with regard to training of the employee. The subject of training should be extended from incidental work-related training, to general forms of life-long-learning. Collective training programmes alone can no longer deal with this subject. In order to remain employable, employees have an interest in an individual right to be trained. Training should also be an obligation for employees.

### 8.2 THE ORIGINAL CONCEPT OF TRAINING IN LABOUR LAW

Many national systems of labour law do not pay much attention to the training of employees. This can be explained by several factors.

Originally, the emphasis of employee training was put on basic education: schools and universities. This basic education was to be followed before entering the labour market. Social law was created to support this: the duty of education until a certain age, the free access to basic education, the prohibition on child labour during the period of basic education.

Training on the job used to be a smaller part of the working life of employees. For some specific jobs, specialized training was required and therefore combinations of work and learning periods, internships etc. were well-known. Those forms of training were directly related to the job: the notion of 'vocational training' reflects this.

During later stages of working life, retraining was sometimes necessary, but mainly for two reasons: to become suitable for other work in case the former work was no longer available, or to get used to new skills and techniques which were introduced after the completion of basic education. On the whole, training was not an important element of working life.

A second reason why training is not often elaborated in national labour law is that it is seen as industry- and company related. By this reasoning, it is up to employers and their organizations to develop training programmes either by themselves or in co-operation with the trade unions. Training rights are more often to be found in collective agreements, and mostly not in the form of rights, but in the form of action programmes, directed to the employer or to institutions. There are reasons to reconsider this situation in this era of employability.

### 8.3 EMPLOYABILITY AND TRAINING OF EMPLOYEES

The change in the concept of training is partly a result of changes in labour relations. Contrary to the past, lesser companies and lesser employees consider life-long employment within the same company as their goal. The company can not offer the same work during an entire career. Business is changing quickly, following the economy and the wishes of consumers. The globalization of the economy contributes to the speed of changes. Enterprises are being merged, split up and taken over by other companies. Employees are asked to adapt to new situations far more often than in the past. Reorganizations are structural and no longer uncommon. But employees are also more likely to want to be 'job-hoppers', who can change job every few years in order to find new challenges. Or in order to be less dependent on just one employer and to be able to raise their income or change their work content as desired.

To meet the resulting requirements from these changes, the concept of 'employability' was invented. This concept implies that an employee must develop his competences continuously during his working life, and adapt his skills and knowledge to developments on the labour market. Some critics see employability merely as a concept that gives the employer the freedom to ask employees to continuously change in order to remain for the company. However, the concept also requires employers to enable their employees to remain fit for the labour market and to continuously develop their capacities. It presupposes confidence in employees and permanent investments in their training. 'Life-long-learning' is connected to this concept. It implies that the employee is willing to learn new things during his career, but also that this is encouraged by the employer.

The content of training has also changed. Whilst training during the working life of employees in the past was usually related to the specific job or company, training today provides more general qualifications.

Society is changing from an industrial society towards a knowledge-oriented society. Fewer jobs can be done on a routine or repetitive basis and more jobs require creativity for a good performance. According to Reich, some 15%–20% of the employees in the USA fall within the category of creative work.<sup>1</sup>

Not only young people, but also adults have to be trained to adapt their work, and find solutions for new problems. Training has to focus less on the continuation of traditional working methods and more on inventing new working methods and improve the organization. Blanpain distinguishes four types of ability that need to be developed: abstraction, systematic thinking, experimentation and communication with others (through languages, technology etc.).<sup>2</sup>

Training is no longer just used in the socialization process to align the skills of new employees with the goals of the organization. It is not limited to new employees, but used for skill enhancement in all ranks of employees.<sup>3</sup>

‘Life-long employment’ is replaced by ‘Life-long learning.’

#### 8.4 TRADITIONAL LEGISLATION ON TRAINING EMPLOYEES

Thus far, labour law seems ill-equipped for these developments. Originally, labour law was mainly focused on the unskilled, or on those who had to be re-skilled as a result of losing their job. Three types of rules with regard to training of employees were common.

##### 8.4.1 ORGANIZATION OF VOCATIONAL TRAINING BY THE GOVERNMENT

This type of rules is not construed as individual employment rights of employees, but as an organizational commitment of the government or of branche-wide organizations of employers (*See*, for instance, the German *Berufsbildungsgesetz* [BbiG] of 2005).

