Perspectives on the regulation of working conditions in times of globalization

Hu, Q.

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Challenges & Obstacles Facing Regulatory Intervention

To my beloved parents, G. Hu & Y. Tian

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List of Abbreviations

ACFTU:	The All-China Federation of Trade Unions
BAG:	Bundesarbeitsgericht (The Federal Labour Court)
BIS:	The Department for Business, Innovation & Skills
BMAS:	Bundesministerium für Arbeit und Soziales (the Federal Ministry of Labour and Social Affairs)
BMF:	Bundesministerium der Finanzen (The Federal Ministry of Finance)
CSOP:	Company Share Option Plan
CSR:	Corporate Social Responsibility
DP:	Direct Participation
ECJ:	The European Court of Justice
EMI:	Enterprise Management Incentives
EPOC	Employee Direct Participation In Organizational Change
EU:	The European Union
EWCS:	European Working Conditions Survey
FDI:	Foreign Direct Investment
FKS:	Finanzkontrolle Schwarzarbeit (The Financial Inspectorate of Undeclared Employment)
FLA:	The Fair Labor Association
FLI:	Family Leave Insurance
FMLA:	The Family and Medical Leave Act of 1993
FP:	Financial Participation
GDP:	Gross domestic Product
GSP:	Generalized System of Preferences
HMRC:	HM Revenue & Customs
ICER:	The Information and Consultation of Employees Regulations
ILO:	International Labour Organization
JCC:	Joint Consultative Committee
LoWER:	European Low-Wage Employment Research Network
MiLoG:	Mindestlohngesetz (the German Act Regulating a General Minimum Wage)
MOHRSS:	The Ministry of Human Resources and Social Security
MOHURD:	The Ministry of Housing and Urban-Rural Development
NGO:	Non-governmental Organization
OECD:	The Organisation for Economic Co-operation and Development
OSH:	Occupational Safety and Health
PEA:	Pre-existing Agreement
PFL:	Paid Family Leave
PLA:	Parental Leave Act
PPS:	Purchasing Power Standard

PRP:	Profit-Related-Pay
RP:	Representative Participation
SAWS:	The State Administration of Work Safety
SAYE:	Save-as-You-Earn
SDI:	State Disability Insurance
SIC:	Social Insurance Code
SIP:	Share Incentive Plan
SME:	Small and Medium-sized Enterprise
SPD:	Sozialdemokratische Partei Deutschlands (The Social Democratic Party of Germany)
TCI:	Temporary Caregiver Insurance
TDI:	Temporary Disability Insurance
TFP:	Total Factor Productivity
TQM:	Total Quality Management
UK:	The United Kingdom
US:	The United States
WERS:	Workplace Employment Relations Survey

1 Introduction

1 Labor Law in the Era of Globalization

This seems to be the worst of times for labor law. In this era, labor law is confronted with an unprecedented crisis; it is immersed in lasting controversy and challenged on both external and internal dimensions (See, e.g. Coutu et al. 2013; Coutu 2013; Davidov and Langille 2011; Estlund 2006; O'Higgins 2004; Davies 2002). The typical aggressive criticisms of labor law usually concern how the values cherished by most economies have been impeded, such as efficiency, flexibility, equality, and employment, and how inadequately the rationality, self-consistency and normative legitimacy of the discipline itself have been maintained (see Davidov and Langille 2011).

The current situation firstly results from the problems inherent in labor law. As analyzed by Davidov (2016: 1-4), the distributional function of labor legislation incurs opposition and elusion, thus generating perpetual challenges for implementation and a continuing need for the justification of lawmaking in this realm. Furthermore, labor law is supposed to be dynamic for the purpose of adapting to the labor market. Any adaption may have to go through objections or criticisms, and consequently, lawmaking always lags behind what reality requires. Over time, doubt has been cast on the efficacy of labor law. The extent to which 'soft' regulations should be adopted in labor legislation has been considered questionable. Most importantly, how to match the goals and means of labor law has been problematic (see Davidov 2016: 1-4).

What is notable is that the above problems embedded in labor law are amplified due to the social and economic changes in the contemporary world. Globalization leads to the free movement of capital, information, human resources, and products, expands within-border competition to worldwide rivalries, and sets higher requirements for the core competence of a business and an economy. Such a process of global integration is accompanied by the flourish of so-called neoliberalism – a revival of the *laissez-faire* economic liberalism of the 19th century. A significant effect on government policymaking is the shift to cutbacks in public expenditure and to the minimization of restrictions on free trade, taxation and the labor and capital markets (see Goldstein 2011: 30). In addition, new challenges have been posed to labor legislation by rapid technological innovation, the change in business management ideas, and many other factors, such as the swiftly evolving structures of business ownership and the unparalleled development of the mechanisms and instruments for raising capital (see Weil 2014).

As a consequence, labor law is called into question on many levels. Firstly, the basic ideas and purposes of labor law seem to have become obscured. Are the reasons for intervening in employment relationships limited to protecting the safety, health and human dignity of employees, satisfying their basic material needs, and making up for their disadvantaged position in collective bargaining (see Weiss 2011; Sinzheimer 1927)? If the answer is in the affirmative, it will be difficult to interpret the far-reaching alterations to the labor law within some countries over recent decades. An example is the emergence of mechanisms that reflect growing emphasis on employee rights to influence managerial decision-making and seek to connect individual and business interests (e.g. employee share ownership plans and profit sharing schemes) or to unite labor law and social security law (e.g. employee pension plans). These changes may be deemed as adaptations to the external environment which would leave the fundamental thoughts and goals of labor legislation intact (see Davidov 2011; Weiss 2011). However, they may also stimulate a broadening of the ideas and functions of labor law. Some scholars therefore propose to update the foundations of labor legislation (e.g. Langille 2011; 2006), and some call for switching attention from the traditional role of labor legislation in 'correcting' and 'limiting' employment relationships to its potential to constitute the markets and to promote development (e.g. Deakin 2011).

Furthermore, it has become more complicated to determine the correctness of the methods employed by labor legislation. The efficiency and appropriateness of the way a country exerts control over domestic workplaces need to be reflected on more seriously, due to the growing volatility of the external environment and the increasing difficulty in balancing the social and economic values of labor legislation.

The worsening ambivalence in terms of the goals and means of labor law has inevitably resulted in an aggravation of the doubts surrounding the actual impact. This raises a string of tough questions concerning the practicability of labor legislation in the presence of strong market forces and about the extent to which setting certain legal constraints may destroy employment and erode the competitive power of an economy.

However, by stepping back and making a macroscopic observation, one may decide that the current situation could also be seen as the best of times for labor law. The problem with labor legislation is by and large related to the way it responds to the changes in historical and political circumstances. Compared with most other branches of law, the making and evolution of labor law have been seriously shaped by the level of economic development, relevant policymaking, the varying nature of the state, employer and employee interactions, the increasing influence of civil society, and the ideological shifts (Hepple 2011). Labor law *per se* is 'part of an historical process and the outcome of struggle between different social groups and of competing ideologies' (Hepple 2011). This indeed implies the plasticity and adaptability of labor law. Facing the unequaled complexity of economic and social transformations, almost every country has experienced tension,

qualms, and even turmoil, occasionally or frequently, due to deep-rooted uncertainty over the foundations, approaches, and results of labor legislation. This painful struggle gives rise to the on-going crisis within labor law, but simultaneously induces motivation for reinvigoration and renewal (Davidov and Langille 2011). Endeavors to update perceptions of the existing paradigms of labor law, to fully reveal the diversity of problems and solutions, and to search for new possibilities of the legal order, may brighten the prospect of labor law and inject new energy into this field. More significantly, the real potential of labor law as well as its inability can be better comprehended because of these efforts.

2 Regulation of Working Conditions

Working conditions can be defined in a narrow sense, as 'the conditions under which employees have to work', including 'matters such as permitted breaks, the state of heating, lighting, and ventilation of workplaces, the safety and comfort of machinery, vehicles, and other equipment, normal manning levels, and disciplinary procedures'(Black et al. 2013). According to this definition, working conditions comprise two parts: the physical environment and working time arrangements. However, in recent literature, increasingly more importance is attached to the psychosocial characteristics of a job, enlarging the scope of the indices of working conditions (e.g. Kalousova and Mendes de Leon 2015; Wahrendorf et. al 2012; Gillen et al. 2007). The current trend is to consider 'working conditions' as a wider concept that contains extensive physical and psychological factors in the workplace. In the European Working Conditions Survey (EWCS) by *Eurofound* (2016; 2012), a wide set of indicators are investigated to measure the level of working conditions across European countries, covering physical environment, work-related risks for health and safety, working time and intensity, earnings, worker participation, access to training and learning, work-life balance, and financial security etc. This basically accords with what the International Labour Organization (hereafter 'ILO') has endorsed.[1] Such a broad interpretation of the meaning of working conditions is adopted by this research, although not every sub-issue under the concept is examined.

Working conditions are the essential elements of employment relationships. Despite historical and regional differences, conflict surrounding working conditions has been the main point that legal interventions have been seeking to mediate. From the perspective of the labor contract, working conditions are relevant to the considerations offered by the employer in exchange for an employee's work, deciding the substantial transaction fairness in employment. From the point of market regulation, working conditions are among the most significant factors that potentially affect

1 See http://www.ilo.org/global/topics/working-conditions/lang--en/index.htm (accessed 5 August 2017).

the direction and frequency of capital flows and meanwhile exert effects on labor supply. Working conditions are also a primary concern for public policy, due to the direct bearing on the living standards and well-being of a sizable majority of population in a country.

Correspondingly, the regulation of working conditions is at the core of labor legislation, and is more likely to trigger political uproars. It is no exaggeration to say that working conditions legislation finds itself in the center of the current crisis where labor law is procrastinating and tends to vacillate, and the challenges faced by labor law are better embodied in working conditions legislation than anywhere else. A crucial and inescapable undertaking for labor lawyers is to figure out sensible principles and practical methods for regulating working conditions. Thus, this research focuses on the regulation of working conditions whiling omitting other issues of labor law.

Despite being conducted against a global backdrop, this research confines itself to observations of the domestic legislation of certain countries, with the exception of the international trade agreements and ILO conventions mentioned in Chapter 2 and 4. Besides, working conditions law in this research only refers to a country's legislation (statutory law) on working conditions, regardless of other types of law, such as case-law, customs, etc.

3 Research Aim & Central Questions

This research has no intention to stay at the level of an abstract depiction of the predicament for a country to regulate working conditions, but aims to draw attention to the practical difficulties that contemporary countries are being confronted with under the combined effects of deepening globalization and characteristics of domestic legal systems. It probes into five heated debates: a general discussion over the foundation and feasibility of regulating working conditions in an era of globalization, followed by four parallel studies that respectively concentrate on China's legislation on construction safety, Germany's minimum wage law, the parental leave policies of the US and Sweden, and Great Britain's experiences with employee participation. By dissecting the situations in which divergent stances, defective mechanisms and practical straits are entangled, the crisis of labor legislation in times of globalization is concretized into specific problems while at the same time opportunities for change are uncovered.

One may wonder about the connections between the five studies included in this research. Indeed, the first study respecting the foothold of working conditions law in times of globalization attempts to address some common concerns of policymakers, and the general observations made in this study are responded to by the findings of the following studies, to different extent. Based on the foundation laid by the first study, the latter four studies go deep into construction safety, minimum wage, parental leave and employee participation successively. These specific topics involve the

most significant material and spiritual facets of working conditions, including the protection of occupational safety, working environment, employee remuneration, work-life balance, gender equality, and employee right to influence organizational decision-making. China, Germany, the US, Sweden and Great Britain are selected to be observed because they feature quite controversial and representative legislation or practices in terms of the forgoing topics, which will be clearly explained in each of the four studies. Such an exploration is not a discursive one that collects together the debris of the current broken picture of global lawmaking on working conditions. Rather, a couple of questions continue to hover in the background throughout:

1 *What is the main dilemma facing the regulation of working conditions in times of globalization?*
2 *How effectively have policymakers reacted to the foregoing dilemma?*

For the above queries, conclusions will be drawn at the end of the research by reflecting on the primary findings of the five studies, which are devoted to deal with more concrete issues and provide no direct responses though.

4 Research Methods

Several different research methods are employed in the five independent studies. The first study concerning whether and where working conditions law can gain a foothold in globalization is mainly based on a retrospect of a substantial amount of academic contributions in the recent three decades (1980s-2010s) which in some sense demonstrate or attempt to disprove the necessity, influence or viability of labor legislation from philosophical, social or economic perspectives. Opposite views on working conditions legislation in times of globalization are initially extracted from the literature as the starting point for the subsequent observation, which comprises three levels. On the first level, current mainstream approaches to justifying the intrinsic foundation of working conditions law are reflected on. What follows is an examination of some typical criticisms of the efficacy and economic effects of working conditions legislation. On the basis of the previous two layers of discussions, the last section provides a tentative suggestion with regard to how working conditions legislation may gain a reliable foothold in the present era.

The remaining four studies deal with certain countries' specific legislation, and an obvious similarity between them is that they all include normative analyses: value-based comments are made on the relevant provisions and institutional arrangements, despite the utilization of factual evidence, such as authoritative statistics suggesting the implementation status, effects and public acceptance of the legislation. However, there are also evident differences among these studies respecting the approaches. To be concrete, in the second study, China's defective legislation on construction safety is analyzed from a comparatively macroscopic perspective and regarded as one of the many reasons that have given rise to the serious construction

safety problem in the country. Hence the bunch of proposals put forward in the last section contribute to the establishment of a framework for legislative reforms in the future, instead of giving concrete advice on the revision of specific regulations.

The third study assesses Germany's legislation on minimum wage in a more detailed manner. By identifying the entry point, the minimum wage rate and coverage, the adjustment mechanism, and the implementation system as the essential components of a minimum wage regime, the corresponding provisions in the German Minimum Wage Act are examined thoroughly.

The fourth study adopts a comparative approach. Swedish and American legislation on parental leave are compared throughout in terms of the models, underlying ideas, and economic effects and social responses. In addition, within the American part, the legislation of a few states that provide parental benefits beyond the federal level is analyzed. Adopting this method effectively disproves the presupposed tradeoff between the level of parental benefits and economic performance of a country.

Based on British legislation and practice, the last study reflects on the three main channels of employee participation and the possibility of cultivating their symbioses in one system, for the purpose of balancing enterprise desire for higher productivity and employee right to exert influence on organizational decisions. Observing Great Britain's experience with the three channels of employee participation is not the purpose, but these channels must be materialized and contextualized before their interactions can be virtually discerned and the proposition of establishing a ternary system of participation channels can be evaluated in a concrete way. Analogous with the first study which draws on research achievements from several other areas, this study is interdisciplinary in that many findings of earlier research in the fields of economics, sociology, and human resource management are taken advantage of.

5 Book Structure

The five studies mentioned above make up the main body of this book, from Chapter 2 to Chapter 6.

In Chapter 2 – "Gaining a Foothold: Working Conditions Law in Globalization", the following principal questions are dealt with:

- *What is the intrinsic foundation for working conditions law?*
- *To what extent do the propositions that predict the negative economic influence of working conditions legislation prove correct?*
- *What can generate a real foothold for working conditions legislation as the international competition and cooperation patterns are transformed with the march of globalization?*

The most important contribution of this chapter is the suggestion of an alternative construction that manages to overcome the salient defects of

the mainstream approaches to justifying working conditions legislation. In addition, it argues that the role of working conditions law in promoting the economy has been underestimated, while the harm has been overstated. A brief and tentative analysis is presented, replying to the question of how an ultimate foothold can be gained by working conditions legislation in times of globalization.

Chapter 3 – "A Legislative Perspective on Construction Safety in China, against the Backdrop of an Industry-wide Labor Shortage" – has been submitted to the ***Journal of Workplace Rights*** and is presently being given consideration for publication in SAGE Open. Two questions are tackled in this chapter:

– *What are the defects in Chinese legislation on construction safety?*
– *Are there any strategies that can ameliorate the crisis?*

The major deficiencies of Chinese construction safety legislation include the impracticability of the construction safety rules, the malfunctions of labor contract law and regulations on work-related injury insurance, and the undermining of the accountability system. In turn, five reformative measures are proposed. Selection of this research subject is due to the fact that the construction industry is one of the prime pillars underpinning the Chinese economy, but the overall working conditions are very gruelling in this section, and the occupational safety and health (hereafter 'OSH') issues are particularly harsh. The growing resistance of the potential labor force to construction jobs has resulted in a grave shortage of manpower across the industry in recent years. Improving the OSH level and other working conditions within the construction sector is imperative from both ethical and economic perspectives.

Chapter 4 was published on ***European Labour Law Journal*** in January 2018, titled as "An Incomplete Breakthrough: Questioning the Momentum and Efficiency of Germany's Minimum Wage Law". This study concerns the following questions:

– *Does German minimum wage legislation have any merits in comparison with the legislation of its counterparts within the European Union (hereafter 'EU')?*
– *Are there limitations that detract from the efficiency of the German minimum wage regime?*

This topic is worth examining in that Germany had been an exception to the widespread implementation of a national minimum wage within the EU, mainly due to fear of the negative influence on employment. After years of delay a national minimum wage was finally introduced against the backdrop of an irreversible decline in trade unions and collective bargaining. The newly established wage floor was expected to prevent serious unfairness in wage setting and to alleviate nationwide in-work poverty. However, the fact is that the previous conservative attitude has not been abandoned, but is reflected in many provisions of the new minimum wage law. It is questionable whether this landmark legislation is able to realize its original legislative intention.

In Chapter 5 – "A Tale of Two Models: Ideas and Results of the Swedish and American Legislation on Parental Leave", the central questions are:

– *What are the differences between the two countries' regulations on parental leave?*
– *What are the ideas that drive the two countries to take different routes?*
– *Is there a tradeoff between the level of parental leave benefits and the economic performance of a country (e.g. enterprise competitiveness, and the employment rate)?*

Sweden provides one of the most generous parental leave policies in the world and therefore forms a stark contrast with the United States (hereafter 'US'), a country that has failed to mandate paid parental leave hitherto. The meaning of this study is to highlight: 1) compared with the differences between objective conditions, cognitive discrepancies may play a more vital role in molding hugely diverging legal frameworks; 2) the belief that the social and economic benefits of satisfactory working conditions outweigh the costs may lead to well-designed rules that are conductive to achieving desirable consequences; 3) it is hard to eliminate policymakers' unreasonable pessimism on the potential effects of generous labor protection, despite the contradictory results shown by empirical evidence.

In Chapter 6 – "Coordinating the 'three channels' of employee participation? Focusing on the British Practices", the following questions are dealt with:

– *Why is it desirable to coordinate the three channels of employee participation?*
– *What is the foremost practical difficulty realizing the theoretical proposal to unite the three channels?*

This chapter firstly analyzes the potential of representative participation and direct participation to complement each other to achieve better results, for which there has been a tendency to bridge the divisions between these two channels in recent years. On this basis, it is argued that representative participation and direct participation are not able to enhance each other in every respect, and that FP needs to be incorporated into the alliance because of the way it affects power sharing and the redistribution of economic fruits. Lastly, it is stated that even in Great Britain the three channels often have little or no overlap in the workplace, however, legislation can hardly exert direct influence in this regard.

Chapter 7 summarizes the findings of the five studies introduced above, and answers the two main research questions that connect these topics.

2 Gaining a Foothold: Working Conditions Law in Globalization

Abstract

In the face of warnings from economists, tenable reasons are needed for regulating the labor market and workplaces in a globalized world. This chapter is devoted to examining the vitality of working conditions law on three levels. Firstly, in answering the question of why regulations on working conditions should not be discarded, the author puts forward an explanation, conquering the vulnerabilities of the mainstream philosophical justifications. Secondly, by referring to a wide range of economic studies, she points out the cursoriness of the standpoint that regulating working conditions is bound to backfire. Finally, it is raised that an approach that places stress on the coordination, rather than the prioritization, of economic efficiency and labor protection may enable working conditions legislation to remain viable in today's globalization.

Key Words: Working conditions law; Globalization; Competitiveness; Employment

1 Introduction

Keen global competition has pushed working conditions legislation to the forefront. In the presence of strong market forces, is it possible to make effective law on working conditions? If the answer is affirmative, how can the conflict between the increase of labor costs and enterprise desire for competitive advantages be addressed? There are contending viewpoints about the issue under discussion. In the eye of the critics, regulations cannot improve working conditions as planned, but in effect cause a general deterioration. For instance, according to Flanagan (2006), the regulatory costs may induce employers to slash formal employment and simultaneously to increase the exploitation of informal workers who are not under the legal roof, so that the laborers who are really disadvantaged (e.g., young workers and the unskilled) are harmed in the end. In addition, working conditions regulations inappropriately lessen the international competitive power of advanced economies and prevent those relying on cheap labor from surviving and growing (Bhagwati 1995; Heintz 2002).The proponents, represented by Heymann and Earle (2010), hold that mandating high standards on domestic working conditions can promote the sustainable growth rather than impeding the development of enterprises within a country.

In a way that corresponds to the academic debates, policymakers of different countries take sharply divergent views on the orientation of working conditions legislation. The EU, the US and China – the three most important economies of the world – are the best examples. The EU, an economy with social values and goals at its core, features comprehensive and well-implemented legislation on working conditions. The strategic intention is to make the European labor market a preferred place to work, which then provides a robust impetus for improving productivity and competitive power of the economy (European Commission 2014). The US exhibits a different model, however. Attaching great importance to market flexibility, and being alert to any impairment to the national competitive advantages, the American legislature has opted for limited and cautious legislation. It mandates strict standards on the central aspects of working conditions, for instance OSH, while applying extremely low requirements to the 'nice-to-have' aspects, such as paid sick leave and paid maternity leave, both of which are considered to be indispensable and fundamental in the remaining parts of the world, though. Compared with the EU and the US, China has displayed a somewhat ambivalent attitude. Social unrest arising from the inadequacy of labor protection hampers the healthy growth of the Chinese economy, and needs to be appeased by upgraded legislation. Moreover, international criticism of developing countries' responsibility for the downwards spiral in global working conditions, together with the trade sanctions and preferential measures adopted by developed countries, are forcing China to improve its domestic working conditions by all possible means. On the other hand, there is a tacit fear that the increased labor costs as a consequence of huge improvements in Chinese working conditions will cause a loss of millions of

jobs and diminish the cheap labor-based competitiveness. Hence, although China has made striking progress on labor legislation in recent decades, some noticeable tolerance – especially towards foreign investors – can be perceived in the legal enforcement (*Associated Press* June 29, 2007).

Confronted with the above issues in both theory and practice, this chapter makes the following levels of observations. Firstly, it looks into the (to a large extent philosophical) foundation of mandatory constraints on working conditions. This helps explain the fact that despite the wish of enterprises to acquire competitive advantages in labor costs no country has abolished domestic legislation on working conditions. The second layer returns to a discussion of the main economic arguments against labor regulation, given that economic consequences will in turn affect the realization of labor law values, or, to put it another way, that the culture and discourse of labor law is impossibly anti-consequentialist. The primary consideration behind the first two layers of discussions is that the existence of working conditions law will be justified if it has intrinsic legitimacy and no decided harm to the economy. Still, necessity and harmlessness are not sufficient for ensuring the viability of working conditions law. Based on identifying the transformation of the global competition mechanisms, the last section of this chapter provides a tentative analysis of what can be a real foothold of working conditions legislation nowadays.

2 The Intrinsic Foundation

2.1 Mainstream Approaches with Vulnerabilities

So far there have been two primary approaches to arguing for the legitimacy of legal constraints on working conditions. One is based on the instrumental values of working conditions law, and the other classifies employee right to a certain level of working conditions as a fundamental human right. Both can be called into question.

In the first approach, working conditions legislation is justified by the contribution to market efficiency, welfare maximization, social equity, individual capacities, or other values. Nonetheless, this approach is put at risk when there are alternative measures for promoting these values, or when there are important social values arguing against labor regulation. For instance, working conditions law might be capable of preventing some market failures and protecting the interests of individuals who do not make a risk assessment in concluding a contract. However, in the view of anti-paternalists, these merits are not worth pursuing at the expense of the autonomy and liberty of the labor market. Rather, employers and employees should be left free to offer and accept particular working conditions, since they are adults who know their own preferences (see Collins 2011). Analogously, the argument that working conditions law improves the position of disadvantaged social members might be challenged by asking

why such a goal cannot be reached by taxation and social welfare measures, which are less interfering and leave labor market more freedom to create wealth (see Collins 2011).

The second approach must envisage the difficulty of including all rights relevant to working conditions in the framework of human rights, which, according to Griffin (2008), should be natural, universal and urgent, owned by human beings because of their personhood and humanity, and characterized by peremptory force. The right to a certain level of working conditions merely covers the employed, and varies with the policy orientation and financial condition of a country, whereas human rights apply to everyone, and represent timeless and borderless fundamental needs of human beings. Furthermore, the interests maintained by working conditions law are important, but not as imperative as the values enshrined in human rights discourse, such as liberty, security and subsistence (Risse 2009). Although the rules on maximum working hours and OSH overlap with the protection of human rights with regard to securing individuals' life and health, most other regulations on working conditions do not carry such compelling moral weight.

2.2 An Alternative Interpretation Inspired by Kant

Treating individuals as ends rather than means, a significant idea of Kantianism, possibly provides a starting point for another construction, one managing to avoid the vulnerabilities of the above approaches. It is important to note here that seeking help from Kantian theories does not mean reverting to the arguments on human rights.

Kant clearly states that *the human being is his own final end*, at the very beginning of his *Anthropology from a Pragmatic Point of View* (See Kant 1798, translated by Louden 2006: 3). This opinion accords with his philosophy of law, placing great emphasis on people. According to Kant, the law is made by men with inherent free will, in order that the freedom and actions of all men may coexist in harmony; the ultimate goal of the law is to maintain men's freedom and all derived rights (see Kant 1790). To put it simply, the law is made for men, not men for the law. This central tenet may lay the foundation for the justification of working conditions legislation.

To start with, the law should guard people's freedom to the largest extent, as long as the actions of an individual do not hinder the freedom of others (see Kant 1790). For the working population, a rational legal system is supposed to regulate working conditions that are essential for the maintenance of life, health, capacity, dignity, and other elements of freedom. Even though other means may serve similar purposes, the absence of legislation on working conditions would violate the original basis and the paramount objective of the law. Moreover, only the law can protect the all-round freedom of individuals. Other means, such as taxation and social welfare instruments, perhaps make up for low wages, help distribute wealth, and improve the financial capacity of individuals to develop themselves. How-

ever, an employee cannot finally enjoy these benefits if working 'around the clock' or deprived of life or health by a hazardous job.

One may further wonder what would happen if other values went against the regulation of the labor market and workplaces. Indeed, based on the fundamental principle that people are the final ends, rational legislators should take into account the way in which each value relates to the freedom of individuals, and then make a balanced scheme. The liberty and autonomy of the labor market is the best-recognized value that opposes mandatory protection for workers. Its logic is that a free man should be allowed to make his own choices rather than being told what to do, and, more importantly, that more dynamism and momentum is injected into the economy when social members are left free to make efficient decisions independently. When economic prosperity makes the 'pie' big enough to share, individuals will not be obstructed by unmet material needs on the road to freedom. Nevertheless, this ratiocination has been disproved in practice. Because of information asymmetry, a person in search of employment may not be aware of the actual working conditions of a job, and thus may have trouble in making a truly efficient decision in his or her own interests. Besides, in an intensely competitive labor market, a person who has no substantial freedom to make a choice is very likely to accept the only available job, even one with unpleasant working conditions. The former situation can be compared to that a person does not realize that a bridge in front is unsafe, and in the latter scenario the person has to cross the river, and an unsafe bridge is the only route. Both cases demand well-intentioned interference: impeding the person who is ignorant of the danger from crossing the unsafe bridge, or reinforcing the bridge to reduce the danger. Such interference does not constitute paternalism, but protects the liberty of individuals (see Spector 2006). What legislators need to work out is the amount of regulations and the forms that they should take; legislative interventions aimed at helping people achieve genuine liberty and autonomy cannot go so far as to cause substantial detriment to the vigor of the labor market.

Besides, justifying working conditions law grounded on the idea that individuals are the ends for the law does not have to invoke human rights. Various conditions are required to promote the freedom of the working population, not only the protection of liberty, dignity, safety, and health, but also material support and sufficient time for family life and self-development. It is the need for these conditions to be met, instead of the imperative force of universal human rights that calls for legislation on working conditions. For instance, workers are entitled to a paid annual holiday in some countries, not because the right to a paid holiday is regarded as a human right with peremptory force, but because it has been perceived that people need to be free of the shackles of work to revive their weary minds from time to time. Labor rights *per se* do not necessarily carry the same moral weight as human rights.

Meanwhile, legal standards for working conditions do not feature the invariability or infrangibility of human rights protection. The conditions

that need to be met to promote working people's (negative and positive) freedom vary with the form of work and over time, and the level of labor protection that can be ultimately provided usually relates to a particular society's fiscal capacity.

Lastly, justifying labor protection does not rely on the universal applicability of human rights. The nature of people being the ends is that the law not only addresses problems shared by the whole society, but also cares about the requirements of a part of members of the society. Labor law conforms to this essence by taking account of the realistic needs of the working population.

3 Doubting the Economists' Doubts

3.1 Making No difference? Examples from China and the US

Heymann and Earle (2010:70) generalize about two major arguments against 'getting better labor laws passed'. The first argument questions the usefulness of labor regulations radically, contending that the necessary resources for enforcement are not always available in developing countries, and that developed economies can perform just as well without labor law (see Heymann and Earle 2010:70).

The stance taken by the author of this book is as following: It is true that the enactment of labor law is the result of long legal and political battles, and the enforcement depends on the availability of the requisite resources. Nonetheless, it is irrational to deduce that labor legislation has little practical influence in developing countries whose wealth and resources may not be on a par with those of their developed counterparts, or that advanced economies would voluntarily offer superior working conditions in the absence of legal requirements.

Take the Chinese legislation on minimum wages, for example. With the world's largest labor force (773 million)[2] and the second largest number of people in poverty (approximately 99 million),[3] China faces huge challenges stemming from having insufficient manpower and material and financial resources to enforce the labor protection laws. In recent decades, the rather low minimum wage standards of this country have become a spur for intensified social contradictions. Low minimum wages give enterprises more room to exploit low-paid workers who may already have suffered from wage arrears or illegal wage reductions (Zheng 2007). Simultaneously, the slow growth in minimum wages cannot match the soaring prices, leaving many working families struggling in poverty (Zhao 2013). Against this

2 See China Labour Statistical Yearbook 2015, available at: http://tongji.cnki.net/kns55/Navi/YearBook.aspx?id=N2016030140&floor=1### (accessed 1 April 2017).

3 See the Overview of The World Bank, http://www.worldbank.org/en/country/china/overview (accessed 1 December 2015).

backdrop, the State Council is refocusing its efforts on the establishment of reasonable standards for minimum wages, and it perceives this as one of the main approaches to a more fair and efficient distribution of national income. The central government has set a goal of raising the minimum wages in most areas of China to 40 percent [4]of the local median monthly earnings (State Council of China 2013).

A favorable condition for the realization of this objective is the adjustment system instituted by the *Labor Law of 1994* and the *Provisions on Minimum Wages of 2004*. The former empowers provincial, autonomous regional and municipal people's governments to lay down local minimum wages, with comprehensive references to the lowest living costs of workers themselves and the number of family members they support, the local average wage, productivity, the employment situation and the level of economic development. The latter supplements this by providing that minimum wages should be adjusted promptly when there are variations in the above factors, and that the adjustments must be made at least biennially. In accordance with these provisions, thirty-one provincial administrative divisions, as of 2014, have set up local mechanisms for adjusting minimum wages.[5] In response to the appeal of the central government, most provinces have made an effort to propose substantial rises in minimum wages in the last few years. Data disclosed by the Ministry of Human Resources and Social Security shows that minimum wages rose by an average of 22 percent over 24 provinces in 2011 and by an average of 20.2 percent over 25 provinces in 2012; the years 2013 and 2014 respectively saw average increases of 17 percent over 27 provinces and 14 percent over 19 provinces (CLSSN 2014).

The above information indicates that, even in a country with insufficient resources, the law does not exist in name only. There might be no guarantee of full implementation, but the law constructs the normative premise on which political initiatives are based. More importantly, when legislation moves faster than social realities, laws on paper will become motivators of social reforms, by shaping political debates and public attitudes, making possible court action for enforcement, and driving the follow-through by the government (Heymann and Earle 2010:xii).

A counter-example to falsify the proposition that affluent countries will perform equally well in offering decent working conditions when there is no corresponding legal obligation for employers to do so is the well-known and oft-cited absence of federal legal requirements for paid sick leave in

4 Setting a minimum wage equivalent to 40 percent of the local median wage is indeed far from being able to meet the standards established by the international economic research, which determines that two-thirds and fifty percent of the local median wage are respectively the 'low-pay' and 'poverty' thresholds. However, '40 percent' is a rational objective for China to accomplish at the present stage, considering a number of EU developed countries have not yet achieved this goal(see Chapter 4).

5 See the transcript of the Press Conference of Q2 2014 of the Ministry of Human Resources and Social Security of the People's Republic of China. Available at: http://www.mohrss.gov.cn/gkml/xxgk/201408/t20140812_138218.htm (accessed 1 December 2015).

the US. Paid sick leave is provided in nearly 150 countries globally, but the US only guarantees unpaid leave for serious illnesses under the Family Medical Leave Act of 1993 (FMLA)[6], and this limited benefit does not cover all workers (Heymann, Earle, and Hayes 2007). Consequently, quite a high number of workers, especially vulnerable ones in the private sector, are not eligible for paid sick days when they are ill or injured. The US Bureau of Labor Statistics disclosed in 2014 that paid sick leave was available to 61 percent of workers in private industry and 89 percent of state and local government workers. Within private industry, only 24 percent of part-time workers were offered paid sick leave, compared with 74 percent of full-time workers. A similar gap existed among government workers – 98 percent of full-time workers versus 41 percent of part-time workers had access to paid sick leave. There was also variation in access to paid sick leave depending on the size of the establishment – 52 percent of workers in small establishments (with fewer than 100 employees) and 72 percent in medium and large establishments (with 100 employees or more) were given paid sick leave. Another trend was that low-wage workers were much less likely to have paid sick leave – only 30 percent of employees whose wages lay in the lowest 25 percent had paid sick leave, in contrast with 84 percent of workers in the highest 25 percent (US Bureau of Labor Statistics 2014).

The examples from China and the US suggest that there is no inherent causality between an abundance of social resources and the quality of labor protection. In both affluent and less-affluent economies, enterprises are, by their nature, profit-driven. When they are not legally bound to offer decent working conditions, a race to the bottom (rather than to the top) is likely to take place. Proper legislation on working conditions has the potential to curb vicious competition in this regard.

3.2 Harming Competitive Power? Incentives to Provide Good Working Conditions

In accordance with Heymann and Earle (2010:70), the second argument against the implementation of high labor standards is that mandating decent working conditions leads to lower competitive power and higher unemployment. As a matter of fact, this has been a common concern over the whole world. Laggard economies surviving on cheap labor dread to think about implementing labor standards as high as some of their developed competitors, and advanced countries that have started from a high baseline may fear that any further labor costs imposed on domestic enterprises will be 'the last straw'.

The above proposition that mandating decent working conditions is bound to diminish the competitive power and employment rate of an economy has contradicted the reality, however. Firstly, the conjectured

6 Family and Medical Leave Act, Public Law 103-3, codified as 29 U.S.C.A. § 2601-2654.

tradeoff between decent working conditions and low competitive power is questionable. Heymann and Earle themselves are the first researchers to look worldwide at whether countries suffer from a lack of competitiveness because of mandating good working conditions. It is found that among the fifteen countries with the highest competitiveness,[7] namely Australia, Austria, Canada, Denmark, Finland, Germany, Iceland, Japan, Netherlands, Norway, Singapore, Sweden, Switzerland, the United Kingdom (hereafter 'UK') and the US, the overwhelming majority go beyond basic labor standards (e.g., a prohibition on forced labor, child labor, and discrimination, and permission for freedom of association) and provide good working conditions, including an overtime premium, paid annual leave, paid sick leave, paid maternity/paternity leave, and even breastfeeding breaks (Heymann and Earle 2010: 55-62).

At the center of the argument that high labor standards will reduce competitiveness is the *priori* conviction that squeezing labor costs is the key to winning in commercial rivalries, which, to some degree, is true under the traditional model of competition. In an era of deepening economic globalization, however, the simple equation between cheap labor and strong competitiveness is becoming unworkable. The competitive power of an enterprise does not lie in labor costs only, but rests with a series of factors such as technological level, innovation capability, organizational efficiency, staff quality, popularity and reputation, and adaptability to market volatility.

In fact, for contestants striving for higher competitiveness amid fierce global competition, there are both internal and external incentives to provide good working conditions. For a start, decent working conditions contribute to the internal growth of an economy. The improvement in OSH alone can produce enormous economic value, given that work-related injuries and diseases usually result in astronomical losses[8] for the whole of society, in both direct costs[9] and a string of consequential costs[10] (ILO

7 These most competitive countries are chosen from the twenty countries with the highest competitiveness rankings in at least eight of the ten years from 1999 to 2008 according to the Global Competitiveness Report of the World Economic Forum (Heymann and Earle 2010: 55).

8 The ILO estimates that occupational diseases and injuries cost approximately 4 percent of annual global GDP (ILO 2009). The following data from diverse sources roughly show the loss to various countries: the total costs of hazardous working conditions in the US reached 1.8 percent of GDP, or US$250 billion, in 2007 (Leigh 2011); the corresponding loss in the UK was £13.9 billion for 2009/10, accounting for nearly 1 percent of GDP (ILO 2012); Australia incurred a loss of AUD 60.6 billion (4.8% of GDP) for 2008/9 (Safe Work Australia 2012); Singapore lost SGD 10.45 billion (3.2% of GDP) in 2011 (WSH Institute 2013).

9 For instance, payments made by enterprises to diseased or injured workers, and medical expenses.

10 For example, downtime, collateral damage to equipment and materials, negative effects on co-workers, compensatory overstaffing, the reduced productivity of 'presenteeism' (ill workers attending work), intense scrutiny, and additional recruitments.

2012). It has been borne out that the OSH level has a positive correlation with national competitiveness, and that firm-level investment in OSH is an efficacious and high-return strategy for achieving higher productivity and other economic objectives (ILO 2006).

Analogously, paid sick leave is found to reduce losses for employers by preventing the spread of diseases and other adverse effects on productivity (Chatterji and Tilley 2002; Goetzel et al. 2004; Lovell 2004). Female workers who are granted paid maternity leave show a stronger inclination to return to the previous jobs after childbirth, greatly reducing employee turnover and the costs incurred by the recruitment and training of new employees (Waldfogel, Higuchi, and Abe 1999; Waldfogel 1998). Workers are more productive and efficient with an appropriate length of the working week, whereas markedly extended working hours prove to lower productivity (Shepard and Clifton 2000; Shimizu et al. 2004; Thomas and Raynar 1997).

Extra benefits may arise out of the combination of different regulations. An illustration is the contribution of working time limits to OSH. A positive relation between overtime work and the incidence of occupational accidents, injuries and some illnesses has proven correct by a great deal of studies (e.g., Dembe et al. 2005; Ettner and Grzywacz 2001; Folkard and Lombardi 2006; Hayashi et al. 1996; Macedo and Silva 2005; Shields 2000). It thus becomes increasingly significant to establish reasonable working schedules among enterprises in order to bring down the occurrence rates of work-related accidents and diseases. The overall costs to the society, employers, workers, and other stakeholders can be reduced accordingly. In a similar vein, workplaces characterized by a high OSH level can develop a healthier and fitter labor force, in return contributing to a reduction of the various costs of paid (unpaid) sick leave (Ahonen 2010).

In addition, there are external stimuli for providing good working conditions. First, because of consumer pressure, multinational companies are showing growing concern for Corporate Social Responsibility (CSR) and reputations, and hence prefer cooperative partners who offer humane or at least acceptable working conditions. The story of Foxconn (also known by the name of the parent company, Hon Hai) is illustrative. As the world's largest contract manufacturer and Apple Corporation's key supplier, Foxconn owns notorious sweatshops in China, and has been accused of violating labor rights for many years due to the horrible working conditions, such as the overcrowded dormitories run by military-like security forces, low wages, extremely long working hours and no compensation for overtime work (*Facing Finance* 2015). In 2010, a spate of suicides of migrant workers in Foxconn's Shenzhen industrial park triggered a global scandal about the 'bloody' production of Apple electronics (*The Guardian* May 27, 2010). Since then, Apple Corporation has been under fire for the lax supervision of the key supplier. To save its own global reputation, Apple asked the Fair Labor Association (FLA) to carry out in-depth investigations into the working conditions in Foxconn factories, and held critical meetings with the top executives of the supplier to force immediate and effective improvements

(*Apple Insider* December 27, 2012). As Apple is too big a client to lose, Foxconn has no choice but to commit itself to wide-ranging reform, including a sharp increase in wages and a significant curtailment of working hours (*New York Times* December 26, 2012). A tracking report by the FLA suggests that Foxconn has greatly improved its working conditions, although many chronic problems remain for the future (*Fair Labor Association* December 12, 2013).

Simultaneously, there is an evident trend towards the incorporation of labor provisions into trade arrangements by open economies. As of 2009, a total of thirty-seven North-South and South-South trade agreements had included conditional or promotional labor provisions. It is a steep numerical rise from the 1990 position (Ebert and Posthuma 2011). Besides, both the US and the EU have introduced conditional labor provisions into their Generalized System of Preferences (GSP), and similar provisions exist in other unilateral instruments of the US, such as the Caribbean Basin Recovery Act (1990), the Andean Trade Preference Act (1991) and the African Growth and Opportunity Act (2000). Promotional labor provisions in trade agreements provide for some rewards (e.g., extra quotas for market access, knowledge sharing and technical or financial assistance), in order to encourage the involved parties to comply with certain labor standards or to improve working conditions. In comparison, the mechanism of conditional labor provisions is more like a carrot and stick game: if the parties or recipient countries follow certain labor standards (e.g., the ILO core labor standards referred to in the EU GSP), or take steps to protect worker rights (which is required by the US GSP legislation, for example), they will be eligible for lower tariffs or completely duty-free access; otherwise, they will probably face the elimination of tariff preferences and sanctions that may or may not be related to trade, such as huge monetary fines, the reduction of technical assistance, or the suspension of cooperative activities (Ebert and Posthuma 2011).

In short, the contention that regulations designed to improve working conditions harm competitiveness disagrees with the reality. Instead, the amelioration of working conditions is a part of the competitive strategy in the current phase of globalization. While some developing economies have achieved economic growth in the past few decades on the basis of the vast supply of cheap labor and the excessive consumption of natural resources, only higher labor standards and decent working conditions can foster the lasting competitiveness of enterprises and countries.

3.3 Reducing Employment? The Connection Remains Unclear

The European unemployment crisis of the 1980s and 1990s is frequently cited as evidence of the link between generous labor protection and unemployment (Heymann and Earle 2010: 54). Yet, by reviewing a fair number of empirical studies, some researchers (e.g., Baker et al. 2003; Blank and Freeman 1994) find that numerous factors may cause a rise in unemployment,

and that the adverse effects of labor policies and institutions on employment is far from being solidly asserted. Gregg and Manning (1997) make the following comments: 1) plenty of econometric work that appears to be successful in explaining the changes in unemployment across countries and over time builds implausible models and uses dummy variables, and therefore, fails to provide convincing evidence of the relationship between unemployment and increased labor protection. 2) Making simple comparisons across countries to judge labor market performance is unreasonable too, since the results could be very sensitive to the measures used. 3) Conventional analyses that emphasize the disemployment effects of labor market regulations only see how employers' motivation to hire workers influences the employment rate, but overlook that job attractiveness to the labor supply side also matters considerably.