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1. Robert Reich, *The Work of Nations. Preparing Ourselves for 21st Century Capitalism* (New York: Alfred A. Knopf, 1992), 174.
  2. R. Blanpain, ‘The Changing World of Work’, in *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, eds R. Blanpain & C. Engels (The Hague/London/Boston: Kluwer Law International, 1998), 32.
  3. R.S. Schuler, J.K. Turnheim & S.E. Jackson, ‘Human Resource Management: Past, Present, Future’, in *Blanpain and Engels*, see n. 2 above, 181–209, 183.

#### 8.4.2 REGULATION OF THE RIGHTS AND DUTIES OF TRAINEES, MOSTLY AT THE INITIAL STAGE OF WORKING

This type of rules is usually found in branch-wide collective agreements. National legislation and case-law usually only provide for rules to distinguish a trainee-relationship from a regular employment relationship (See, for instance, the regulation of the '*Contrat d'apprentissage*' in the French *Code du Travail*, Article L-115–119).

#### 8.4.3 RIGHTS WITH REGARD TO SPECIFIC TRAINING ON THE JOB, FOR INSTANCE FOR MEMBERS OF WORK COUNCILS

This type of rules usually deals with the question of whether the training is followed during regular working hours, whether the wage is paid during the training, and who is responsible for the costs of the training etc. (see, for instance, Article 18 of the Netherlands' *Wet op de Ondernemingsraden* on the training of members of works councils).

#### 8.4.4 ANALYSIS

All these traditional forms of labour regulations with regard to training have in common that, as a matter of principle, they provide training on a specific ground and not on general grounds. Training is not seen as part of 'life-long-learning', that needs continuous attention, but as an incident that occurs on certain specific occasions during working life.

Another aspect of the conventional approach to training in labour law, was to implement it as part of social programmes, rather than as individual rights. Rules with regard to training were usually found in collective labour law. Unions demanded training for employees and agreed this in collective agreements with employers. This is also reflected in the German co-determination legislation, where '*Berufsbildung*' is a separate subchapter in which three articles deal with the responsibilities of the works councils in this respect (§§ 96–98 *Betriebsverfassungsgesetz*). Employees did not claim their training rights as individuals, but as group. This was partly caused by the fact that training was seen as to be organized on special occasions, for specific reasons. In such cases it is easier to organize collective training. This type of training will continue to exist in the future. For instance, when new computer software is introduced, a large group of employees can follow an instruction course together.

#### 8.5 A BROADER PERSPECTIVE: THE ILO-CONVENTIONS

Since most Labour Law systems do not have an overall training policy for employees, it is interesting that the International Labour Organization (ILO) has

explicitly developed a general approach to the training of employees. The ILO has adopted two relevant general conventions: no. 140 on Paid Educational Leave (1974) and Convention no. 142 on Human Resource Development (1975).<sup>4</sup>

### 8.5.1 THE PAID EDUCATIONAL LEAVE CONVENTION

ILO-Convention no. 140 deals with paid educational leave.<sup>5</sup> The Convention defines paid educational leave as leave granted to a worker for educational purposes for a specified period during working hours, with adequate financial entitlements. Each Member should formulate and apply a policy designed to promote the granting of paid educational leave for the purpose of:

- (a) training at any level;
- (b) general, social and civic education;
- (c) trade union education.

The policy shall be designed to contribute, on differing terms if necessary:

- (a) to the acquisition, improvement and adaptation of occupational and functional skills, and the promotion of employment and job security in conditions of scientific and technological development and economic and structural change;
- (b) to the competent and active participation of employees and their representatives in the life of the undertaking and of the community;
- (c) to the human, social and cultural advancement of employees; and
- (d) generally, to the promotion of appropriate continuing education and training, helping employees to adjust to contemporary requirements.

According to Article 7, the financing of arrangements for paid educational leave should be on a regular and adequate base and in accordance with national practice.

The Convention gives room to leave this matter to collective agreements, and does not oblige governments to set up a system of paid educational leave.

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4. In addition, Convention no. 69 (1946) deals with the Certification of Ships' Cooks and Convention no. 74 (1946) with the Certification of Able Seaman. Both Conventions were recently consolidated in Convention no. 186, the Maritime Labour Convention (MLC). These conventions deal with professional qualification requirements rather than with employability.

5. Convention no. 140 is ratified by 34 countries, among whom 10 EC-Member States: Belgium, Finland, France, Germany, the Netherlands, Poland, Slovenia, Spain, Sweden and the United Kingdom.