Apart from estimates at the overall level, studies that assess the employment effects of specific working conditions regulations have achieved very mixed conclusions. A causal relationship between better working conditions and lower employment cannot be deduced from these either. Above all, great controversy exists in the burgeoning discussion of the influence of minimum wages. The proponents contend that moderate hikes in minimum wages do not impinge on the employment rate (Card and Krueger 1995: 389-90; Freeman 1994), and that the elasticity of the labor market is likely to 'absorb minimum wage increases' (Miller 2008: 274). The growth in the minimum wage just offsets the value lost in persistent inflation, and hence it cannot possibly lower businesses' profits or induce disemployment (Batra 2005: 184-9). In contrast, the opponents of mandated minimum wages are firmly convinced that an increase in minimum wages is not cost-free – businesses must make adjustments to adapt to the higher labor costs, and thus low-skilled workers, young people and minorities ultimately suffer, whom the policy intends to help indeed (Wilson 2012).

According to a review of the earlier literature, amongst more than 100 minimum wage studies published since the 1990s when the new minimum wage research began to thrive, nearly two-thirds endorse the negative employment effects of minimum wages, whereas only eight give a relatively consistent indication of positive employment effects. Among the 33 most reliable estimates, up to 28 (85 percent) point to negative employment effects (Neumark and Wascher 2007).

Nevertheless, the predominance of estimates that prove the disemployment effects of minimum wages does not of itself corroborate the negative relation between minimum wages and employment. Firstly, while more studies claim that minimum wages have negative employment effects, not all of them provide statistically significant evidence. On the contrary, some studies with the minority conclusion present very persuasive data to show that minimum wages have a non-negative influence on the employment rate (see Neumark and Wascher 2007). Secondly, jumping out of the research mode of most orthodox studies that concentrate on how minimum wages affect the employment rate, a small set of studies reveal that in some

areas a reduction in the hiring rate as a result of minimum wage increases is accompanied by a distinct decline in the dismissal rate (e.g., Brochu and Green 2012; Dube, Lester, and Reich 2012; Portugal and Cardoso 2006). It means that an increase in the minimum wage may reduce the chance that an unemployed person will find work but also reduce the probability that a job will end. This finding inspires a reflection on the question of whether it is problematic to describe the employment effects of minimum wages simply as 'negative' or 'positive'. Last but not least, the relevant literature has probably been contaminated by publication selection bias. In other words, the genuine negative effects of minimum wages on employment are not necessarily as large as has been commonly reported by the majority of the existing studies. By applying recently developed meta-analysis methods to 64 US minimum wage studies, Doucouliagos and Stanley (2009) found that once publication selection bias was removed, little or no evidence for the negative employment effects of minimum wages would remain.

Similarly, there are as yet no conclusive results about the employment effects of overtime regulations. On the hypothesis that less work for some will create more jobs for others, some scholars praise the reduction of working time as an instrument against unemployment. However, this verdict has been accused of ignoring the consequential increases in labor costs and of resting on assumptions that lack empirical support (Börsch-Supan 1999). A few other theoretical studies (e.g., Anxo 1998, citing Federal Planning Bureau 1997; Oaxaca 2014) take into account several complex scenarios, and arrive at the conclusion that a general reduction in working time has employment-boosting potential only when the resulting increase in wage costs is suppressed; otherwise, shortened working time tends to influence employment negatively. Original wage costs will be maintained if there is no wage compensation (or increase in hourly wage rates), or if the wage compensation is diluted by an accompanying reduction in production costs, which may come from a re-organization of production methods (Anxo 1998), a direct increase in labor productivity that does not replace employees (Zachmann 1986), or supporting policies aimed at reducing employers' charges (Anxo 1998, citing Federal Planning Bureau 1997). In terms of empirical evidence, the data from different countries exhibit rather contradictory results: positive employment effects of reducing working hours were detected in Germany (Franz and König 1986) and Finland (Holm and Kiander 1993), whereas non-positive influences were found in Japan (Brunello 1989), Germany (Hunt 1999), Canada (Skuterud 2007) and France (Chemin and Wasmer 2009; Crépon and Kramarz 2002). It therefore seems too simplistic to draw a conclusion that overtime regulations influence employment either favorably or adversely.

The employment effects of paid sick leave are not less debatable. However, in the literature, there is more immediate and convincing evidence pointing to the non-negative employment effects of paid sick leave. For instance, in a comparative study of employment levels in San Francisco – the first US city to implement a paid sick leave law, in 2007 – and five

neighboring counties, none of which had a paid sick leave law, between 2006 and 2009, San Francisco was found to outperform the other counties in job growth in spite of the occurrence of the worst recession since World War II (Petro 2010). This finding echoes earlier data that demonstrate that San Francisco managed to maintain a higher employment level than nearby counties in the first year after the implementation of its paid sick leave flaw (Lovell and Miller 2008). In another study, this one carried out worldwide, Earle and Heymann (2006) examined the labor-related legislation as well as the individual country reports of more than 150 countries, and found no evidence of a negative correlation between the availability of paid sick leave and the macro-economic performance measured by unemployment, productivity, Gross Domestic Product (hereafter 'GDP'), and competitiveness. Afterwards, they explored whether the duration of paid sick leave could cause more unemployment, by analyzing comparable data of 22 countries with the highest scores on the United Nation's Human Development Index. The upshot remained consistent with the foregoing findings: the national unemployment rate does not have a statistically significant relationship with the length of mandated paid sick leave (Schmitt et al. 2009).

To conclude, the true employment effects of working conditions law are not yet clear. The disemployment outcome seems to be a preconceived and shaky ground for denouncing the economic efficiency and far-reaching social influence of working conditions legislation.

4 The Real Foothold of Working Conditions Legislation

Cheap labor used to be a significant factor that induced the movement of capital from industrialized countries to emerging economies. However, the situation has been gradually changed. The international community pays increasing attention to CSR, and there is a worldwide adjustment of Foreign Direct Investment (FDI) strategies. Relying on low labor costs to gain competitive advantages is no longer a wise choice. Instead, an enterprise and a country are more like to obtain strong and sustainable competitiveness from effective integration of global resources, high productivity, technological advantages, and good reputation. Understanding this transformation is the basis for figuring out the ultimate foothold of working conditions law.

Legislatures of both developed and developing countries may have to dismantle the ideological systems where improving working conditions and promoting the competitive power of domestic enterprises are considered conflicting objectives. With a view to fitting in with the global trend towards more intensive economic growth, a country should recognize the potential of decent working conditions to boost the productivity of the labor force and to create long-term cooperative relations with foreign countries. This is not to overstate the motivational effect of high labor standards or to suggest that the increased costs for enterprises can always be justified and offset, but to remind the probable existence of a point where the economic and social

benefits of decent working conditions are balanced. This balance is a goal that may never be realized but can be infinitely approached. The higher the level of such equilibrium and the better the relations between enterprises, employees and government may be stabilized due to the harmonized interests of all three parties. The main idea put forward here is that a country will not find a real foothold for domestic working conditions legation at the current stage of globalization unless continuous endeavor underlies the making and revision of relevant regulations in order to achieve a greater degree of forgoing balance.

Undoubtedly, numerous challenges may stand in the way of a country reaching an ideal balance between economic efficiency and labor protection in domestic legislation on working conditions. Above all, it is a prerequisite that an optimistic stance is taken by the policymakers towards the coordination between economic and social objectives in working conditions legislation. The key is a firm belief in the prospect of moving beyond the 'zero-sum' approach to dealing with employment relations, based on which a policy package must be in place to arrange the distribution and redistribution, resource allocation, and cost sharing among different social actors in order to support the implementation of the law. Secondly, great demands are made on the capability of the legislature. The extent to which the necessary soundness, flexibility, and timeliness can be met in lawmaking determines the internal rationality and practicability of relative rules, and relies on the mastering of a high level of legislative expertise, thorough understanding about domestic conditions, and systems of effective evaluation. It is unrealistic to presume that concrete and efficient strategies can be developed when the above conditions are absent. Moreover, there might be some barriers that are unsurmountable in the short run. For instance, it is impossible to make prompt changes to unfavorable social environment and the level of economic development so as to facilitate the enforcement of a law, even if it has evident significance for transforming the 'tug-of-war' between employers and employees into a 'win-win game'.

What is intriguing is that many countries fail to make the first step in emancipating the mind from traditional ideas before being faced with further practical difficulties. American parental leave legislation is a typical example. As is shown in Chapter 5 of this book, the US has implemented one of least generous and most ineffective parental leave policies in the world, while the humane and efficient model established by Sweden has contributed to national employment and competitive power. In fact, the widest gap exists between the philosophies adopted by American and Swedish policymakers, rather than between the capability of the two countries to make sophisticated legislation or the availability of resources for law enforcement.

5 Final Remarks

The academic disagreements and the disparities between the legislative stances of different countries inspire an exploration of the foothold of working conditions law against the background of intense global competition. In an effort to address this issue, this chapter looks at the following key questions: why is the regulation of working conditions indispensable, in spite of the widespread worry that enterprises are carrying too heavy a burden to compete? To what extent do the propositions that throw doubt on the efficiency and predict the negative economic influence of working conditions legislation prove correct? What is the real foothold of working conditions legislation in globalization?

By rights, the legitimacy of the regulation of working conditions should be uncontroversial, considering the conspicuous significance for employment fairness and for the living standards of the working population. However, it is not an easy task to clarify the theoretical foundation for the legal constraints on working conditions. This chapter categorizes the existing justifications for labor law into two primary approaches. Both are found to be defective. The instrumental value approach fails to highlight the fact that labor legislation is irreplaceable for achieving certain values, and does not consider whether other values argue against legislative interference. For the human rights approach, it is difficult to explain away the visible differences between human rights and the rights to certain levels of working conditions in terms of moral weight and applicability. In order to conquer these vulnerabilities, this chapter proposes an alternative interpretation based on the core idea of Kantian legal philosophy – people, who are born with free will, are the ends of law. This is not to resort to the human rights approach again. Since the paramount goal of the law is to preserve the inherent freedom of individuals to the greatest degree, the existence of other means for the same purpose cannot free labor legislation from the responsibility of creating the conditions for the employed to realize the freedom. Meanwhile, legislators will be able to judge the priority of different values according to whether and how they are related to the preservation of individuals' freedom. This construction also avoids the danger of classifying all labor rights as human rights. It adopts a dynamic explanation that the regulations on working conditions derive from the need of the working population for certain conditions to preserve the basic freedom, rather than from the imperative force of human rights. By the same token, working conditions law does not have to feature the universal applicability or unified standards of human rights protection.

The author then considers whether the inefficiency or the negative influence of working conditions law on the economy has been overstated. Obviously, the arbitrary assertion that regulation is useless does not stand up to scrutiny, because there is no lack of counter-examples. The experiences of China and the US illuminate the fact that, regardless of whether a society has sufficient resources to implement the law, the relevant legislation is

needed to 'raise the floor' for workers. Many studies have tried to rebut the long-believed equation between cheap labor and high competitiveness, but Heymann and Earle (2010) provide the most direct evidence that a majority of the fifteen countries with the highest competitiveness in the world offer decent working conditions. The main reason for this unexpected consequence is that there are apparent internal and external incentives to lift labor standards in a globalized world. To be brief, a country that is active in improving domestic working conditions is likely to obtain stronger internal growth, and has access to more international cooperation and preferential trade deals. Lastly, abundant studies seem to have corroborated the disemployment effects of working conditions law, but not all of them find significant evidence, and some even depend on implausible models or dummy variables. In contrast, a few findings indicative of non-negative employment effects are relatively convincing.

The author finally raises the idea that working conditions legislation can gain a reliable foothold in globalization only by making an unflagging effort to approach the balance point where the economic and social benefits are bound in perfect unity.

3 A Legislative Perspective on Construction Safety in China, against the Backdrop of an Industry-wide Labor Shortage▪

Abstract

In the context of the ongoing labor shortage in China's construction industry, this chapter examines how the defective domestic legislation related to construction safety worsens the situation, and also, in the legislative dimension, what reformative measures are likely to bring about fundamental improvements. Three levels of description in this chapter show, respectively, the impracticability of the main construction safety rules, the malfunctions of the Labor Contract Law and the regulations about work-related injury insurance, and the undermining of the responsibility system. While it would be difficult to construct a more efficient legal framework right away, immediate efforts can be made to address specific tough issues that are key to ameliorating China's construction safety performance and to decelerating the outflow of the construction workforce. This chapter identifies five reformative measures that should be taken: generalizing an IT system platform for construction labor management, strengthening the combination of liabilities and incentives to guide hesitant building enterprises, exploring the likelihood of absorbing migrant construction workers into unions, guaranteeing workers easy access to post-accident remedies, and promoting the role of NGOs.

Key Words: Construction Safety; China; Legislation; Labor Shortage

▪ This chapter has been submitted to the *Journal of Workplace Rights* and is presently being given consideration for publication in SAGE Open.

1 Background: A Tricky Situation for China's Construction Industry

Since the implementation of the Tenth Five-year Plan for National Economic and Social Development, the construction industry has thrived in China (China AEC Industry Summit 2015). The corresponding gross output value exceeded ¥ 11 trillion in 2011, accounting for approximately a quarter of China's GDP for that year (National Bureau of Statistics 2012). However, behind this fascinating achievement is a nationwide shortage of construction workers. The fast-rising labor costs threaten the long-term prosperity of the whole industry.

This seems unusual for one of the most recognized surplus labor economies in the world, but the truth is that construction workers have become very sought after in mainland China in recent years. Developers[11] and building enterprises have to pay increasingly high prices to attract skilled manpower (See *South China Morning Post*, September 15, 2014). According to the data available on the China Engineering Cost Network, the national average daily wage for each of 18 types of Chinese construction worker ascended steeply from Q4 2011 to Q1 2014 (see the comparison between these two quarters in Chart 1). In a few cities, for example Changsha (Chart 2) and Guangzhou (Chart 3), the average daily earnings of all kinds of construction workers grew by more than 100 percent during this period.

There are many reasons behind the situation. To start with, the continuing currency inflation and soaring price level force all professions and trades to increase wages in order to satisfy laborers' basic living needs, especially in the construction industry, where workers are generally unfairly paid (China Engineering Cost Association, 2012). Secondly, China's urban-rural dualistic economic structure has been changing dramatically. Some economists believe that this fastest-growing country in the world is getting close to the so-called 'Lewis turning point' (e.g. Das and N'Diaye, 2013a; Knight et al., 2010). Thus, a few industries that have relied heavily on cheap rural migrant labor to grow face a shrinking workforce, such as construction, manufacturing, and services. Moreover, the serious problem of the aging population accelerates the exhaustion of the 'demographic dividend' in China (Das and N'Diaye, 2013b). Lastly, it is well known in China that the working conditions in the construction industry are dreadful. Construction jobs have been almost synonymous with severe wage arrears, round-the-clock working, and a high incidence of injuries and fatalities, so the appeal is conspicuously weaker than that of other professions, in particular when the competition in the labor market is becoming less stiff (Dai, 2013).

11 'Developers' refer to real estate developers, who are the original owners of commercial buildings.

Focusing on the last reason listed above, some labor lawyers raise that the ongoing supply-demand imbalance in the construction labor market provides a golden opportunity to stimulate radical improvements in the overall situation of Chinese construction workers (see *China Real Estate Business*, April 2, 2012). Agreeing with this perception, the chapter takes stock of how construction safety might be alleviated to reduce the domestic antipathy to construction jobs.

Different from previous studies that concentrate on the defeat of building enterprises in managing construction safety (e.g., Tam et al., 2003), ineffective government regulation (e.g., Wang[1], 2015), historical and social reasons (e.g., Yan, 2005), and the characteristics of China's informal employment and rural migrant workers (e.g., Swider, 2015), this chapter reflects on the multidimensional problems with the national legislation. On this basis, it raises new possibilities about the legislative changes that should be made to improve China's construction safety. These measures may play a decisive part in slowing down the outflow of workers – new-generation rural migrant workers in particular – from the labor pool of the construction industry.

2 Major Defects of the Chinese Legislation in Terms of Construction Safety

At the beginning of this century, construction accidents and fatalities happened in their thousands every year in China (see table 1). After a decade of inadequate improvement the situation remains grim (see table 2).[12] As indicated by the aforementioned studies, a collection of particular national conditions have combined to result in the high incidence of construction accidents. However, from a legislative standpoint, it is more reasonable to say that China lacks legal institutions suited to the national conditions.

Above all, China has established an elementary legislative framework related to construction safety, but the specific regulations and technical codes that serve as criteria for behavior and bases for regulation are far from complete, significantly decreasing the effectiveness of the law (Zhang et al., 2003). In the meantime, Chinese labor legislation has by and large made few efforts to assist the 36 million rural migrant workers engaged in the con-

12 Because the data are incomplete, table 2 just shows the number of nationwide construction accidents and fatalities taking place in the first half of five consecutive years from 2011 to 2015. Simultaneously, it is important to note that China's central system for registering occupational accidents is very unsound (Wang and Fang 2007:9), thus, the actual numbers of construction accidents and deaths are likely much greater than the registered numbers.

struction industry,[13] who are left outside the formal employment structure and are accordingly excluded from *de facto* labor protection. Furthermore, the system for legal responsibility is seriously flawed, and hence cannot play a proper role in eradicating the malpractice and illegalities that are regarded as the cause of most domestic construction accidents.

What follows is a detailed depiction of how these legislative defects have militated against the Chinese progress in improving construction safety. Several notable initiatives launched in 2014 are given special attention, because they demonstrate the policymakers' increasing awareness that measures must be taken to enhance construction safety, but these ultimately failed to spark sweeping transformations as had been expected.

2.1 Impractical Rules

As the most significant laws containing work safety rules, the Labor Law (2009 Amendment)[14], Construction Law (2011 Amendment)[15], and Work Safety Law (2014 Amendment)[16] offer inadequate down-to-earth guidelines for the management of construction safety.

To be specific, in the Labor Law there are only a small number of sketchy clauses concerning occupational safety in all professions (in Articles 52-57). For example, "employers shall establish and perfect the system for labor safety and sanitation" (Article 52), "labor safety and sanitation facilities shall meet State-fixed standards" (Article 53), and "laborers should strictly follow rules on safe operation" (Article 56). The practicability of these provisions is questionable.

In the Construction Law, the basic law for the construction industry, a whole chapter with 16 articles (Articles 36-51) constructs only a few pragmatic norms for conduct. Many of the formulations cannot be implemented as they are too vague and are expressed in terms of principles, and no further explanations or supporting provisions are provided. For instance, Article 36 stipulates that a system should be established and perfected in order to enable the masses to participate in accident prevention and safety management, but how to set up such a system is not mentioned. According to Article 47, workers are entitled to propose improvement schemes for programs and working conditions that may cause harm to health,

13 Some 45 million people work in China's construction industry, so rural migrant workers account for 80 percent of these. See http://www.mohrss.gov.cn/gsbxs/GSBXSgongzuodongtai/201501/t20150130_150792.htm (accessed 12 March 2016).

14 《中华人民共和国劳动法（2009修正）》(***Zhonghua Renmin Gongheguo Laodongfa (2009 Xiuzheng)***).

15 《中华人民共和国建筑法（2011修正）》(***Zhonghua Renmin Gongheguo Jianzhufa (2011 Xiuzheng)***).

16 《中华人民共和国安全生产法（2014修正）》(***Zhonghua Renmin Gongheguo Anquan Shengchanfa (2014Xiuzheng)***).

and have the right to criticize, inform against and accuse management of actions endangering their health and safety. However, this provision comes to naught as well, since it virtually repeats the Article 56(2) of the Labor Law while failing to elaborate on the relevant procedures (including which government department should receive the complaints) and assigning no social resources or assistance to vulnerable workers. In the Chinese context, the millions of migrant construction workers are by no means capable of making suggestions and bringing accusations, due to the averagely poor educational background and inferior position in the labor market. Hence, the foregoing provisions are particularly empty for them.

The 2014 Work Safety Law reinforces the original version of its 2002 predecessor in many ways. By defining the rights to safety at work and the obligations of employers, workers, inspectors and government officials much better, it overcomes the roughness of the Labor Law and the Construction Law. Nevertheless, in relation to the administration of construction safety, it still has notable limitations. As the principal law for a number of high-risk industries, one can understand that it should not lay particular stress on a certain sector. However, some 'one-size-fits-all' provisions are hard to implement in the construction industry, which requires concrete regulations addressing its peculiarities. Additionally, some clauses of the 2014 Work Safety Law direct people to other specific laws, rules, or standards that need to be made by different legislatures or government departments. This is especially problematic for the Chinese construction industry, because the legislation in this field is rather laggard and undeveloped. Last but not least, although the 2014 Work Safety Law is much more detailed than the Labor Law or the Construction Law, it continues with the prescriptive approach that describes 'means' instead of 'ends' and tries to standardize work processes by applying prescriptive rules and procedures backed up by compliance monitoring and by timely sanctions for non-compliance (Zhang et al., 2003). Nonetheless, it is impossible for prescriptive regulations to embrace all construction hazards. Such hazards emerge in an endless stream because of continuous technical innovation and the development of material. Moreover, with more than 40 million construction workers,[17] countless building and labor companies, and the large economic gaps between different regions, China desperately lacks the human and material resources to uphold the prescriptive approach to regulating construction safety problems. These limitations all reduce the practicability of the 2014 Work Safety Law in the construction field.

17 *Idem.*

2.2 The Labor Contract Law[18] and the Impact on Construction Safety

2.2.1 The Malfunctioning of the Labor Contract Law in the Construction Industry

Enacted in 2007, the Labor Contract Law is considered a landmark in labor market governance in China. Nonetheless, the enforcement of this law has not improved the number of rural migrant workers who sign labor contracts with employers. Data collected by the National Bureau of Statistics from 2009 to 2016 suggest that for the whole labor market the percentage of rural migrant workers with written contracts has remained below 45% and has declined considerably overall (42.8% in 2009 vs. 35.1% in 2016).[19] In the years 2009, 2011 and 2012, when data for specific industries are available, the construction sector always had the highest proportion (some 75%) of rural migrant workers that had not entered into a labor contract with the employer.[20]

In theory, the Labor Contract Law develops the relevant rules of the Labor Law, and strengthens the rights of the employed (who, of course, include the approximately 290 million[21] rural migrant workers) to written labor contracts. But what did not change was the legislative indifference to the real difficulties of the uneducated rural migrant workers in understanding and defending their own rights.

In the general provisions of the Labor Contract Law, Article 3 highlights that a labor contract should be concluded in accordance with the principles of lawfulness, fairness, equality, free will, negotiation for agreement and good faith. Articles 4, 5, and 6 emphasize the crucial role of labor unions or employee representatives in determining rules and important events in relation to remuneration, working time, health and safety at work, etc. In the special provisions (Articles 51-56) on the conclusion and implementation of collective labor contracts, the irreplaceable position of different levels of unions is again underlined.

These provisions can hardly benefit migrant construction workers in reality, although they are aimed at making up for the inferiority of workers in signing a labor contract with the mighty employer. The fundamental reason is that since a sequence of 'reforms' of the employment system in

18 《中华人民共和国劳动合同法（2012修正）》(***Zhonghua Renmin Gongheguo Laodong Hetongfa (2012 Xiuzheng)***).

19 See the monitoring surveys of NBSC on nationwide migrant workers, available at: http://www.stats.gov.cn/was5/web/search?channelid=288041&andsen=%E5%86%9C%E6%B0%91%E5%B7%A5%E7%9B%91%E6%B5%8B%E8%B0%83%E6%9F%A5%E6%8A%A5%E5%91%8A (accessed 5 February 2016).

20 *Idem.*

21 *Idem.*

the construction industry in the 1980s,[22] unlawful contract awards, multi-layer subcontracting, contracting-out and affiliating have been prevalent in China's construction works. These illegal actions may occur separately or simultaneously. To be specific, developers may award the main building contract illicitly, derailing the entire operation from the start. At the implementation stage, the substantive construction work is not fulfilled by the head contractor[23], but is contracted out, or split into parts and subcontracted to several small building enterprises, labor service companies or labor contractors, most of whom are unqualified and are only nominally affiliated to authorized companies. Through 4-6 times of subcontracting, it is the lowest level of labor contractors that take charge of worker recruitment and management, based on such social ties as friendship, kinship, or coming from the same town. Problems arise here: 1) most poorly-educated migrant construction workers know nothing about labor contracts or the Labor Contract Law; for the minority who have heard about labor contracts, it is too complicated to figure out the other contracting party (Yizhuanyiwa Migrant Workers Culture Development Center, 2013). 2) A shocking secret is hidden in the foregoing illegal actions: the unclear relationships actually enable developers, building enterprises and labor companies to escape

22 Before 1980, Chinese rural migrant construction workers were fairly well protected, and received the same wages and benefits as urban workers, because all construction projects were planned and managed by the government. In 1980, to stimulate the vitality of the brand-new market economy, the State Council introduced a project-contracting system to the construction industry by enacting the《建筑安装工程包工合同条例》***Jianzhu Anzhuang Gongcheng Baogong Hetong Tiaoli*** (Regulations on Contracts of Construction Installation Engineering). In September 1984, another piece of legislation passed by the State Council – 《关于改革建筑业和基本建设管理体制若干问题的暂行规定》***Guanyu Gaige Jianzhuye he Jiben Jianshe Guanli Tizhi Ruoganwenti de Zanxing Guiding*** (Interim Provisions on Several Issues concerning the Reform of the Construction Industry and the Basic Construction Management System) – clearly stipulated that state-owned building enterprises should gradually replace permanent employment with contract-based employment, and that in the near future only a small number of technical experts could be employed permanently. However, the household registration (the so-called 'hukou' in Chinese) and social security institutions were not prepared for this dramatic change and enterprises therefore blatantly took advantage of these institutional deficiencies and treated migrant construction workers in a discriminatory way. In November of the same year, the Ministry of Construction and the National Planning Commission jointly issued《建设工程招标投标暂行规定》***Jianshe Gongcheng Zhaobiao Toubiao Zanxing Guiding*** (Interim Provisions on the Tendering and Bidding on Construction Projects), further encouraging contractors to lower their bidding prices. In consequence, countless private labor contractors and unauthorized labor companies that focused on finding rural migrant workers emerged, and the practices of exploiting inferior migrant workers and carving up interests, in the forms of contracting-out, affiliating and multi-layer subcontracting, started spreading widely in the construction industry.

23 A 'head contractor' is a building enterprise that signs the main building contract with the developer.

regulatory governance, not to prepay labor costs,[24] and to shift various risks to construction workers who are at the end of the chain of interests. 3) The great informality of employment and the cognitive limitations of rural migrant workers work against the solidarity of workers and certainly work against the formation of strong unions that would be capable of helping workers to conclude a fair labor contract with the employer.

Enterprises that are qualified to sign labor contracts have no direct or apparent employment relationship with workers, whereas labor contractors that directly recruit and manage workers are not eligible to conclude labor contracts with workers. For the sake of addressing this dilemma, regulations that identify who is capable of recruiting construction workers and who is obliged to sign labor contracts with workers in different situations should have been made for the construction industry.

2.2.2 The Impact on Construction Safety

The low proportion of workers with labor contracts in the construction industry stores up trouble for construction safety. First of all, many employers force rural migrant workers to work extremely long hours due to the absence of labor contracts. According to the latest official data in the national monitoring survey of 2009, the average working hours in the construction sector is 59.4 hours per week (National Bureau of Statistics 2010), far beyond the general limit of 44 hours set by the Labor Law. The research of Zhang (2014) about the association between fatigue and construction safety shows that the error rate increases significantly as soon as construction workers feel slightly fatigued, and as they feel further fatigue the hazard perception and motor control starts to fail; workers are unconscious of most of the errors because the sensory ability is impaired.

Secondly, the unstable contract-free relationship between building enterprises and rural migrant workers gives rise to a high level of labor mobility in the construction industry. Given that the workers will move to another construction project promptly after finishing the first one, many building enterprises wriggle out of investing in professional safety training and facilities, even though they have an obligation to do so. In other words, the temporary connection with workers gives building enterprises little promise of long-term return for human resources investment, which fundamentally discourages any real expenditure on safety training. In consequence, many construction sites adopt simple and one-sided rules to deter risky behaviors, such as heavy fines for smoking and for not wearing a helmet. The importance of construction safety and the relevant skills

24 Workers' basic accommodation is usually offered by private labor contractors, who do not pay wages until they themselves are paid by the higher layers of subcontractors after the construction work is finished. This means that a default on payment at any step will give rise to wage arrears, which is not the focus of this chapter but is another huge challenge for labor protection in China's construction industry.

and knowledge are rarely imparted in ways that rural migrant workers can understand. For the workers, it is not clear why trivial things like 'smoking' and 'forgetting to wear a helmet' matter, and the unpersuasive penalties are more like shackles of the last freedom.

2.3 Legislation on Work-Related Injury Insurance May Worsen the Predicament

In addition to the above impact on construction safety, the scarcity of contract-based employment relationships in the construction industry has an unfavorable interaction with the legislation on work safety insurance. In the light of the Regulation on Work-Related Injury Insurance[25] issued by the State Council in 2003 and revised in 2010, work-related injury insurance is the basic mechanism to ensure that workers injured in occupational accidents can obtain medical care and economic compensation, and to promote the prevention of work-related injuries and occupational recovery (Article 1). The insurance funds are deposited into a designated financial account and used to pay work-related injury insurance benefits, work ability appraisal fees, fees for publicity, and training with respect to the prevention of work-related injury (Article 12). Bearing in mind the great significance of these provisions, the Ministry of Labor and Social Security – one of the predecessors of today's Ministry of Human Resources and Social Security (MOHRSS) – issued the Notification of Doing Well the Work about Migrant Construction Workers' Participation in Work-related Injury Insurance (2006)[26]. It required that local construction administrative departments should only award a safety production license to building enterprises (head contractors) that have paid work-related injury insurance premiums for all their construction workers. However, as already mentioned, the head contractors do not directly employ or contract with construction workers. For the purpose of getting the production licenses quickly, some head contractors fabricate a roll call of workers and then buy insurance for non-existent people, while the real workers who are informally employed by unauthorized private labor contractors to work on the construction projects are not covered by occupational insurance (Li 2013).

With a view to addressing the above frauds and irregularities, the Social Insurance Law[27] enacted in 2010 prescribes that employers who do not pay work-related injury insurance premiums must pay insurance benefits and compensation to injured workers or bereaved families following work-related accidents. If an employer fails to pay these costs, the work-related

25 《工伤保险条例》(***Gongshang Baoxian Tiaoli***).

26 《关于做好建筑施工企业农民工参加工伤保险有关工作的通知》(***Guanyu Zuohao Jianzhu Shigong Qiye Nongmingong Canjia Gongshang Baoxian Youguan Gongzuo de Tongzhi***). See http://www.mohrss.gov.cn/gkml/xxgk/201407/t20140717_136115.htm (accessed 27 Jan 2016).

27 《中华人民共和国社会保险法》(***Zhonghua Renmin Gongheguo Shehui Baoxianfa***).

insurance fund must advance the payment and then pursue the debt from the employer (Article 41). This means that the building enterprises or labor companies that actually use the laborers cannot evade paying either work-related insurance premiums or benefits. Nonetheless, the problem remains. Injured workers or bereaved families must prove the existence of labor relationship with these enterprises when applying for 'work-related injury ascertainment' (Article 18 of the Regulation on Work-Related Injury Insurance), which is the prerequisite for obtaining compensation and insurance benefits. So, we are taken back to the start – the 'missing' labor contract. What can be used as proof of the employment relationship except a labor contract? How can rural migrant workers who do not even realize the importance of a labor contract be aware that they must collect other evidence in advance? Most crucially, building enterprises, labor companies, and labor contractors may all take a share of the illegal profits made from exploiting rural migrant workers. Would they leave evidence behind? Once these queries have begun to be deliberated over, one will probably decide that the road ahead for injured construction workers is rather long and dim.

Furthermore, the Regulation on Work-Related Injury Insurance (Article 17) sets a one-year limit for injured workers or their relatives, bereaved families, or unions to apply for work-related injury ascertainment if the employer fails to do so within 30 days after the day on which the accident occurs. This provision overlooks the fact that one year may be too short to allow migrant construction workers to get ready. Sometimes, the treatment period exceeds one year, and in addition there is the time spent in getting acquainted with the relevant procedures, collecting evidence, seeking legal aid, and resorting to labor relationship arbitration and litigation. As explained by the labor lawyer Mr. Tong Lihua, the dean of Beijing Zhicheng Legal Aid and Research Center (mentioned later), it takes around three years and nine months, or six years and seven months when there are extensions, to go through all the procedures for obtaining a due legal remedy.[28]

On account of these obstacles, most injured workers opt out of the legal route and accept the inappropriately low compensation offered by the employer 'behind closed doors'. In this sense, law breakers win in the end, which virtually brings about more circumventions of the law.

In order to break the current vicious circle, the MOHRSS, the Ministry of Housing and Urban-Rural Development (MOHURD), the State Administration of Work Safety (SAWS), and the All-China Federation of Trade Unions (ACFTU) jointly issued an Opinion on Further Improving the Work on Work-related Injury Insurance in the Construction Industry[29] (hereafter

28 See http://www.chinasafety.ac.cn/main/xwzx/aqyw/2013-12-10/6374.html (accessed 2 February 2016).

29 《关于进一步做好建筑业工伤保险工作的意见》(***Guanyu Jinyibu Zuohao Jianzhuye Gongshang Baoxian Gongzuo de Yijian***). See http://www.mohrss.gov.cn/SYrlzyhshbzb/ldbk/shehuibaozhang/gongshang/201501/t20150105_148141.htm (accessed 15 August 2017).

referred to as the 'Opinion') in late 2014. This central administrative document puts forward a string of measures to enforce the universal coverage of work-related insurance for construction workers.

The first pioneering move is to instruct head contractors to insure workers who are not formally employed, based on the construction projects rather than labor contracts. The aim is to deal with the high degree of labor mobility in the construction industry. The Opinion also emphasizes that the cost of insurance premiums should be calculated as an independent expenditure and should not be counted as a part of the bidding price. Before starting the construction project, the head contractor should pay the one-off insurance premiums and put all the safety measures in place; failing this, the construction permit must not be awarded. Simultaneously, the Opinion makes an appreciable effort to assist injured construction workers in applying for work-related injury ascertainment and for compensation: 1) aside from a labor contract (the primary evidence of the employment relationship), the roster, wage payment proofs, work cards, attendance records, recruitment registration, and testimony of other workers should be counted as effective evidence for the factual labor relationship; 2) the procedures for work-related injury ascertainment should be simplified and shortened to make the relief more efficacious; and 3) if the owners (developers) of construction projects, head contractors, or subcontractors who are qualified to employ workers give out subcontracts to unauthorized organizations or individuals, they should jointly bear the liability for compensation for the losses of injured workers or bereaved families. Finally, the Opinion re-emphasizes the significant role of unions, proposes schemes for policy propaganda and training among rural migrant workers, and urges building enterprises to give a true and prompt account of construction accidents.

Still, it is doubtful whether the Opinion has revolutionary implications. Issued by departments of the central government, it has a certain binding force. However, it cannot accomplish much in circumstances where higher levels of legislation demonstrate little sympathy for the plight of construction workers. Moreover, what the Opinion provides is not so much refined rules as preliminary proposals, and these will exert actual influence only when there is layer-by-layer local legislation to develop concrete provisions. The reality is that after the issuance of the Opinion, most provincial and municipal authorities only specified the minimum proportion of building enterprises' work-related injury insurance costs to total construction costs, and transcribed the other parts of the Opinion into local administrative documents. In another word, local legislatures have scarcely improved the enforceability of the Opinion. Furthermore, the lack of overall solutions to boost the coverage of work-related injury insurance among rural migrant workers erodes the Opinion's momentum. Unions remain feeble since there are no sophisticated measures to make them powerful, and developers and head contractors are unlikely to make massive changes when there are no explicit punishments for deliberately hindering workers' quest for insurance benefits.

2.4 The Undermining of the Responsibility System

Under the current legal framework, responsibilities for construction safety are mainly imposed on developers and head contractors. However, under the veil of subcontracting, contracting-out and nominal affiliating, these responsibilities are often shifted to the labor companies or private labor contractors who actually control the behavior of workers on construction sites. These lowest-level 'exploiters' are unlikely to pay for the costly training, equipment and facilities that are necessary for reducing the precariousness faced by workers. In such cases, the responsibility system is undermined to a large degree.

Here, an underlying question is worth contemplating: why do illegal contract awards, multi-layer subcontracting, contracting-out, and affiliating keep flourishing in practice? The deep-seated reason still lies in the defective legislation. According to a disclosure by a MOHURD spokesman, around 40 percent of catastrophic construction accidents nationwide are bound up with unlawful contract awards, multi-layer subcontracting, contracting-out and affiliating.[30] However, there have been few systematic measures aimed at reducing these offenses, and pronounced legislative deficiencies are found in the following aspects.

1) The concepts of 'illegal contract award', 'subcontracting', 'contracting-out' and 'affiliating' have never been defined explicitly in the important pieces of construction legislation, although they have been banned for so long. In addition, without paying any regard to the many different forms in which they are found in practice, the laws and administrative regulations in relation to construction attempt to encapsulate varied cases in simplistic provisions. Consequently, the implementation of the law is thwarted. In 2014, the MOHURD defined these offenses and listed their typical forms for the first time in the Measures for the Administration of the Diagnosis, Investigation and Handling of Illegal Contract Award, Subcontracting and other Unlawful Actions (for Trial Implementation)[31] (hereafter referred to as the '2014 Measures'). Nevertheless, interim legislation like this made by the MOHURD should not be used to interpret indefinite concepts in laws and administrative regulations, whose ambiguity can only be removed by legislative actions of the (Standing Committee of the) National People's Congress and of the State Council.
2) As the legal liabilities for the foregoing offenses and for regulators' dereliction of duty have been either unclear or irrationally light, the importance of construction safety has been belittled. In order to deal

30 http://www.mohurd.gov.cn/zxydt/201409/t20140929_219193.html (accessed 3 March 2016).

31 《建筑工程施工转包违法分包等违法行为认定查处管理办法（试行）》(***Jianzhu Gongcheng Shigong Zhuanbao Weifa Fenbao deng Weifa Xingwei Rending Chachu Guanli Banfa*** (***Shixing***)). Available at: http://www.mohurd.gov.cn/zcfg/jsbwj_0/jsbwjjzsc/201409/t20140904_218909.html (accessed 7 February 2016).

with the hollowness of the liability clauses in the Construction Law, in the Regulation on the Quality Management of Construction Projects, and in the Administrative Regulations on the Work Safety of Construction Projects[32], the 2014 Measures lay down specific standards of administrative fines for different situations and adopt a variety of sanctions, such as suspending construction projects until the failures are rectified, revoking or down-grading an enterprise's qualifications, ceasing to disburse funds (for state-funded projects), and so forth. While this is a step towards defining the penalties for illegal contract awards, subcontracting, contracting-out and affiliating, the 2014 Measures have not established a sound accountability system for eliminating these chronic and stubborn 'ills' of the construction industry. As departmental rules, the 2014 Measures have temporarily filled the gap in terms of the administrative liabilities for the above illegal actions, but the corresponding criminal liabilities and civil liabilities based on tort law and employment law are of comparable significance and need framing simultaneously. Furthermore, since the influence of malpractice has been underestimated, the 2014 Measures fail to address the liabilities of regulators. It is actually a simple truth that lax regulation by government has the potential to subvert the effectiveness of the strictest liability clauses designed to deter illegal actions of the monitored entities.

3) The MOHURD has set quite high thresholds for building enterprises to enter the construction market. A great many unqualified building/labor companies and private labor contractors survive by 'rent-seeking', namely reaching a trade-off between money and nominal affiliation. A number of certificated enterprises make a profit from renting out the qualifications, and ineligible organizations or individuals undertake construction work in the name of those who lend out the qualifications. A comparison between the 2001 and 2014 versions of the Grade Standards of Construction Enterprise Qualifications suggests a slight trend towards looser qualification requirements for domestic construction companies. However, the new standards continue to emphasize the financial and material condition (net asset value, highest contract amount, personnel, and technical equipment) of a company, while not touching upon the safety record, safety management level, or competency to deal with construction hazards.[33] This is a deficient way of controlling building enterprises and relevant individuals' access to the construction market. One the one hand, when OSH performance is not a criterion for qualification assessment, certificated companies need not fear that permitting a nominal affiliation may discredit their own safety records. 'Rent-seeking' is more likely to take place. In the meantime,

32 《建设工程安全生产管理条例》(***Jianshe Gongcheng Anquan Shengchan Guanli Tiaoli***).

33 See http://economics.hnsci.net/sites/economics.hnws.cn/files/economics/pdf/2-root/2.1.7.pdf and http://www.mohurd.gov.cn/wjfb/201411/W020141231012846.pdf (accessed 2 March 2016).

some building businesses in fact have the ability to manage construction risks, but they are totally blocked out of the construction market by the high financial thresholds. To stay within this market, they cannot but join the 'rent-seekers'.

3 New-Generation Migrant Workers are Fleeing the Dangerous Construction Industry: Legislative Possibilities and Challenges

The concept of 'New-Generation Migrant Workers' was proposed by China's No.1 Central Document for 2010,[34] referring to rural migrant workers born after 1980 and aged over 16. A report by ACFTU (2010) estimates that this population amounted to 100 million people as of 2010, accounting for more than 60 percent of all rural migrant workers.

In the building industry, the older generation of migrant workers is becoming physically inactive and demonstrating a tendency to return to rural areas in the near future. The inclinations of the new-generation migrant workers towards job selection will therefore have a strong influence on the labor supply for the construction sector. The fact is that only 9.8 percent of the new-generation migrant workers opt to work in the construction industry, as opposed to 27.8 percent of the older generation (see Table 3). Even though the average wages for all kinds of construction work have been growing, the new-generation migrant workers show a fading interest in it, and gradually drift into the manufacturing and service sectors (National Bureau of Statistic 2011).

Indeed, unfavorable factors, such as long working hours, low wages and instability, exist in non-construction sectors as well (National Bureau of Statistic 2011). The unwillingness of new-generation migrant workers to do construction work is not derived from a shortage of hardworking spirit among them, but from the pursuit of a comparatively safe and decent working environment. The National Bureau of Statistics (2011) discloses that the coverage of social insurance among new-generation migrant workers is quite low in all sectors, but those engaged in the construction industry feel particularly unsafe in every way. Confronted with diverse deadly hazards, only 5.2 percent of the new-generation construction workers are covered by medical insurance, and 16.1 percent by work-related injury insurance. These proportions are even lower than those of the new-generation migrant workers covered by medical and work-related injury insurance in most of the less precarious sectors (see table 4). Moreover, depressingly few of the new-generation construction workers are covered by endowment insurance and unemployment insurance (see table 4). In short, it is the disrespect for life that scares the new-generation migrant workers away from the construction industry.

34 See http://english.agri.gov.cn/hottopics/cpc/201301/t20130115_9543.htm (accessed 14 March 2016).

Whether the safety assurance system for construction work can be appreciably improved in short order will have a determining influence on future trends in the industry-wide labor shortage. This section digs into what would be feasible and effective in the legislative dimension, and puts forward the following five possibilities that would probably make a major difference.