### 8.5.2 THE HUMAN RESOURCES DEVELOPMENT CONVENTION

ILO-Convention no. 142 deals with human resources development.<sup>6</sup> This Convention requires that each Member shall adopt and develop comprehensive and co-ordinated policies and programmes of vocational guidance and vocational training, closely linked with employment, in particular through public employment services. These policies and programmes shall take due account of:

- (a) employment needs, opportunities and problems, both regional and national;
- (b) the stage and level of economic, social and cultural development; and
- (c) the mutual relationships between human resources development and other economic, social and cultural objectives.

The policies and programmes shall be designed to improve the ability of the individual to understand and, individually or collectively, to influence the working and social environment.

The policies and programmes shall encourage and enable all persons, on an equal basis and without any discrimination whatsoever, to develop and use their capabilities for work in their own best interests and in accordance with their own aspirations, taking account of the needs of society.

With the above ends in view, each Member shall establish and develop open, flexible and complementary systems of general, technical and vocational education, educational and vocational guidance and vocational training, whether these activities take place within the system of formal education or outside it (Article 2).

Each Member shall gradually extend, adapt and harmonize its vocational training systems to meet the needs for vocational training throughout the life of both young persons and adults in all sectors of the economy and branches of economic activity and at all levels of skill and responsibility (Article 4).

This Convention provides basic rules that could be used for life-long-learning systems, but there are not many concrete directives that oblige either employers or employees to cooperate with this. It is a rather vague Convention.

### 8.5.3 ANALYSIS OF THE ILO-CONVENTIONS

Both ILO-Conventions were progressive for the time when they were designed: the 1970's. They have a human resources perspective, which means that they cover a broad field of training and are not restricted to specific work-related forms of training that were typical for the previous forms of labour legislation in this field. However, both Conventions rely heavily on governments to take action.

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6. Convention no. 142 is ratified by sixty-five countries, among whom twenty-one EC Member States: Austria, Cyprus, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

This fits into the labour law of those years, but shortly after these conventions were accepted in many European countries, governments began to transfer more of their tasks to the market. The convention does not completely exclude the possibility that training may be organized by private enterprises in competition, but the suggestion is clear: the government should organize and pay for the training. As a result both Conventions make an outdated impression. In today's world that is not the solution that is most likely to be successful. In addition, the Conventions also have the traditional collective approach to training and do not formulate individual rights and duties.

## 8.6 MODERN FORMS OF REGULATION

I would now like to examine some new examples of legislation on training that take a different approach.

### 8.6.1 AUSTRIA

Austria has a form of leave for training purposes, called '*Bildungskarenz*.' It allows for a period of leave between three and twelve months.<sup>7</sup> During this period the employee receives a payment from the Employment Institute. The employer does not have to pay wages, but the employment contract is continued. The employer also has to agree with the length of and the period during which the employee takes the leave. Only employees who work for over three years for the same employer may use this form of leave. A measure that was originally introduced for people with a low level of education is in practice often used by women who want to extend their pregnancy leave.<sup>8</sup>

### 8.6.2 JAPAN

Japanese Labour Law has a specific Act on the Development of Human Resources: the Human Resources Development Promotion Act. This Act originally dates back to 1969,<sup>9</sup> but received its present structure and title in 1985.<sup>10</sup>

Article 3 of this Act states that:

In view of the fact that development and improvement of worker's ability necessary for the vocation (hereinafter called 'human resources') are indispensable for the security of employment and the elevation of their status

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7. §11 Arbeitsvertragsrechts-Anpassungsgesetz. See G. Pisatsky & M. Elsik, *Vocational education and training in Austria* (Thessaloniki: Cedefop, 2000).
  8. M. Tölle, H. Heller & T. Mayr, *Mechanisms for the Co-finance of Lifelong Learning. Taking Stock of Experience with Co-finance Mechanisms* (London: Elap, 2002), 13.
  9. Act no. 64 of 18 Jul. 1969.
  10. Act no. 56 of 8 Jun. 1985.

as well as constituting a basis for the development of economy and society, the development and improvement of human resources shall be carried out by stages and systematically throughout the worker's entire period of vocational life ...

Article 4 gives a general duty to the employer:

The employer shall provide his employees with necessary vocational training, extend necessary aid and otherwise secure opportunities for employees to receive on their own educational training or vocational testing ... .