3.1 Mandating an Real-Name IT System for Construction Labor Management

The rather random and informal relationship between workers and employers is the root cause of the poor safety records and most of the other labor protection problems on China's construction sites. Nothing is more urgent than taking measures to regularize the employment status of building workers and transform the whole of the labor management system in the construction industry.

For a long time the employment status of construction workers has been supervised based on the reports by building enterprises. Then the regulatory authorities establish and maintain dossiers manually. The technological backwardness of this approach leaves clear space for intentional falsification and concealment. With a view to accessing real information about construction employment more effectively, a few provincial governments, such as Beijing, Tianjin, Shanghai, Chongqing, Shannxi, and Hebei, have been voluntarily experimenting with their respective information systems in recent years, establishing an alliance between the internet and other modern technologies (such as Radio- Frequency Identification Technology). Chart 4 displays the typical model for these systems. In short, the regulatory authorities, building enterprises, and construction workers are the main users of the information platform, and they all contribute to the establishment of a central database that embraces complete information about individuals and building enterprises. Laborers who intend to do construction work are first of all issued with an 'all-in-one information card'. Their real name, picture, date of birth, registered place of domicile, ID number, skill level, training history, physical condition, and union membership are input into the card with the help of governmental aid workers. After the construction workers have been employed, the head contractors, authorized subcontractors or labor companies must add information about the labor contract and social security status of the worker to the card. The specialized software installed in the project division obtains and uploads the on-site records of the labor services. As all the messages eventually flow into the central database, the regulators and social security agencies are able to learn, analyze and manage them comprehensively in order to improve administrative effectiveness (see Wang[2] , 2015; Wang, 2009).

By applying the network platforms, the aforementioned provinces and municipalities have basically achieved the unified management of information about construction labor services within their territories. This has

huge potential to suppress informal employment and noncompliance with obligations concerning the conclusion of labor contracts, payment of wages, training, safety protection, and work-related injury insurance.

This chapter proposes that central legislative instruments make immediate efforts to spread the advanced way of administering construction employment across the country, and that the systems of all the provinces are interconnected to form a national database. With a universally valid information card, a construction laborer would be less likely to be exploited by anonymous organizations that work outside the legal employment rules, since work-related movements and working conditions would be continuously tracked. The regulatory authorities could also prevent untrained, poorly equipped or uninsured workers from entering construction sites. If any accidents did happen, rescues and investigations would become more efficient.

The major challenge in putting in place the information system under discussion lies in ensuring that potential construction laborers know of the system and actively seek protection. The new-generation migrant workers are, on average, better educated than the older generation and are more familiar with the internet and other electronic media. This probably facilitates their acquaintance with and the utilization of the all-in-one information card and other relevant components. However, the bad news is that it has been found that, at present, the new-generation migrant workers use the internet and other modern media mainly for entertainment, and rarely for learning technical knowledge, labor legislation, policy changes, or industry trends (Mei, 2012; He, 2015). Thus, if the real-name information platform for construction labor management is brought into play, the government should publicize this in various ways and at the same time do its utmost to improve the media literacy of construction workers.

3.2 A Two-Pronged Strategy to Guide Building Enterprises

Building enterprises may be aware that there is no more effective way to cope with the industry-wide labor crisis than by reforming the existing employment mechanism and business model in the construction sector and fundamentally improving working conditions, in particular the OSH level. Nonetheless, few are willing to spearhead forgoing reforms, since any individual endeavor is no more than 'a drop in the ocean' when divorced from the common efforts of the industry overall. More importantly, taking part in a 'race to the top' seems very unrewarding for enterprises that are incapable of bearing the temporarily increased costs. The point advanced here is that a two-pronged strategy should be adopted by construction legislation to spur the revolution in construction businesses.

Stronger deterrents must be introduced, so as to raise the costs of breaking the law at all levels. Firstly, records indicating how well building enterprises maintain on-site safety and comply with other labor protection obligations ought to be made one of the criteria for grading business

qualifications, granting the entitlement to bid for projects, and awarding construction permits. It is worth mentioning that the standards for evaluating safety records should be result-oriented. Building enterprises must reduce the incidence of accidents and fatalities, or they will be disqualified at the first stage. This also means that building enterprises should minimize the influence of uncontrollable factors, and stop conniving with illegitimate subcontractors or unauthorized labor contractors. Secondly, it is time to use major legislative instruments, instead of tentative regulations, to construct a complete responsibility system that intensively and comprehensively addresses the civil, administrative and criminal responsibilities of different offenders whose actions cause damage or pose a threat to construction safety (e.g. those who manage building enterprises, workers, on-site safety supervisors, administrative officials, and so forth).

On the other hand, central and local legislation should provide a series of incentives to ensure the survival of building enterprises that desire to ameliorate their own safety performance. Firstly, building enterprises that actively carry out safety-promotion policies ought to be granted certain forms of recompense, such as tax preferences, bonus points in the qualification assessment, and priority in bidding. Secondly, the government should be obliged to allocate or collect special funds in order to support enterprise investment in OSH training, facilities and equipment. Thirdly, local administrative departments shoulder the responsibility of helping building enterprises set up long-term cooperative relationships with trustworthy training agencies and safety equipment suppliers that offer excellent services or products but charge reasonably, with a view to reducing the economic burden borne by building enterprises. Alternatively, local governments could utilize the power to integrate available resources and provide uniform training and safety equipment based on cost-sharing principles, benefiting building enterprises indirectly.

3.3 Creating Adaptable Unions

It has been a Gordian knot that unions are absent or fail to play a proper part in the construction industry in China. In striving for fair labor contracts, shorter working hours, and proper payment of wages, and in accusing of actions that expose workers to high risk, unions should undoubtedly have exerted an irreplaceable influence and given the strongest backing to construction workers. However, as discussed earlier, the very high mobility and the cognitive limitations of Chinese rural migrant workers have broken up the foundation needed for traditional unions to take root and grow (Zhao 2011). Unionism may adapt to this situation and come into play only by innovating in the organizational structure and operating model.

In July 2015, the Grassroots Organization Department of ACFTU gave suggestions for promoting the establishment of unions in building and labor enterprises, from which five constructive ideas can be extracted. Firstly, no matter whether construction workers are employed by legitimate

subcontractors or labor companies, and regardless of whether the employment is contract-based or not, head contractors should spare no efforts to assure every worker of access to union membership. Secondly, allowing for the fact that migrant construction workers almost all live where they work, construction sites should be the main 'battlefield' of unions. Unions belonging to the head contractor's special project division can function on behalf of the unions of subcontractors and labor companies, or associated grassroots unions can be established so as to carry out project-based union activities. Thirdly, within the territory of a county, associated unions can be set up for several different construction projects in order to facilitate the management of local unions and the selection of chairmen from 'socialized union officials'[35] recommended by the superior unions. Fourthly, branches of ACFTU should solicit the support of local administrative authorities to help unions solve financial problems. Developers ought to lay down in the contracting agreements that contractors need to reserve sufficient funding for union activities, as required by the Trade Union Law, and that the spending on project-based unionism must be independent of other parts of union expenditure. Lastly, more up-to-date and adaptable means should be introduced to cope with the high labor mobility and to make it easier for migrant construction workers to join and transfer between unions. For instance, a 'green passage' could be opened in local job markets to offer union-related services; union officials could preach about unionism on construction sites or by mobile phone applications; and union members could surely be managed more effectively if the real-name IT system discussed previously was in place (Wang and Sun 2015).

The Grassroots Organization Department of ACFTU puts forward the above solutions based upon its experience in dealing with local unions. The attempt to structure project-based unionism in the construction industry is obvious, by defining the responsibilities of relevant parties, ensuring the funds for union activities, and developing various means of absorbing migrant workers into unions. Central and local legislatures should examine the effectiveness and feasibility of these proposals straight away in pilot areas, and host hearings and seminars to collect the opinions of union experts, social activists, building enterprises, and representatives of migrant construction workers. Only in this way can effective legislation be made to address the low union density in the construction sector.

3.4 Making Procedures for Post-Accident Remedies 'Worker-Friendly'

It has been difficult for millions of Chinese building workers to receive post-accident legal remedies, due to the insurmountable procedural barriers. Previous analyses of the legislation on work-related injury insurance show

35 Socialized union officials are employed by local branches of ACFTU as full-time experts who are devoted to pushing forward with the establishment and expansion of unions in domestic private enterprises and non-public economic and social organizations.

that the improper time limits and lengthy judicial proceedings discourage most injured workers and bereaved families from requesting confirmation of the labor relationship, applying for injury ascertainment, and claiming insurance benefits. Indeed, victims of construction accidents face similar problems in claiming compensation, employer-paid medical treatment, job placement assistance and disability (death) subsidies. This is a vital reason why the new-generation migrant construction workers demonstrate no stronger preference to the older generation workers for seeking legal remedies (Huang and Xing, 2012). In most instances, they would rather reach a private settlement with the employer or resort to political power by a group petition (Huang and Xing, 2012).

In order to cultivate the new-generation migrant workers' faith in the law and in the prospect of working in the construction industry, a whole package of initiatives aimed at improving the practicability of post-accident remedies should be put on the next legislative agenda of both central and local government. In general, strict liability ought to be imposed on building enterprises that hamper or fail to assist the application of an injured worker or the bereaved family for work-related accident ascertainment.

Moreover, for the main facts in dispute, 'a principle of presumption' should be implemented to the workers' advantage, according to which a building enterprise would bear the burden of disproving the presumed facts that were in favor of the worker's claim. This principle has been merely adopted to deal with disputes about whether an injury is work-related or not (Article 19, the Regulation on Work-Related Injury Insurance). There is certainly every reason to establish it for the investigation of other key facts too, including whether a factual employment relationship exists, whether an injured worker is legally eligible for insurance benefits, compensation, and subsidies, and so on.

In addition, founding a separate tribunal in the court system to handle labor disputes and simplifying the judicial procedures with a view to increasing the efficiency of case processing, as advocated by some Chinese scholars (e.g. Chen, 2002; Lin, 2007), would be of great significance for diminishing the costs and difficulty faced by injured workers or bereaved families in seeking judicial help.

Besides, Chinese rural migrant workers are in desperate need of a legal aid mechanism, which has only been applied in criminal litigation procedures in China. According to *2005-2015: A Ten-Year Report of Legal Aid for Rural Migrant Workers* released by the Beijing Zhicheng Legal Aid and Research Center[36], the Beijing Zhicheng alone offered free legal counseling to rural migrant workers in 65,201 labor disputes during the decade, involving up to 200,000 man-hours and ¥ 500 million. In all, 10,069 cases had been settled, as of 2015, and the economic losses were reduced by ¥145

36 Beijing Zhicheng Legal Aid and Research Center is one of the leading privately-run organizations for public interest in China.

million.[37] These figures imply the tremendous demand by Chinese rural migrant workers for a well-functioning legal aid system in the labor law field. One would imagine that most rural migrant workers would be willing to use the law as a 'weapon' to assert their own rights, if the labor legislation stipulated that there was free or low-cost assistance to workers who were otherwise unable to afford legal advice or access to the judicial system, and if it provided sufficient stimuli to the expansion of legal aid services in the form of duty lawyers and community legal clinics.

3.5 NGO Training and Supportive Interventions

Apart from the few non-governmental organizations (NGOs) concentrating on free legal aid for rural migrant workers (such as the Beijing Zhicheng mentioned above), another type of NGO is devoted to interventions at community level, with the aim of helping rural migrant workers to achieve decent and safe working conditions and to lead a dignified urban life. Yizhuanyiwa and Xingzairenjian are the two best-known of these. In the northern and southern suburbs of Beijing they provide OSH and legal literacy training together with various forms of community services to migrant construction workers, and in many aspects they perform functions similar to those of unions.

Take Yizhuanyiwa, for instance. This organization has been making contributions in the following areas since it was founded in 2010. Firstly, with the permission of building enterprises, the staff of Yizhuanyiwa come to construction sites and use various means to implant OSH and legal knowledge into the minds of rural migrant workers, such as by hosting themed galas, handing out safety manuals, communicating with workers face to face in the latter's dormitories, and setting up standing offices on construction sites. Secondly, since Yizhuanyiwa's training and intervention are more than welcome among migrant construction workers, and Yizhuanyiwa has achieved very positive outcomes, some building enterprises take the initiative of inviting Yizhuanyiwa to deliver training courses to their workers. Thirdly, making the most of their opportunities to collect first-hand data, Yizhuanyiwa teams up with academics to do empirical research and to hold periodical symposiums on OSH and employment issues in China's construction industry. Its goal is to launch a campaign that culminates in the birth of a national code of conduct and social responsibility for building enterprises so as to fill the gap in this respect. Lastly, in view of the plight of unions in cities,[38] Yizhuanyiwa sends its staff to labor-exporting areas (rural areas) to establish grassroots labor organizations that collaborate with local administrative authorities to give potential migrants preliminary train-

37 See http://yzlx.pkulaw.cn/fulltext_form.aspx?Db=lawfirmarticles&Gid=1778402821&keyword=&EncodingName=&Search_Mode= (accessed 4 April 2016).

38 Urban unions cannot try their utmost to safeguard workers' interests under political pressure to balance social stability and economic development.

ing on OSH and labor legislation. The target audience can therefore make a proper assessment of the risks of working in the construction industry and have a clear picture of their own rights, legal position, and channels for problem-solving (Guo, 2014).

The commitment by Yizhuanyiwa demonstrates the chances of NGOs acting as a fourth party in making positive changes to China's construction safety performance. Its endeavors on many occasions smooth over the difficulties confronting building enterprises, workers, and public authorities. The current problem is that, even in the capital city, this sort of NGO is terribly scarce. To be precise, Yizhuanyiwa and Xingzairenjian are the only two in the Beijing area, where all kinds of resources are much more available than in the rest parts of the country. Chinese legislators should work outside the box without a doubt, and embrace NGOs in their future strategies for addressing construction safety issues. This of course means offering them sufficient financial support, free space for self-development, and access to long-term cooperation with the authorities. It is conceivable that the multiplication of these NGOs would be conducive to breaking the logjam in the construction sector today.

4 Final Remarks

Given that the recent labor shortage in China's construction sector is partly derived from the growing antipathy of potential laborers towards the serious and persistent occupational safety problems, this chapter illustrates how legislative deficiencies have exerted a negative influence in this process, and explores the solutions that could make a change in the status quo. In short, China's major pieces of legislation associated with construction safety have failed to play a due role because of the low practicability. Meanwhile, inadequate attention has been paid to the plight of millions of rural migrant workers, who are the primary construction workforce and are in the greatest need of extra legal help to realize their rights to occupational safety. In addition, there has been no comprehensive liability system to deter various violations of construction safety obligations. By elaborating on these defects embedded in China's construction safety legislation, this chapter firstly argues that future legislation could mandate a real-name IT system in all provinces and municipalities, for the purpose of regularizing the recruitment and employment practices in the construction industry. Secondly, not only a complete responsibility system and a mechanism that gives consideration to the safety records of building enterprises in qualification assessment, but also a full set of incentives, such as subsidies, tax preferences and training allowances, should be introduced. Only a two-pronged strategy can induce enterprises to participate in the reform within the sector. Thirdly, the innovative ideas raised by ACFTU about adapting the structure and operating model of unionism to China's construction industry in order to give rural migrant workers strong backing in their battle for safety rights,

deserve serious evaluation by the legislature. Fourthly, it is essential to remove the many barriers that hinder construction workers from obtaining post-accident legal remedies, so that people's confidence and interest in construction work may not continue to drop. Finally, a few NGOs have been making a silent contribution to construction safety compliance and risk management. The multiplication of these organizations, however, cries out for official recognition and support.

Charts and Tables

Table 1: Registered Construction Accidents and Deaths in Mainland China from 2001 to 2005

Year	Accidents	Deaths
2001	1674	1647
2002	1948	2042
2003	2634	2788
2004	2581	2777
2005	2288	2607

Data Published by State Administration of Work Safety of China, Quoted from Wang and Fang (2007:9)

Table 2: Registered Construction Accidents and Deaths in Mainland China in the first half year *of 2011-2015*

Year	Accidents	Deaths
2011	282	345
2012	209	247
2013	219	283
2014	243	287
2015	168	219

Data Published by the Ministry of Housing and Urban-Rural Development of China, Available at: http://www.mohurd.gov.cn

Table 3: Main Industries Where Old and New Generations of Rural Migrant Workers Are Employed

Industrial Distribution (%)	Old Generation	New Generation
Manufacturing	31.5	44.4
Construction	**27.8**	**9.8**
Transportation, Storage & Postal Services	7.1	5.0
Wholesale & Retail	6.9	8.4
Accommodation & Catering	5.9	9.2
Residential Services	11.0	12.4
Other	9.8	10.8

Data from the Report of NBSC (2011)

Table 4: Coverage of Social Insurance among the New-Generation Migrant Workers in Main Industries

Industrial Sector	Work-Related Injury Insurance	Medical Insurance	Endowment Insurance	Unemployment Insurance
Manufacturing	26.9	14.5	7.8	3.9
Construction	**16.1**	**5.2**	**2.4**	**1.3**
Transportation, Storage & Postal Services	25.5	14.9	9.6	5.8
Wholesale & Retail	10.1	8.0	6.2	3.2
Accommodation & Catering	11.8	7.0	3.5	1.9
Residential Services & Other	13.7	9.0	4.2	2.4

Data from the Report of NBSC (2011)

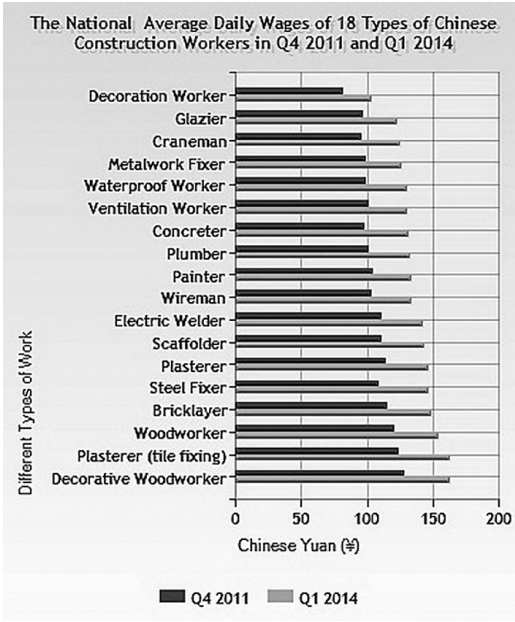

Chart 1: Data from China Engineering Cost Network [accessed March 20, 2016]

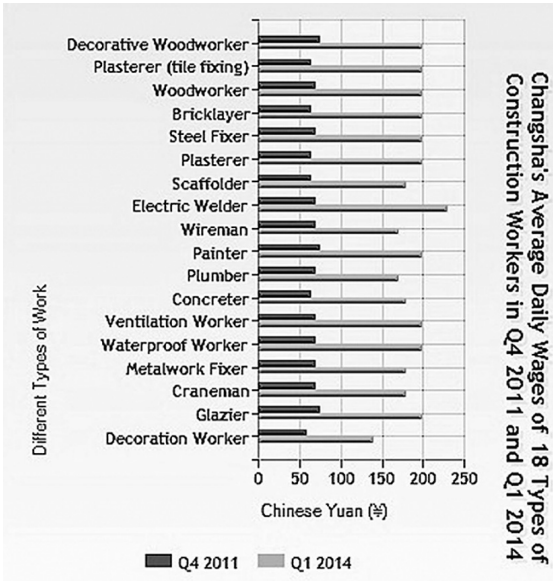

Chart 2: Data from China Engineering Cost Network

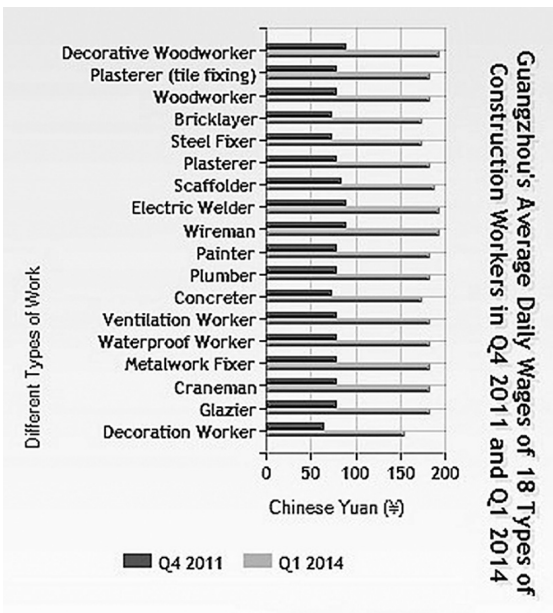

Chart 3: Data from China Engineering Cost [accessed March 20, 2016] Network [accessed March 20, 2016]

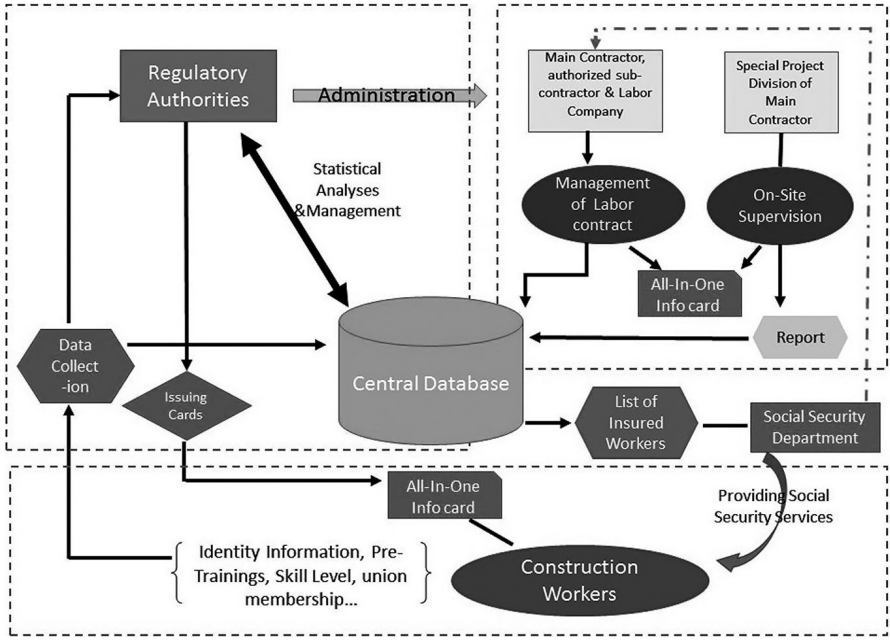

Chart 4: Source from Wang (2009)

4 An Incomplete Breakthrough: Questioning the Momentum and Efficiency of Germany's Minimum Wage Law■

Abstract

This chapter reflects on how appropriately the German Minimum Wage Act – the latest national minimum wage legislation within the EU – has been constructed so as to remedy the fading role of collective bargaining in wage setting and curb the increasing in-work poverty across the country. Based on identifying four fundamental parts of a minimum wage regime, it examines successively the corresponding provisions in the German law, with frequent comparisons with the legislation of several other member states. It is found that Germany has refrained from learning the positive legislative experiences of its EU counterparts, and has developed a minimum wage regime that is distinct in more than one aspect. Such a wage floor, however, loses efficiency and momentum before serving the original purposes of its own introduction.

Key Words: Germany; Minimum Wage Act; In-Work Poverty; Legislation

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1 Introduction

To prevent the employed from being paid unfairly, EU countries apply two principal approaches to the wage-setting systems. For convenience, they could be referred to as participative and protective approaches, by drawing on Sengenberger's distinction between protective and participative standards (Bosch 2015; Sengenberger 1994). The core of the participative approach is that an employee or a representative has a right to codetermination or consultation on wage-related enterprise decision-making. However, the state does not exert direct influence by means of corrective measures. In a protective approach, the state itself intervenes in the wage-setting process by fixing a minimum amount. A country's choice is usually dictated by the strength of domestic unions or other labor organizations to affect employer decisions on wage rates. Only in countries where unions are strong enough to counterbalance the power of employers (e.g. Sweden), can the participative approach work efficiently with the absence of a wage floor. Otherwise, a protective approach is taken in most cases, independently (e.g. UK[39]) or conjointly with the participative approach (e.g. Belgium and France).

Since the 1990s, Germany has been experiencing the obvious dysfunction of an autonomous wage-setting system. This situation derived from a dramatic weakening in the power of trade unions and a decline in the percentage of those covered by collective agreements. The low wage sector has escalated across the whole country, particularly in East Germany. As warned by economists, Germany continued to retain a cautious attitude out of the fear that a national minimum wage would have a huge negative effect on employment. Subsequently, the enactment of the minimum wage legislation was postponed until 2015, when it turned out that no alternative way would be able to revitalize collective bargaining or enhance union strength. In the words of Bosch (2015), 'the new minimum wage is no 'planned' child but was born out of necessity'.

In the year following the introduction of the statutory minimum wage, 'predicted job drama did not occur' (Joachim Möller, quoted by Eubel 2016). Rather, both West and East Germany witnessed the lowest level of unemployment since the early 1990s (Amlinger et al. 2016, citing Bundesagentur Für Arbeit 2015). Regular employees with social insurance increased by 713,000 from October 2014 to the same month of 2015 (Amlinger et al. 2016, citing Bundesagentur Für Arbeit 2016). Typical low-income sectors, which seemingly suffered the heaviest impact from the new wage floor, recorded an above-average improvement in employment, while a few of the marginally influenced sectors saw a modest decrease in employment

39 Albeit the UK might leave the EU based on the result of the Brexit referendum on 23 June 2016, the process for leaving has not been initiated formally. It is expected that it will take at least several years. Considering that the UK minimum wage legislation has significant referential values for the improvement of the German Minimum Wage Act, it is included in the discussions of this chapter.

(Amlinger et al. 2016, citing Bundesagentur Für Arbeit 2016). Statistics that reflect an apparent decline of marginal part-time jobs – the so-called 'mini-jobs' – were considered by some as strong evidence of the negative effect on employment due to the new minimum wage (e.g. Peters 2015; Groll 2015). Nonetheless, with further examination, later research reveals that just above half of the aforementioned reduction could be ascribed to the minimum wage legislation, and crucially, that the affected former mini-jobbers have by and large turned to a regular employment relationship subject to social insurance rather than getting fired (see Berge et al. 2016).

It may be said that the negative influence on employment as a consequence of Germany's introduction of a statutory minimum wage is not nearly as tenable as alleged. This is nevertheless not the focus of the present chapter. Alternatively, this is an effort to investigate another comparatively significant but much less debated question: Is the German wage floor appropriately constructed so as to ensure its efficiency in achieving the original goal of combatting the persistent spread of in-work poverty across the country?

In order to explore a materialized answer to the above question posed from a legislative perspective, four essential properties of a minimum wage regime should be identified. First, fixing a proper initial value is critical because a very low minimum wage can barely cut poverty, but at the other extreme, if too high, the multi-faceted control over employment, price level and compliance with the minimum wage will be impossible to achieve (Saget, 2004). Additionally, decisions regarding the exclusion of certain categories of workers from the legal coverage of a minimum wage and regarding the adoption of a single or combined rates for covered workers have to be carefully made. This is dependent on what specific objectives are being pursued and what the actual role a state seeks to play in wage determination. Besides, the method and frequency of adjusting the level of a minimum wage have a sizable bearing on its adaptability to the time-varying conditions that are necessary for satisfying the basic material needs of working families. Lastly, an effective implementation system ensures that the purpose of a minimum wage is not defeated by noncompliance. Setting this up, however, relies on a wide range of institutional preconditions.

By observing these four fundamental sections of provisions in Germany's first Minimum Wage Act[40], and by referencing the relevant – successful or unsuccessful – legislative experiences amongst additional member states, this chapter attempts to clarify what progress the German minimum wage legislation has achieved compared with its European counterparts. More importantly, the major problems embedded in this newly established minimum wage regime are revealed, which potentially limit its momentum to function as hoped.

40 Unless stated otherwise, 'Minimum Wage Act' refers to the **German Act Regulating a General Minimum Wage** (*Mindestlohngesetz* (MiLoG)) in this chapter.

2 A Strong 'Bite'? Evaluations on the Entry Point of the German Minimum Wage

8.5 euros,[41] the initial rate of the German national minimum wage, was far below the level of several EU states when it started to be applied in 2015. What is the likelihood of this moderate minimum wage substantially improving the increasing working poor in Germany? Differently oriented evaluations have demonstrated the multiple facets of this issue. In short, the Kaitz Index is the most frequently used measure for having been established upon globally recognized concepts of 'low pay' and 'poverty wage', while a purchasing power comparison between EU countries helps clarify the actual value of a minimum wage of 8.5 euros. Differing from international comparative research, the German domestic investigations particularly value the calculation of the magnitude of potential beneficiaries as a direct way to see the influence of the initial minimum wage rate. And when contextualized against the preexisting income support system of Germany, the efficacy of a legal wage floor of 8.5 euros is found seriously derogated from.

2.1 Kaitz Index

The Kaitz index is an economic indicator represented by the ratio of a legal minimum wage to the national median wage.[42] In the light of the standard benchmark built up by the reports of the Organisation for Economic Co-operation and Development (hereafter 'OECD') and by the agenda-setting publications of LoWER[43], 'low pay' means a gross hourly wage below two-thirds of the national median wage for full-time workers (Grimshaw 2011). This definition, amongst many others existing in various studies of different countries, has been adopted by most current literature. A respectable agreement has been reached regarding the viewpoint that with an hourly wage below the 'two-thirds' threshold, even full-time workers are not able to obtain the socially acceptable level of economic resources in order to support a working family's full participation in relative communities (Howell et al. 2015: 117). By analogy with the poverty threshold established by international research in this area, an individual wage below 50 percent of the median wage should be deemed to be a 'poverty wage' (Schulten et al. 2015: 337), with which working families cannot even maintain the average living standard in the society where they live, not to mention obtaining access to social inclusion.

41 Section1 (2), the German Minimum Wage Act.

42 It is necessary to distinguish the median wage from the average wage: the former is the amount that divides the overall wage structure into two equal segments, with a half of all workers earning more and the other half earning less, while the latter represents the arithmetic mean of all wages.

43 The Abbreviation for 'European Low-Wage Employment Research Network'.

With reference to the latest OECD statistics for 2015, Germany ranks in the lower middle section of the European countries where the relevant data is available (Chart 5). Its value of 48% on the Kaitz Index is not only far below the low-pay threshold but it is also beneath the poverty threshold. Due to the two-year freeze of the new minimum wage and the general wage increases year by year, the corresponding figure for 2016 is likely to be lower.

In accordance with the decision of the German Minimum Wage Commission, the statutory minimum wage is 8.84 euros per hour from January 2017.[44] However, even assuming that the median hourly wage of 2017 does not increase compared with the 2015 level, the value of the German minimum wage on the Kaitz Index would not exceed 50%.[45] To sum up, the German minimum wage is set at an unreasonably low level providing it is assessed by the internationally prevailing standards concerning the relation between a minimum wage and the national wage structure. However, it is worth nothing that none of the inspected EU countries have performed satisfactorily under such an evaluation framework.

2.2 Purchasing Power Standard

Purchasing Power Standard (PPS) is an artificial currency unit named by Eurostat. An evaluation of PPS is desirable for detecting the actual level of a minimum wage, because one euro can buy different amounts of goods and services in different countries, due to the sizable price discrepancies across borders. The latest update of WSI Minimum Wage Database in January 2016 indicates that Germany ranks higher among its EU counterparts if its minimum wage is measured by PPS (Table 5). To be precise, after being adjusted for purchasing power, the level of the German minimum wage compares favorably with that of Ireland and Belgium, both of which have fixed higher nominal amounts. Furthermore, the gaps between the German minimum wage and the three highest rates paid in Luxembourg, France and the Netherlands are noticeably narrowed in the PPS comparison.

44 See https://www.destatis.de/EN/FactsFigures/InFocus/Archive.html (accessed 20 November 2016).

45 The value of the German minimum wage on the Kaitz Index in 2015 is the ratio of a fictitious minimum wage of 8.5 euros to the median hourly wage in that year. Hence, Germany's median hourly wage in 2015 is equivalent to €17.7 (8.5÷0.48). Even if Germany's median hourly wage in 2017 remains this level, the corresponding value on Kaize Index (8.84÷17.7) would stay below 50%.

2.3 Magnitude of Potential Beneficiaries

As some evident legislative defects in the German Minimum Wage Act increase the implementation uncertainty (see the last part of this chapter), it is difficult to count exactly how many employees can practically benefit from the new wage floor. Relatively speaking, calculating the number of employees that earned less than 8.5 euros before the introduction of the minimum wage is a feasible method to measure the general magnitude of the beneficiaries. Yet, some authoritative evaluations that follow this way have produced inconsistent data. For instance, before the German Minimum Wage Act came into force, the Federal Ministry of Labour and Social Affairs (*Bundesministerium für Arbeit und Soziales*, abbreviated BMAS) (2014: 7) predicted that some 3.7 million employees from low-wage sectors would benefit. One year after the introduction of the minimum wage, WSI estimated that between 4.8 and 5.4 million employees – corresponding to a share of between 14.8% and 16.6 % of all dependent employees – were paid less than 8.5 euros per hour in 2014 (Amlinger et al. 2016). The Federal Statistical Office (*Statistisches Bundesamt/Destatis)* (2016) provided a different statistical result showing that a total amount of 5.5 million employees earned less than 8.5 euros in 2014. However, only 4 million would be potentially affected, because the reminder of 1.5 million belonged to the statutory exceptions to the application of the minimum wage.

Notwithstanding the indefinite quantity of German employees who received less than 8.5 euros before the introduction of the minimum wage, it is largely agreed that some categories of employees – according to variant partition criteria – faced a higher probability of being paid below this price than others. Small (in particular micro) enterprises were characterized by a much higher proportion of employees who earned less than the minimum wage (Amlinger et al. 2016; Kalina and Weinkopf 2014). In terms of gender, the percentage of women working for less than 8.5 euros was twice that of men (Amlinger et al. 2016; *Destatis* 2016; Kalina und Weinkopf 2014). Additionally, wage levels are closely associated with working-time arrangements, thus, approximately three-fifths of mini-jobbers were paid less than 8.5 euros in 2014, in contrast to one-fifth of part-time workers and one-thirteenth of full-time workers (Amlinger et al. 2016). Alternatively, according to *Destatis* (2016), people holding mini-jobs accounted for over a half of the working poor concerned. As for the distribution of low wages in different sectors, hotels and restaurants constituted the major ones that would be affected, of which over half of employees worked for less than 8.5 euros. The retail sector took the second place with thirty percent of employees paid less than this amount (Amlinger et al. 2016). Unsurprisingly, unskilled and semiskilled workers were influenced more seriously by the minimum wage than skilled ones, due to being confronted with a higher risk of receiving 'poverty wages' (Amlinger et al. 2016; Kalina and Weinkopf 2014). With respect to the impact on different regions, in West Germany, mini-jobbers were supposed to be the main beneficiaries of the minimum wage. In East

Germany, apart from mini-jobs, a considerable portion of part-time jobs also paid less than the minimum wage, and even the hourly wages of full-time jobs concentrated in the area slightly above 8.5 euros (Amlinger et al. 2016). Finally, low-wage earners not covered by collective agreements represented more than four-fifths of the working population paid less than 8.5 euros (*Destatis* 2016). On the contrary, around four-fifths of the employees in collective agreements were paid more than 10 euros per hour (Amlinger et al. 2016).

Indeed, the groups subjected to hourly salaries below 8.5 euros usually overlap, because factors that give rise to in-work poverty have been interweaving in Germany from 1990s onwards. In short, under the influence of the traditional German family model, women have scarcely been regarded as the main breadwinners. It is sometimes taken for granted that women would only be able to receive low pay in order to supplement the spouses' earnings (Bosch and Weinkopf 2008: 15). Therefore, in spite of the increasing public attention to low-wage earners in the German society, women, especially mothers, have become the main workforce of mini-jobbers. One should be able to imagine how difficult it is to organize these loosely connected people to maintain the power base for unionism. Meanwhile, mini-jobs are mainly provided by hotels, restaurants, the retailing and other service businesses. In these sectors, cheap labor expenditure is the rule, and the associations of employers are too fragmented to conclude an industrial minimum wage (Bosch 2015). Consequently, a vicious cycle comes into being, and female mini-jobbers working in service industries are particularly trapped in lifelong economic powerlessness. In East Germany, mini-jobs are not as common as in West Germany. However, the severer erosion of union power and more widespread noncompliance with collective agreements in new federal states has further decreased the lower overall wage levels (Bosch 2015).

Undoubtedly, a statutory minimum wage that starts from 8.5 euros could exert certain positive effects on the living standards of the aforementioned working poor, surviving on lower hourly wages and struggling to make ends meet. More significantly, it could play a great role in protecting these people against ceaseless 'wage dumping' in future (BMAS 2014: 7). Seen in this light, the new wage floor is nothing else than an encouraging move.

Still, it has to be acknowledged that with an entry point of 8.5 euros the German minimum wage actually confines its influence to the very poor, rather than the average poor of the country. For the employees covered by collective agreements and accounting for more than 60 percent [46]of all the employed individuals in Germany, the new wage floor is insufficient to bring about any remarkable benefit, since most of them already earned more than 8.5 euros per hour before 2015.

46 See http://www.worker-participation.eu/National-Industrial-Relations/Countries/Germany (accessed 7 October 2016)

2.4 Efficiency Derogated from by the Income Support System

Taking effect from 2005, the Hartz IV reform replaced Germany's income-related unemployment assistance (*Arbeitslosenhilfe*) with a flat-rate, income-unrelated and means-tested benefit – unemployment benefit II (*Arbeitslosengeld II*), paid at the same level as the also flat-rate and means-tested social benefit (*Sozialgeld*). Recipients of unemployment benefit II include all the long-term unemployed and employees whose household income is below the basic security level. Driven by the idea underlying both the OECD job strategy (OECD 2006: 63) and the European Employment strategy, Hartz (I-IV) reforms were aimed at eliminating low-pay traps and disincentives to work, breathing new life into the economy by diminishing the costs incurred due to unemployment (Bosch and Kalina 2008: 50). In comparison with the other three Acts, Hartz IV has a more direct objective to force unemployed people, especially those who used to earn a good salary, to accept the next available (often lower-paid) job, in order to reduce unemployment and the benefits paid to those out of work .

The necessity of assessing the level of the new minimum wage in the above context stems from the fact that the income support that unemployment benefit II gives to different types of recipients is a top-up benefit pushing up household income to subsistence levels. In a sense, the people entitled to income support get an 'implicit minimum wage' from the government. Statistics show that the introduction of the 'real minimum wage' has given rise to a fall in the number of 'topper uppers' (*Aufstocker*), from 1.268 million in December 2014 to 1.223 million in February 2015 (*EurActiv*, June 23, 2015). Nonetheless, compared with the same period of preceding years, which also saw some decreases of the supplementary claims for unemployment benefit II for some reasons, this is by no means a significant reduction. The limited role of the legal wage floor of 8.5 euros in helping the poor break away from unemployment benefit II is put down to several unsolved practical issues, which piece together the latent interactions between different tools for combating poverty and hitherto lack any comprehensive reflection.

Firstly, unless the statutory minimum wage reaches a bar that is capable of ensuring earnings above the means-tested income support levels, the unemployed will not have any incentive to work. In this regard, the micro-simulation model established by Müller and Steiner (2008) reveals that the suggested minimum wage of 7.5 euros per hour would be ineffective in stimulating unemployed people's motivation to work due to the contemporary means-tested income support system. However, few economic studies have been devoted to make analogous evaluations since the statutory minimum wage of 8.5 euros was finally brought in.

Secondly, despite the conversion of the previous generous amalgamation of unemployment assistance and social welfare benefits into the present neat package, underpaid part-timers' motivation to work longer hours has not increased. For people who are economically inactive and not employed

full-time, a paradox exists in the system of income support that both benefit withdrawal rates and the marginal burden of tax and social security contributions increase simultaneously with the increasing wages. Hence, there is just no inducement to prolong working time, particularly above the mini-job level (Bosch and Kalina 2008: 52). The introduction of a minimum wage of 8.5 euros intensifies this conflict and forces mini-jobbers, those most affected, to adopt a negative coping strategy in the dilemma: now that earning a monthly wage less than 450 euros is a condition for being exempt from tax and social security contributions, rational employees in marginal part-time employment are prone to work for a maximum of 53 hours per month to preserve the privilege and subsequently choose to live on the welfare benefits for additional support. This is a complex problem resulting from the disharmony between Germany's income support system, tax and contribution collection systems, and the new minimum wage. Further serious exploration is imperative.

Finally, for both full-time and part-time employees in the low-wage segment, there is a risk that employers may further reduce wage rates, since the government would close the gap against the so-called basic security level (Bosch and Kalina 2008: 52-3). Figuring out how widely a statutory minimum wage of 8.5 euros could hold back this type of opportunistic practice is a meaningful part of the evaluation of its effectiveness.

3 The German Model of Flexibility within the General Wage Floor: Rate Diversity and Coverage

3.1 Rate & Coverage

The German Minimum Wage Act stipulates no second rate other than 8.5 euros. Groups that are not sheltered by the single minimum wage rate include trainees, young people doing their entry-level qualifications, people in compulsory practical training as part of an apprenticeship or university-level study course, and the long-term unemployed who receive a new job within 6 months.[47]

From a global perspective, there is no universal answer to the queries of exactly who should be excluded from minimum wage protection and how many different rates a minimum wage regime should comprise. Multifarious systems have been developed around the world. At one extreme are the oversimplified systems that apply a sole minimum wage rate to all employees. At the other, overcomplicated systems that set a grid of up to hundreds of wage rates by sector, occupation, region, population or enterprise size. It is the disparities in the understanding as to how the minimum wage system should be structured in order to achieve the original purpose invested in

47 See Section 22, the German Minimum Wage Act.

it that fundamentally induce policymakers of different countries to make divergent choices. In general, the logic behind the application of one rate to all the employees of a country is the right to identical wage protection regardless of extrinsic factors, and that the basic needs of working families should be satisfied equally (ILO 2016). By contrast, systems that set forth exemptions or utilize multiple rates give more consideration to the flexibility and direct applicability of a minimum wage policy; in lieu of providing a base wage rate for the most vulnerable employees, the purpose is to facilitate some at-risk workers' entry into the labor market or to yield actual influence on the wage rates of varying sectors and enterprises (Eyraud and Saget 2005: 9-10). To avoid broad discussion, the focus of this part is narrowed to a comparison between Germany's uniform national minimum wage and other homogeneous systems within the EU, in terms of exemption or differentiation across groups.

Overall, in the EU, Germany and 21 other countries (including the UK) have introduced a general statutory minimum wage,[48] protecting the majority of employees whilst excluding particular groups from legal coverage or setting sub-rates on top of the standard rate. From a global point of view, these countries' minimum wage systems exhibit simplicity, as opposed to excessively complicated systems (e.g. Costa Rica[49]) in other areas of the world. Yet, the intention to draw upon some degree of flexibility from the more intricate systems is apparent. As indicated in Table 6, all the listed EU countries permit some legal deviations from the general wage floor. Exemptions or differentiated rates apply to certain groups, such as young workers, disabled workers, the inexperienced (trainees, interns and apprentices), or people within some professions that necessitate higher levels of qualifications or skills or have specific occupational features. The first three categories are linked with sub-average levels of productivity, whereas the last features above-average productivity or special responsibility. Imposing a flat rate covering everyone would probably hinder less productive workers' entry into the labor market, or discourage competent people to occupy

48 Austria, Denmark, Finland, Sweden are typical examples that stick to collectively agreed minimum wages. Italy used to include the possibility of introducing a statutory minimum wage in its reform of the Jobs Act, but this plan was finally laid aside because of the strong criticism from trade unions. Cyprus is unique because its minimum wage law does not stipulate a statutory minimum wage at national level, but sets specific rates for nine occupations.