This obligation of the employer is elaborated in Chapter III, Section I of the Act. Attention is paid to training in facilities external to the employers' premises, to adjusting working hours in order to make training accessible and to the granting of paid leave for this purpose. Other parts of the Act foresee the promotion of vocational training as one of the responsibilities of the Government.

### 8.6.3 FRANCE

In 2003 the French employers' associations and labour unions concluded a national intersectoral agreement which gives employees a 'right to training during lifetime': '*droit individuel à la formation*.'<sup>11</sup> This is an individual right of employees to follow continued education and a higher financial contribution from employers. The individual right was introduced in the French legislation afterwards.<sup>12</sup>

Besides this act, the notion of 'individual training leave' (*Congé Individuel de Formation*, CIF) already existed in France. Article L 931-1 of the Code du Travail states that the right to training has as a goal to allow every employee, in the course of his professional life to follow at his initiative and on his individual title, training activities, independent from training activities that follow from the training plans of the employer.

When an employee works for more than two years as employee and one year for the same company, he may take leave to follow training. After making use of this leave, the employee has to observe a waiting period (depending on the length of his leave) before he may take up leave for this reason again. The employer is allowed to refuse the leave if more than 2% of his employees already use this form of leave or in case the continuity of the company is being threatened. During this leave the employment contract is suspended. But after the leave the employee is allowed to return to the service of the employer and the contribution to his pension scheme is continued during his leave. The employee will receive compensation

11. C. Vincent, *Formation professionnelle: une signature historique pour un accord qui reste à préciser* (Paris: Institut de Recherches Economiques et sociales, 2003).

12. Loi n° 2004-391 du 4 mai 2004 *relative à la formation professionnelle tout au long de la vie et au dialogue social*.

during his leave, depending on his income and the length of his leave. This compensation is paid by a bi-partite committee.<sup>13</sup>

France has also a concept that relates to the duty of employees to follow training: the training plan (*Plan de formation*). In this plan the employer formulates the demands of the training to be followed by the employees. The costs of this training are paid by the employer. Training will take place during working hours when it has a direct relation with the tasks of the employee.

#### 8.6.4 ANALYSIS

In these three modern forms of legislation on training, we see that the concept of a right to training is further developed as an individual right. The Austrian example is limited in the sense that is restricted to specific training periods. In practice this lack of flexibility means that it is not much used for its original purpose. The Japanese example is formulated as an individual right, but not very elaborated. The French example is the most sophisticated and well-thought out regulation.

#### 8.7 TRAINING AS AN INDIVIDUAL RIGHT OF THE EMPLOYEE

As the modern forms of legislation already indicate, the new tendency of employability promotes an approach that is different from that of the past. Training is becoming more and more of an individual issue. Today, it is in the interest of the individual employee to be attentive to remaining employable. Of course, unions may still find an interest in collective bargaining to defend the training interests of their members as a group, but their members will expect them to guarantee rights that they can claim themselves on an individual base.

In today's knowledge-orientated society employees have less interest than in the past in job protection by dismissal legislation and relatively more interest in the possibility to acquire the necessary skills by life-long-learning. Once a dismissal is being prepared time is usually too short to follow a training program. Therefore, employees of today have no longer the time to wait until the moment they might be dismissed to prepare themselves for other jobs. They have to be alert and to check continuously whether they are still 'employable' in case they have to return to the labour market. For that goal the right to training is an essential condition.

It is the initial responsibility of the individual employee to see to it that he will remain employable. And it is for this reason that he needs to be enabled to claim an individual right to access to training. This does not mean that the employer has no responsibility. In many cases, an employer is more capable of overseeing the training needs of the employee. The argument that the employee never asked for

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13. Circé, *Vocational Education and Training in France* (Thessaloniki: Cedfop, 2000), 67–69.

training is not enough to answer a claim that the employer did not provide enough training.

The individual character of the right to training may have consequences in case an employer fails to comply with his duty to provide such training. For instance, if an employee did not receive proper training on safety matters and got harmed because he was not aware of the actual safety standards, he may claim for damages from his employer. Another example: if the employer did not enable the employee to work on his employability, this may give the employee a claim for a higher severance payment in case of dismissal.