49 Costa Rica brought in its minimum wage in 1933, which developed at the cantonal level and later at provincial level. The system was very complicated, because it included differences by region, sector, occupation, enterprise size, skill level, etc., and expanded at a high speed. Until 1987, the ambitious system had already embraced 520 specific minimum wages. Afterwards, because of the difficulties in implementation, the National Wage Council gradually reduced the number of minimum wage rates to 23. Nowadays, the system is still highly complex, consisting of minimum wages for skilled, semi-skilled, unskilled and specialized workers, in addition to five different rates for varying education levels (ILO, 2016).

the more demanding jobs within society. This shared perception results in a similar rationale as is behind the EU minimum wage systems in question.

What is notable is that Germany adopts somewhat distinctive strategies in respect of both manner and condition of its legitimate deviations from the general wage floor. It is manifest that the majority of countries in Table 6 display a preference for utilizing separate rates for certain individual groups. Germany is unique in that it sets no sub-rate to supplement the standard rate. Its acknowledgement of lower rates for newspaper delivery staff and for workers covered by deviating regulations of existent collective agreements is merely makeshift,[50] with a view to paving the way for the full implementation of the uniform minimum wage in the near future. The other involved groups are all exempt from the application of the legal wage floor.

However, adding sub-rates to the standard rate of a statutory minimum wage is a common means of buffering the impact of absolute exclusion of certain groups. Passing over this middle-ground approach means that the scope of exclusion must be defined cautiously – as small as possible but as large as necessary. Germany seems to have followed this principle and put strict restrictions on the exempted groups: for young workers, only those under 18 years old and without any completed vocational training are not regarded as workers within the meaning of the Minimum Wage Act;[51] interns are entitled to wages above the statutory minimum unless the internship is a compulsory part of the education or apprenticeship;[52] as regards the long-term unemployed, minimum wage protection is only absent in the first six months of any new employment.[53]

It should be clarified that the six-month exclusion of those who used to be long-term unemployed is not a finalized rule as yet. The federal government was obliged to report to the legislative bodies on June 1st of 2016 about the extent to which this rule can promote the reintegration of the long-term unemployed into the labor market and provide an assessment concerning whether it should continue.[54] In other words, verified positive effects on the reentry of long-term unemployed people into the labor market will be the only effective justification for the necessity of this rule.

50 Section 24, the German Minimum Wage Act.
51 Section 22 (2), *Idem.*
52 Section 22 (1), *Idem.*
53 Section 22 (4), *Idem.*
54 Section 22 (4), *Idem.*

Meanwhile, vocational training or education is the key factor highlighted in the other exemption situations. There is reason to believe that such a legislative predisposition is connected with the system of dual vocational training in Germany.[55] Dual vocational training is a system that combines vocational schooling and structured learning through work experience in undertakings to help young people improve skill and qualification levels (Pitch 2015: 4-5). It engages a major proportion of young German people and constitutes a formalized core of new entrants into the labor market. The point emphasized here is that while the school-based part of vocational education is government financed, the remainder of the training – the apprenticeship and on-the-job learning – hinges on the willingness of enterprises to afford the training costs within the firms (Pitch 2015:4-5). It is well recognized in Germany that applying a remuneration rate that is considerably below the wage of a low-paid full-timer to involved young people is an acceptable and even necessary tradeoff for motivated companies to commit themselves to the dual vocational training system. In one sense, instead of suffering, young people without completed vocational education benefit from moderate earnings, because regular and better-paid jobs will be more attainable after they complete the systematic training and education.

3.2 Pros and Cons of the German Model

The German minimum wage law is less complex to implement in comparison to that of other EU member states. This is a major advantage. As concluded by the ILO (2016), single-rate minimum wage systems are superior to multi-rate ones in the following aspects: 1) the determination of the initial rate and subsequent adjustment only requires relatively simple aggregate information and macroeconomic data, which a wage-setting body (say, a national minimum wage commission) can manage to process and analyze with the aid of professionals; 2) a single rate is easier to communicate and disseminate so that keeping people informed as well as implementing the adjustments would prove more effortless; 3) a single-rate minimum wage also lowers the difficulty of monitoring, given that inspectors need not consider the differences between sectors, groups, regions, occupations, or enterprise sizes, but just compare the actual wages with the wage floor; 4) the chance is greatly reduced that an enterprise refrains from hiring many an employee or moves to less developed regions in order to benefit from lower minimum wage rates.

55 In Europe, only a small number of countries – Austria, Denmark, Switzerland, and Germany – have established systems of dual vocational training. However, among all the EU countries that have a general statutory minimum wage, Germany is the unique one that has this sort of training system.

Nevertheless, a corresponding drawback is that an undifferentiated statutory minimum wage can hardly benefit different levels of working poor. Choosing this solution amounts to throwing away the opportunity to enlarge the actual influence of the new wage floor. What is more problematic is that the German model is unable to avoid the ethical and legal concerns primarily faced by systems that adopt sub-minimum wage rates.[56]

Critics of sub-minimum wage rates have mainly raised awareness of the possible violation of the principle of equal remuneration for work of equal value. The principle was initially acknowledged by the Treaty of Versailles in 1919,[57] and written into the preamble of the ILO constitution, as a key element of social justice.[58] Afterwards, it was entrenched by the reiteration in the Equal Remuneration Convention, 1951 (No.100). However, the concept of the principle had been limited to 'equal pay for men and women doing work of equal value'. It was not until the adoption of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) that the principle was officially broadened to protect workers with different characteristics. In spite of the strong connection to Convention No. 100, Convention No. 111 aims to eliminate all distinctions, exclusions or preferences in respect of employment and occupation.

Convention No.100 and No.111 are both fundamental ILO conventions, and as a result are ratified by all EU member states.[59] The prevalent use of sub-minimum wage rates within the EU can be attributed to a belief that some groups' work is of less value than that of normal employees per unit time, as illustrated earlier. However, the truth is that productivity level not only varies from group to group, but also from individual to individual. It is questionable whether every individual in a generally advantaged group has the requisite mental and physical qualities to guarantee higher productivity. Indeed, a disadvantaged but industrious employee sometimes can outperform a normal one who is sluggish and inactive. In this case it is not convincing to apply a lower minimum wage to the more productive person.

A bigger problem may be found in the usage of sub-minimum wage rates. The disabled, the young, the long-term unemployed, trainees, interns and apprentices are all typical disadvantaged groups in the labor market.

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56 The principle of equal remuneration for work of equal value is different from the principle of equal pay for equal work. The latter refers to equal pay for two persons that undertake the same work in the same area of activity and in the same enterprise.

57 Article 427 of the Treaty of Versailles: ILO, Official Bulletin, Vol. 1.

58 Constitution of the ILO, as amended in 1946 to add a specific reference to equal remuneration for work of equal value in the Preamble (originally stated in Article 41): ILO, Official Bulletin, Vol. XXIX, No. 4

59 See the ILO Information System on International Labour Standards, at: http://www.ilo.org/dyn/normlex/en/f?p=1000:10011:::NO:10011:P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F (accessed 2 January 2017).

Nonetheless, as shown in Table 6, differentiated rates are not established for every foregoing group, no matter in which country. For example, Luxemburg sets lower rates for young workers, but entitles the disabled, the long-term unemployed, trainees and interns to receive the standard rate. It is necessary to query how the legislators determine that young workers are systematically of lower productivity while other groups under discussion are not. Unless the decision is backed by an evaluation comparing the average productivity levels of all groups, any imposition of sub-minimum wage rates would appear subjective and optional.

Moreover, there are numerous variables that intertwine and produce diverse effects on employee productivity, such as gender, age, experience, physical condition, skill level, job type and regional and sectoral features. It is worth contemplating why the gender-based difference is a taboo in justifying the wage gaps between groups whereas other variables are considered as good reasons for differentiated wage protection. In practice, granted that a country attempts to promote the employment of women by catering to the potential preference of employers, it would not formally legalize less favorable remuneration for female workers. Instead, lower minimum wage rates might be imposed on where female employees predominate in the name of sectoral or occupational differences (ILO 2014). As a matter of fact, the principle of equal remuneration for work of equal value is merely in theory applied to all kinds of employees that are likely to be discriminated against in labor legislation. Voices against the incautious introduction of sub-minimum wage rates have never been loud enough to break the parochialism in the application of the principle. Nor have they provoked overwhelming discussions about the incorporation of productivity variables into an integrated evaluation system that provides both qualitative and quantitative bases for differentiated minimum wage protection.

Although the German minimum wage law prescribes a single rate, the excluded groups in nature receive differentiated treatment. Similar problems arise with regard to the legitimacy for exempting these people from the minimum wage protection. In fact, the problems pertain to all minimum wage systems that abandon absolute egalitarianism in exchange for necessary flexibility. This sort of compromise is not necessarily good or bad per se. The crux is whether every determination in relation to weakening or removing minimum wage protection is robustly held to ensure that the original purpose is best served and the principle of equal remuneration for work of equal value is respected to the highest possible degree. This makes great demands on minimum wage legislation. In particular, concerning the first minimum wage law of Germany, existing inappropriateness can only be ferreted out by years of post-implementation assessment. A saving grace is that by placing training or education-related restrictions on the exclusion of interns, young workers and trainees, Germany's current legislation demonstrates a tendency to build up relatively objective and consistent criteria for filtering out who is to stand a credible chance of being less productive and therefore, needing reduced wage protection in a national context.

4 Germany's Potential Loss of Efficiency Adjusting the National Minimum Wage

4.1 Adjustment Method

Domestic policymaking and lawmaking on the adjustment of the national minimum wage mainly tackle two issues – the method and frequency. In the EU, three major adjustment methods are recognized. The first is the *indexation method*, whereby the national minimum wage is adjusted automatically in the wake of the changes of certain economic indicators. The second is the *negotiation method*, basing the adjustment of the national minimum wage on negotiations between employers and trade unions. The state is only responsible for transposing the negotiation outcomes into the minimum wage legislation. Thirdly, there is the *consultation method*, which involves employers, trade unions and sometimes other people – for instance, academics – in institutionalized consultations on the adjustment of the minimum wage, however, ensures the state has the final say (Schulten 2014).

According to the DICE database (2015), the vast majority of EU member states with national minimum wages have introduced indexation or consultation methods or the combination of both for the adjustment. The reason is that they are more timely and effective means of adjusting minimum wages. The indexation method makes sure that a minimum wage is adjusted regularly in light of variations in consumer prices, wage development or inflation. With a consultation method, the government lives up to its responsibility and takes necessary control over the adjustment of the national minimum wage.

Germany is a rare exception in that it has brought in a bipartite negotiation method.[60] It rules out automatic adjustments in line with changes of cost-living indexes, excuses the government from an obligation to construct decent minimum wage levels, and leaves the entire decision to collective bargaining parties. Although the procedure takes the form of minimum wage commission members voting upon resolutions in respect to the adjustment of the national minimum wage, the competition between employer organizations and trade unions is still the determinant. It is noteworthy that in Germany's national minimum wage commission, apart from members with voting rights coming out of trade unions and employer associations, there are two advisory members without voting rights chosen from the scientific community.[61] From this perspective, the negotiation method adopted by the German legislation shares some similarities with the consultation method. Yet, it is distinguished from the consultation method in essence because the ultimate decision on minimum wage adjustment does not lie with the state.

60 According to Section 4-10, the German Minimum Wage Act.
61 Section 4 (2), *idem*.

Attention should be paid to the fact that Germany's adoption of a bipartite negotiation method indeed reflects adherence to the constitutional guarantee of freedom of association. To be specific, the German Basic Law ensures every individual and every occupation or profession the right to form associations in order to safeguard and improve working and economic conditions.[62] The entitlement to form and act through trade unions and employer associations is rigidly protected, and simultaneously, the government plays a very limited role in setting working conditions (Bröhmer et al. 2012: 546). There is generally no room for the government to exert control over matters that are typically negotiated by employee and employer associations; legislation enforcing a wage freeze or an increase would be challenged in terms of its constitutionality, unless it is applicable across all sectors (Bröhmer et al. 2012: 546). In principle, the adjustment of the national minimum wage belongs to the scope within which the state is allowed to intervene, because it involves the whole economy instead of only certain sectors. However, the legislature of the Minimum Wage Act has made a 'path-dependent' option, despite the attempt to reform the national labor relations via the new legislation.

4.2 Adjustment Frequency Tied up with the Adopted Method

The German pace of adjusting the wage floor every other year[63]sets a record for the scantiest adjustments amongst all the EU countries with explicit provisions on the adjustment frequency. This is a consequence of the adjustment method, indeed. As the sole representative of the bipartite negotiation model within the EU, Germany attaches greater importance to social partner agreement upon adjustment plans than the practical development of the minimum wage level. Thus, a definitely lower frequency is prescribed for the updating of the minimum wage rate.

On the contrary, the meaning of the indexation method lies in adapting minimum wage adjustments to the changes to the living costs of working families and other economic conditions. Therefore, at least within the EU, countries adopting this method usually specify one year (e.g. in Luxembourg, Belgium, France, Malta, Slovenia, etc.) or a shorter period (for instance, six months in the Netherlands) as the interval between regular adjustments. Occasional political adjustments are added during this period for the purpose of coping with extra risks caused by the automatic updating of the minimum wage or abnormal index variations.

In member states where consultation methods have been developed, the timeliness of minimum wage adjustments may not be valued as much as the balance between social acceptance and the government's domination in

62 Article 9 (3), the Basic Law for the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*).

63 Section 9 (1), the German Minimum Wage Act.

decision-making. A few countries falling into this category fail to stipulate how frequently the national minimum wage rate should be adjusted (e.g. Bulgaria and Romania), while others basically mandate annual adjustments of the national minimum wages (e.g. UK and Croatia).

4.3 The Lost Efficiency: A Diminutive Growth of 0.34 Euros Costs Two Years

After being frozen for two full years, the first German minimum wage rate of 8.5 euros per hour will finally be replaced by a new one of 8.84 euros from January 2017. The real development of national minimum wages has been modest in the whole of Europe since the 2000s, due to the economic cycle (Schulten 2014). However, it can more or less be anticipated that Germany – the largest European economy – would probably fall behind many of its counterparts in terms of providing an assurance regarding stable and regular increases of the minimum wage.

It is stated at the beginning of this chapter that the deterioration of the imbalance between the strength of the two parties at the 'bargaining table' is the fundamental cause of the introduction of a national minimum wage in Germany. Against this background, employing a method that virtually rests with both sides' ability to exert political pressure is tantamount to putting 'old wine in new bottles'. The German trade unions do not possess the power to force substantial minimum wage adjustments with which employers take issue (Schulten 2014).

Despite the German legislation setting a chairperson who has the casting vote in the minimum wage commission so as to prevent a potential deadlock, the trade unions' plight is not improved, and adequate adjustments are unlikely to take place. To be specific, the chairperson is appointed upon a joint proposal of the central employer and the employee organizations; if no joint proposal is made, the chair will rotate between the nominees of both sides.[64] In the former scenario, the jointly nominated chairperson is under pressure from both parties, especially the influential employer side. Nothing more than a mild increase of the national minimum wage can be guaranteed. In the latter scenario, there seem to be opportunities to elevate the wage floor markedly when trade union nominees chair the passing of adjustment resolutions. Nevertheless, it should be taken into consideration that the chairperson is requested to abstain from voting immediately if the resolution does not have the majority of votes cast. A compromise proposal has to be made firstly, and the chairperson's decisive vote must not be cast unless the compromise proposal lacks the majority of votes.[65]

64 Section 6, the German Minimum Wage Act.
65 Section 10(2), *idem*.

That is to say that capturing the position of chairmanship does not necessarily enable the trade unions to reach sufficient adjustments of the national minimum wage.

In the meantime, the biennial rhythm of adjustments worsens the situation. The initial rate and Kaitz index value of the German minimum wage are already below those of a number of EU member states. These gaps are likely to continuingly widen, by reason of the infrequent updates that cannot catch up with the adjustment speeds of other countries nor the changes happening within the German domestic wage structure in general. Moreover, the two-year adjustment cycle prolongs the shortest interval between considerable increases of the national minimum wage to four years, because in the German context, trade unions have little chance of bringing about ample adjustments during the chairmanship of its opponent, and can only expect to gain the upper hand after another biennium.

It is clear that Germany is crying out for a more dynamic and forceful system to update the national minimum wage so that the spreading of in-work poverty across the country can be addressed more efficiently. The indexation or consultation method needs adopting as a supplement or alternative to the retrogressive negotiation procedure. In addition, no matter whether the adjustment frequency is specified, wage floors should be revised opportunely.

5 An Implementation System Flawed by Inadequate Preparation of Essential Rules or Conditions

Level of difficulty in implementing a national minimum wage is influenced by the other three components of a minimum wage regime discussed in this chapter. Nevertheless, only the implementation system *per se* directly deals with the ways and process of putting the minimum wage into practice, and remains at the core of achieving employer compliance.

In view of the legislative experiences of a number of EU countries, a successful implementation system should touch upon the following key points in order to guarantee the execution of a national minimum wage: 1) instructions for employers must be clear and precise enough to comply with, *inter alia* those defining the contents of the minimum wage and its relationship with working hours; 2) the whole implementation system will come to nothing if there is no efficient monitoring; 3) to overcome moral persuasion's lack of binding force, it is a must to introduce serious sanctions that deter noncompliance by making lawbreaking costs overweigh potential benefits; 4) employees deserve assistance in suing employers in order to recover minimum wage arrears, in particular the circumstances where supervision loopholes exist and unfair dismissal or victimization may take place.

Below is an analysis of the existence and adequacy of these conditions for implementing the German Minimum Wage Act.

5.1 Provisions on Calculating Hourly Remuneration and Recording Working Hours

The primary technical issues envisaged to have direct effects on the realization of a minimum wage entitlement are: a) which parts of remuneration should count towards the hourly wage of an employee; b) how the working hours are calculated and recorded. Until both issues are settled properly, ambiguities can give rise to factual evasion of the obligation to pay above the wage floor and set barriers for monitoring and liability identification. The UK has actually set a model in this regard since its national minimum wage was first introduced nearly two decades ago, under which the government endeavors to provide exhaustive guidance on the foregoing questions in order to eliminate misapprehensions in practice.[66]

By contrast, the 'immature' minimum wage law of Germany has hitherto made much less efforts to clarify the issues listed above. Firstly, there is no explanation about what components make up an employee's hourly remuneration.[67] In the face of the Federal Council's criticism that the unavailability of concrete criteria could undermine the minimum wage, the Federal Government argues that the calculation of the minimum wage has indeed been clarified by the case law of the European Court of Justice (ECJ) and the Federal Labour Court (*Bundesarbeitsgericht*, abbreviated BAG). The fact is that no further detailed conclusions can be drawn from the ECJ and BAG case law, except from the principle of only payments recompensing the agreed normal performance being included in the calculation of the minimum wage (Schulten 2015). Therefore, it is merely possible to confirm

66 The UK National Minimum Wage Act 1998 authorizes the Secretary of State to make detailed provisions that clarify the determination of the hourly wage rate at which a person is actually paid by the employer in any pay reference period (section 2) and the maintenance of records as are relevant to establishing whether or not the worker has, for any pay reference period to which the records relate, been remunerated above the national minimum wage rate (section 9&10). Accordingly, a government guidance (titled '*Guidance on Calculating the Minimum Wage')* consisting of systematic rules has been introduced to solve the aforementioned practical issues .The Secretary of State has overall responsibilities for the government department that publishes this guidance. First published in April 2013, the Guidance is updated quite often. The latest version published in October, 2016 is already the 11th update. See https://www.gov.uk/government/publications/calculating-the-minimum-wage#history (accessed 20 December 2016).

67 The BMAS (2014:15-21)provides some explanations about the components of an employee's hourly wage and the calculation and recording of working hours in a pay reference period for the purposes of the German Minimum Wage Act. However, it differs from the UK government guidance referred to in the previous footnote. First, the German Minimum Wage Act does not authorize the BMAS to make supplementary regulations on forgoing issues in its text, so it is constitutionally questionable if BMAS explanations represent the attitudes of legislators. Second, the interpretations of the BMAS are far less precise, certain and comprehensive than a real guidance, and can probably only offer reference for employers and employees in understanding the German Minimum Wage Act.

that bonuses for additional work (e.g. wages for overtime, public holidays, shift work and night work), payments with specific purposes (e.g. pension contributions, reimbursements), or voluntary compensations by third parties (e.g. tips) should be counted out. Salary elements that cannot be clearly recognized as payments for an employee's normal performance (e.g. 13th month's wage, year-end bonuses, Christmas bonuses, holiday bonuses) continue to be controversial among academics, judicial authorities and the government (Schulten 2015).

Apart from the calculation of hourly remuneration, the total amount of working hours in a pay reference period is a pivotal factor that could be falsified to sidestep the wage floor. Different from the UK law, which imposes a universal obligation to record working hours by elaborating on measurement rules in various situations, the German Minimum Wage Act only includes simplified regulations that oblige employers to document the commencement, end and duration of employees' daily working hours and retain the records for at least two years. More importantly, these regulations just apply to marginal part-time jobs and the specific sectors or industry branches defined in section 2a of the Act to Combat Clandestine Employment.[68]

The current legislative pattern seems not to conform to the social reality in Germany. As mentioned earlier, a considerable proportion of full-timers, chiefly in the East Germany, earn hourly wages roughly above or below 8.5 euros. Provided that these employees are frequently compelled to do additional unpaid work, the actual salaries they receive for each hour are likely to fall (further) below the minimum wage. Besides, when a piecework principle – work paid for according to the amount produced – is adopted by employers, it is also difficult to ensure hourly wage rates above the wage floor. The most effective way to reduce these manipulative behaviors of employers in low-wage sectors is sticking to the principle that the minimum wage must be achieved for every hour actually worked, which is confirmed by the explanatory memorandum attached to the law, and setting up common rules for the measurement of working time.