## 8.8 TRAINING AS A DUTY OF THE EMPLOYEE

Not only employees themselves, but also employers have wishes with regard to the training of employees. In some cases, they will demand that the employee follows training on the introduction of new working methods. Employers with a broader view will think it wise that employees are trained continuously in order to remain employable. This is important with a view to possible changes within the company in the future, as well as a possible reason to leave the company, such as the loss of work, change of work of a partner, personal problems and other reasons.

Some employees do not want to follow a training program, either because they do not see the need, or because they do not agree with the kind of training that the employer has in mind. For these cases it may be important for the employer that a duty to participate in training rests on the employee as the 'other side of the coin' of the right to follow training.

In many cases it will not be wise to send an employee to training without enough motivation. On the other hand it may be important in order to create this motivation, that the duty is clearly formulated and not under discussion.

The sanctions for the employee who does not undertake obligatory training, may depend on the consequences of his decision and the question of whether they were foreseeable. In case an employee refuses to take part in a course which is necessary to be able to continue his job, this may lead to his dismissal or change of work. A structural refusal of an employee to work on his employability may lead to lower severance payments in case of dismissal.

Finally, another aspect on the duty-side of the right to training can be mentioned. In case the employee does not follow the training that is organized by his employer or does not seriously participate, or he does not take part in the final examination or in other ways frustrates the training, he might be held responsible for the damage.

## 8.9 THE FUNDING OF TRAINING

Once a right to training is guaranteed, this training must be funded. The first question to be answered is: does the employer have to fund the training or the employee

or should the burden be shared and in the latter case how should the costs be divided?

Principally, it seems clear that when the training is essential for the job the employer should pay for it. When the employee is not qualified at the beginning of the job, it could of course be negotiated whether he should take part in the costs of the training. The answer will depend on factors such as the length and costs of the training, the benefits to the employee in his further career, and the situation on the labour market.

When the training is of little use to the company the costs of the training are more likely to be borne by the employee. This is the case for instance, with a course in another field where the employee would like to find his next job.

But in many cases of training that is not directly necessary for the job, the benefits may be on both sides, for instance in the case of acquiring new skills that might be of benefit to job performance. In those cases both parties could negotiate the costs of the course.

Generally, it is not necessary to accompany rules with regard to the right to training with specific funds that guarantee that the training can be paid. A good employer will organize a budget for training. That there are wealthier and poorer companies needs no discussion. An employee has to take into consideration in his training demands what the company reasonably can afford. In case it is litigated, a court can perfectly ascertain what can reasonably be asked from an employer to invest in the training of employees.

It is of course possible to encourage employers to create funds, for instance by spending yearly a certain percentage of the total wages on training expenses. Such a budget can also be arranged in collective agreements, or promoted by government, for instance through tax regulations.

Two questions related to that of funding are whether the training can be followed during the working hours and whether those hours will be paid by the employer. The answer to these questions will depend on various circumstances, such as the hours during which the training is given, the practical possibilities of following the training in free hours, the length of the training and the amount of leave, the interest of both parties in the training, the division between the parties of the payment of the training, and so forth. In general, one could give as a rule of thumb that a short course will more often be followed during working hours and be paid, while for more intensive forms of training more often a contribution of the employee will be asked to invest a part of his own time.

In some cases employers do conclude an agreement with the employee that in case he leaves the company within a certain amount of time after starting the training, he will have to pay back part of the training costs. In case of very expensive training such contracts may be reasonable. In some cases the company that attracts the employee can take over the investment in his training. On the other hand, such contracts should be limited in time and the amount to be paid back should be reduced in proportion to the period that has passed since the training was followed. The payment should not be so high, that it would make it practically impossible to leave the company. And when the worker is dismissed or his contract is not

renewed on the initiative of the employer there should be no reason to pay back the training expenses.

## 8.10 CONCLUSION

In today's knowledge-orientated society employees have less interest than in the past in job protection by dismissal legislation and relatively more interest in the possibility of acquiring the necessary skills by life-long-learning. Once a dismissal is being prepared time is usually too short to undergo training. Therefore, employees of today no longer have the time to wait to prepare themselves for other jobs until the moment they might be dismissed. They have to be alert and checking continuously whether they are still 'employable' in case they have to return to the labour market.

In line with this development, labour law should include an individual right of the employee to training in the form of life-long learning, which also should imply a duty to follow such training. The costs of training should be reasonably divided between employer and employee. This right could be formulated in employment contracts, collective agreements, national legislation, but in its basic form also in international sources of law, like ILO-Conventions and EC legislation.