Yet, imposing an indiscriminate obligation to record working hours sometimes runs counter to economic realities, given the diverse features of different occupations and sectors. For example, for a salesman travelling between cities to market products all year round, it is almost impossible to precisely distinguish between the occupational and private behaviors that are subsumed by the manner of working. Another example is a warehouse guard. The person employed to take care of the products and facilities of a warehouse may be provided with a residence nearby and required to be prepared to handle emergencies at any time, but in reality, this person does not work twenty-four seven. Personal activities, such as dining, rest and recreations, just proceed between routine inspections. In both instances,

68 Section 17, the German Minimum Wage Act.

maintaining timesheets is challenging, due to the inexistence of apparent demarcation between on and off work. It may only be workable when minimum wage legislation is sophisticated insofar as rules about the measurement of working hours are designed for all possible movements of the employees in the above two examples. However, this is an endless and impractical task. Take UK for instance. Its legislative model is one that attempts to exemplify as many scenarios as possible and tailor rules for different situations. This includes the calculation method of time spent travelling on business and criteria for judging the nature of sleeping hours between duties. Still, many possibilities that need clarification on the measurement of working time have been left out. That is because each case may be different, and a written law cannot cover all eventualities.

Therefore, the core idea advanced here is that perhaps the German minimum wage legislation should not have narrowed the application of regulations on working time recording to mini-jobs and sectors susceptible to illegal employment. This increases the likelihood that low-wage earners outside these limits could not practically reach the minimum wage entitlements. At the same time, considering the difficulties of recording employees' precise working time in some occupations or sectors, legislators must come up with substitutes for a 'one-size-fits-all' settlement. Two possible approaches suggest themselves. First, the obligation to record working time could be forced widely on employers, however, the prerequisite is that authorized departments of the Federal Government legislate on how employers may simplify or modify the general manner of recording and retaining workers' working hours whenever specific features of an occupation or sector necessitate alterations.[69] Second, in some exceptional cases, recording the working time of employees is not difficult, but is infeasible. Employers should be eligible to apply for exemption from the duty if ensuring employees annual or monthly gross salaries above a certain high amount. In doing so, working time autonomy is given back to occupations and sectors that feature unmeasurable working length or need employees to be on standby, and simultaneously, less opportunities are left for employers to bypass the hourly minimum wage.

5.2 The Major Monitoring Authority and 'Risk-Oriented' Approach

More than one government authority gets involved in the inspection of employer adherence to the minimum wage law in Germany, but the Financial Inspectorate of Undeclared Employment (Finanzkontrolle Schwarzarbeit, abbreviated FKS) is tasked with the leading role in this regard, as has

69 This is actually promoting an expansion of the application of Section 17, paragraph 4 of the German Minimum Wage Act, which urges the BMF to determine by way of a statutory instrument how employers referred to in paragraph1 may alter the general way of recording and retaining the working time of workers in so far as this is necessary on account of the specific features of a sector or occupation.

been the case with sectoral minimum wages in the past. The basic reason for this is that this customs unit responsible for enforcing the law on illicit employment and benefit fraud is endowed with extensive investigatory powers to serve the original purpose of prosecuting cases of illicit employment, nicely facilitating intensive monitoring of the minimum wage. Compliance with the statutory wage floor is required to be examined during all FKS audits. Relevant information found by authorities that shoulder other labor protection responsibilities, such as the pension funds, trade inspectorates, employment agencies, social security funds, etc., in workplace checks shall be transferred to the FKS.

While the FKS has been expected to initiate massive scrutiny of the carrying out of the minimum wage in enterprises, the reality is somewhat disappointing. According to the figures provided by the Federal Ministry of Finance (*Bundesministerium der Finanzen*, abbreviated BMF), the FKS checked around 43,700 enterprises in 2015, over 30 percent less than the amount of 63,000 in 2014. In the construction sector, which is particularly vulnerable to illicit employment and 'wage dumping', the number of inspections fell by approximately half to 17,000 (*Süddeutsche Zeitung* February 19, 2016[a]).

The sudden decline of investigations originates from the incapacity of the FKS to handle the soaring workload caused by the additional mission of enforcing the minimum wage with the present staffing levels. More than a decade ago, the former Finance Minister Hans Eichel (SPD[70]) launched a plan for increasing the amount of FKS customs officers gradually from 5,200 to 7,000 to cope with the long standing staff shortage. At that time, an extra demand of investigating officers as a result of the introduction of a national minimum wage was not considered. According to the Ministry of Finance, 600 of the 6865 positions initially planned for 2015 had not yet been filled. To take over the monitoring of the national minimum wage, another 1,600 customs investigators are needed, but further recruitment has been delayed to the financial years of 2017-2022.Worse still, hundreds of the existing FKS employees have been dispatched to the Federal Office for Migration and Refugees to help with the current necessity of refugee control (*Süddeutsche Zeitung* February 19, 2016 [a]).

Thus, the FKS has adopted a 'risk-oriented' approach for checks on unreported employment as well as compliance with the minimum wage, reducing the total number of investigations and concentrating available resources on the revelation of suspected major violations. Despite the concern that such an approach may tempt fraudulent businesses – construction companies in particular – to make profits from illicit employment and disobedience to the minimum wage law, the FKS has no other viable option at present (*Süddeutsche Zeitung* February 19, 2016[b]).

70 The abbreviation for 'Sozialdemokratische Partei Deutschlands', referring to the Social Democratic Party of Germany.

In fact, the problem does not lie in the insufficient preparation of the FKS for the expanded task, but in reality there is no specialized labor inspectorate in Germany. Administrative control of working conditions, leaving aside occupational health and safety, is quite a new challenge for the German system of labor relations. At the moment, the complex mission to compel observance of a national minimum wage can only be assigned to an authority like the FKS who possesses a relatively higher capability of accomplishing the undertaking, despite not having reached the requisite staffing level. To some extent, it is an obvious consequence that the efficacy of minimum wage monitoring will continue to be thwarted by the staff shortage of the FKS in the next few years. Furthermore, due to the shortage of relevant experience in the inspection of working conditions, a prudent stance is likely to be maintained by the legislature on the way how the FKS manages this task.

5.3 Sanctions

In the EU, the most common sanctions for disobeying national minimum wages are pecuniary ones in the manner of fines. Still, discrepancies widely exist between the legislation of member states with respect to the criteria of determining levels of fines and the diversity of penalties. As shown by the ILO Working Conditions Laws Database,[71] Bulgaria, Croatia, Czech, Estonia, Greece and Spain offer a numerical range of the whole fine system, requiring enforcement authorities to exercise discretion based on both the seriousness and type of violations. France, Hungary and the Netherlands clearly identify the number of employees concerned as a factor that should influence the total amount of a fine. The difference is that France and the Netherlands specify how much an employer will be fined if one employee is paid below the minimum wage – the penalty shall be applied as many times as there have been violations,[72] while Hungary stipulates different ranges of fines for cases involving one or multiple employees. Apart from the quantity of employees with unsatisfied minimum wage entitlements, statutory reasons for increasing or reducing fines mainly include repeat offences (e.g. in Hungary, Luxemburg and the Netherlands), severe accidents incurred by violations (e.g. in Slovakia), the turnover of an enterprise (e.g. in Portugal) and company size (e.g. in Slovenia).

Despite the dominance of financial penalties, a few EU countries (e.g. Belgium, Romania and Ireland) adopt imprisonment as an alternative. Offending against minimum wage entitlements of employees in these countries results in liabilities of fines or incarceration, or both.

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71 Available at http://www.ilo.org/dyn/travail/travmain.sectionChoice?p_structure= (last accessed 10 December 2016).

72 Notwithstanding the similarities, a small difference exists between the French and Dutch legislation. The French law provides for a specific fine for paying an employee below the minimum wage, whereas the Dutch law only sets the upper limit of the fine for infringing on the minimum wage entitlement of an employee.

In comparison with the rest of the EU, Germany has set a quite high upper range limit (€500,000) for the whole fine resulting from a failure to pay employees above the wage floor in due time. How factors, such as the number of involved employees, economic losses caused by violations, repeated offences and company scale should affect a penalty decision is not specified. Breaching one of the ancillary obligations to cooperate with enforcement authorities in audits, to notify the required information and relevant changes in due time and prescribed manner, and to record and retain employees' working time properly can give rise to a fine of up to € 30,000.[73] An enterprise that has been fined more than € 2,500 shall be excluded from public procurement procedures in the fields of delivery, construction and service until its reliability has been reestablished.[74]

In short, the sanction system for propping up the implementation of the German minimum wage has demonstrated two primary characteristics. Firstly, although imprisonment is not adopted, comparatively heavy economic penalties – significant fines plus loss of eligibility for tendering for a contract of public procurement – have been introduced as strong deterrents for various types of noncompliance with the Minimum Wage Act. Secondly, the domains in which offenders are deprived of the capacity to participate in public procurement procedures are those particularly susceptible to incorrect remuneration for employees because of high prevalence of low-paid work, illegal employment or 'mini-jobs'. These two points mirror that appropriate attention has been paid to the effects of lawbreaking costs on employer adherence to the minimum wage and the possibilities of creating sanctions pertaining to domestic industrial attributes.

A deficiency of the German Minimum Wage Act is that it lacks provisions requiring an employer who infringes on a minimum wage entitlement to make a supplementary payment to the involved employee within a specific time in order to meet the required legal standard. The same loopholes are found in the legislation of other member states, except in the Netherlands, Malta and the UK. Whether liability to repay minimum wage arrears is prescribed as a component of the enforcement system of a minimum wage makes an essential difference. With the existence of this statutory liability, there is a higher chance that an employer will cover the shortfall as required by order of the enforcement authority so as to avoid further serious legal consequences. An employee need not necessarily resort to litigation to claim adequate remuneration. Conversely, when the statutory liability under discussion is absent, an employer may attempt to put off remunerating the employee to reach the wage floor, and it is more likely that an employee will take legal action and request arrears based on the judicial decision.

73 See Section 15,16,17,20 and 21, the German Minimum Wage Act.
74 See Section 19, *idem*.

5.4 Viability of Minimum Wage Litigation

Individual employees are not inclined to make use of judicial proceedings to realize minimum wage entitlements for fear of job loss or potential revenge tactics from employers. The situation can be altered, however, if effective assistance is provided for them in applying the right to judicial remedy. This is of particular significance for Germany, where the law fails to urge an offender to pay back arrears and an employee stands a good chance of needing to sue the employer in a court of law to receive minimum wage. Nevertheless, the German Minimum Wage Act has completely omitted this section of legislation that should have been put in place to improve the viability of minimum wage litigation.

As opposed to Germany, many member states that recognize employees' vulnerability in lawsuits against powerful employers offer constructive solutions in the domestic legislation. For instance, in the UK, an officer of the HM Revenue & Customs (HMRC) – the authority that enforces the national minimum wage – can take a case to an employment tribunal or county civil court (or Scottish equivalent) on behalf of an employee with a view to enforcing the minimum wage entitlement to be applied. If the employee suffers unfair dismissal or any detriment by the employer, the employee is entitled to present a complaint to an employment tribunal. In France, the associative right of a labor organization to sue on behalf of employees is acknowledged. Therefore, trade unions can bring class action lawsuits to protect the rights of employees to be paid above the national minimum wage (Schulten 2015).

It is unsure which of the existing solutions agrees with the German national conditions, or whether Germany is in need of another way out. Nonetheless, there is no doubt that the realization of minimum wage entitlements will be frustrated if the corresponding regulations remain unavailable in the German law.

6 Final Remarks

Despite the fact that Germany's introduction of a wage floor from the beginning of 2015 was a great breakthrough for national poverty reduction and wage structure rationalization, it is perhaps not complete. This chapter throws doubts over the effects of this major policy change at a legislative level. By examining the German Minimum Wage Act in terms of the general minimum wage rate, flexibility in application, adjustment method and frequency, and implementation system from an EU perspective, it reveals that this legislation, despite making noticeable progress in some regards, has a huge potential for improvement.

A minimum wage of 8.5 euros can hardly curb the in-work poverty across Germany according to the Kaitz index measurement. An evaluation in terms of PPS indicates a less pessimistic result, though. Current authori-

tative estimations disagree on the precise amount of latent beneficiaries, but it is certain that the main beneficiaries are those trapped in serious poverty for multiple interweaved reasons, in particular female mini-jobbers, and that the German average poor will not virtually benefit from the new minimum wage. An often neglected problem with the general level of the German minimum wage is its unsuccessful link-up with the preexisting income support and tax and contribution collection systems, which tends to significantly detract from the efficiency in promoting people's economic activeness.

Germany has developed a distinctive model of flexibility within the general wage floor. It sets no sub-rate on top of the standard rate, but puts strict restrictions in relation to vocational training and education, on most groups exempted from the application of the minimum wage. Such a model is easier to implement, but the disadvantage is that it cannot exert actual influence over different levels of working poor nor avoid the ethical and legal concerns faced by multi-rate systems.

Ignoring the indexation and consultation methods prevalent in other member states, Germany becomes the unique state that adopts a bipartite negotiation method of determining adjustments of the national minimum wage. Tied up with the adopted method, a biennial rhythm of adjustments is fixed. These two elements constitute an adjustment mechanism that is unable to ensure timely and efficient adjustments in a country like Germany.

The greatest drawbacks of the German minimum wage law are embedded in the implementation system. There is a lack of comprehensive guidance over the calculation of an employee's hourly remuneration and the measurement of working hours to make employers meet the minimum wage. The FKS is assigned the undertaking of checking employer compliance with the minimum wage due to its extensive investigatory power in the monitoring of illicit employment, but its present staff level is far from adequate to handle both tasks. Compared with most other member states, Germany adopts severer economic penalties to deter noncompliance with the minimum wage, but it fails to instruct offenders to repay arrears of wages, for which involved employees face a higher risk of having to turn to judicial proceedings to protect personal interests. Unfortunately, the high barriers standing in the way of an individual employee exercising the right to sue is entirely disregarded by the German minimum wage law, and no legal measure is in place to promote the viability of minimum wage litigation.

Chart and Tables

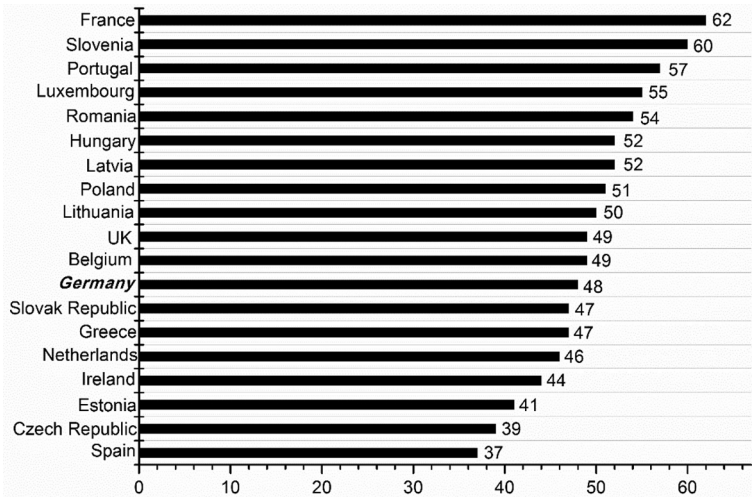

Chart 5: Kaitz Index Values of EU countries' National Minimum Wages in 2015 (in Percentage Terms).

Source: OECD.
Available at: https://stats.oecd.org/Index.aspx?DataSetCode=MIN2AVE#(accessed 12 January 2017)

Table 5: Minimum Wages of EU Countries in Euro and PPS (Effective January 2016)

Per hour in Euro**		latest change	per hour in PPS (Purchasing Power Standard)***	
Luxembourg	11.12	01.01.2015	Luxembourg	9.40
France	9.67	01.01.2016	France	9.11
Netherlands	9.36	01.01.2016	Netherlands	8.52
United Kingdom	9.23	01.10.2015	Germany	8.50
Ireland	9.15	01.01.2016	Belgium	8.48
Belgium	9.10	01.12.2012	Ireland	7.65
Germany	8.50	01.01.2015	United Kingdom	6.95
Slovenia	4.57	01.01.2015	Slovenia	5.59
Malta	4.20	01.01.2016	Malta	5.14
Spain	3.97	01.01.2016	Poland	4.64
Greece	3.35	01.03.2012	Spain	4.34
Portugal	3.19	01.01.2016	Portugal	3.96
Poland	2.55	01.01.2016	Greece	3.92
Estonia	2.54	01.01.2016	Hungary	3.67
Croatia	2.37	01.01.2016	Croatia	3.60
Slovakia	2.33	01.01.2016	Slovakia	3.41
Latvia	2.20	01.01.2016	Lithuania	3.36
Czech Republic	2.15	01.01.2016	Czech Republic	3.36
Lithuania	2.13	01.01.2016	Estonia	3.25
Hungary	2.06	01.01.2016	Latvia	3.11
Romania	1.40	01.07.2015	Romania	2.62
Bulgaria	1.24	01.01.2016	Bulgaria	2.59

Source: WSI Minimum Wage Database.
Available at: http://www.boeckler.de/pdf/ta_january_2016_mwdb_v0116.pdf (accessed 12 January 2017)

Table 6: Minimum Wage Exemption or Differentiation across Groups in EU Countries with a General Statutory Minimum Wage

	Population A (young workers)			Population B (Disabled workers)	Population C			Population D (Long-term unemployed)	Population E (New entrants to the labor market)	Occupation (skill level, qualification, responsibility, productivity level, risk and working time[12])	Sector	Region
	Years of working/ Experiences	Skill or educational level, or training period	Regardless of the factors in left columns		(Trainees)	(Interns)	(Apprentices)					
Belgium	–	◎[1]	◎[2]	–	–	–	–	–	–	–	–	–
Bulgaria	–	–	–	–	–	–	◎	–	–	–	–	–
Czech Republic	–	–	–	◎	–	–	–	–	–	◎	–	–
France	◎[3]	–	–	–	–	–	◎	–	–	–	–	–
Germany	–	×[4]	–	–	×	×[5]	–	×[6]	–	◎[7]	◎[8]	–
Greece	–	–	◎	–	–	–	–	◎	–	◎	–	–
Hungary	–	–	–	–	–	–	–	–	–	◎	–	–
Ireland [13]	◎	◎	◎[9]	–	–	–	×	–	–	–	–	–
Latvia	–	–	◎[9]	–	–	–	–	–	–	◎[10]	–	–
Lithuania	–	–	–	–	–	–	–	–	–	◎	◎	◎
Luxembourg	–	–	◎	–	–	–	–	–	–	◎	–	–
Malta	–	–	◎	–	–	–	–	–	–	–	–	–
Netherlands	–	–	◎	◎[11]	–	–	–	–	–	–	–	–
Poland	–	–	–	–	–	–	–	–	◎	–	–	–
Portugal	–	–	◎	◎	◎			–	–	–	–	◎
Slovak Republic	–	–	–	◎	–	–	–	–	–	◎	–	–
United Kingdom[13]	–	–	◎	–	–	–	◎[12]	–	–	◎	–	–

***Source: DICE Database; ILO Working Conditions Laws Database**

Signs: ◎ using different minimum wage rates for different groups; × exempting certain groups from the application of a minimum wage

Notes:

1 Higher Rates (>100% of the standard rate) for young workers at the age of 21.5 plus 6 months seniority and at the age of 22 plus 12 months seniority.
2 Lower rates for workers at the age of 20 and younger.
3 Lower rates for young workers below 18 years and with less than six months of experiences.
4 Young workers under 18 years and without finished education.
5 An internship is a compulsory part of the education or apprentices.
6 The statutory minimum wage is just not applicable in the first 6 months of employment.
7 Transition rules: Lower rates for newspaper delivery until the end of 2017.
8 Transition rules: Lower rates may apply if they are a part of a sectoral agreement, but full minimum wage rate must be implemented from 2018 onwards.
9 Young workers under 18 years old.
10 Latvia stipulates a higher minimum wage rate for employees whose jobs are not mainly featured by a higher level of qualification, skill or productivity, but a particular risk that allows a maximum of 7 working hours per day and 35 working hours per week.
11 The Dutch government has just started experimenting with deviating from the general wage floor for some categories of disabled employees.
12 The involved apprentices are either within the first 12 months of the contract of apprenticeship, or have not attained the age of 19.
13 The application of Ireland and UK's statutory national minimum wage exclude some very special groups, such as the close relatives of an employer, prisoners, homeless people who receive income allowance and perform work in a scheme meeting certain requirements, etc. Since they are not commonly seen in other countries' legislation, we bypass them here.

5 A Tale of Two Models: Ideas and Results of the Swedish and American Legislation on Parental Leave

Abstract

This chapter compares the models, underlying ideas, and results of Swedish and American legislation on parental leave. It is found that Sweden, whose parental leave policy is characterized by generosity and flexibility, has achieved quite positive outcomes respecting economic growth and the employment of both genders. In stark contrast, the US has failed to acquire stronger competitiveness or higher employment rates, despite implementing a much less generous parental leave policy. The presupposed tradeoff between the level of parental benefits and economic performance has contradicted the empirical evidence so far. Paid parental leave is strongly demanded by American society, not only amongst employees but also amongst employers.

Key Words: Sweden; the US; Parental Leave; Economic Performance; Legislation

1 Introduction

Sweden and the US both stand out in terms of the national legislation on parental leave. The main difference between the two countries is that Sweden has one of the most generous policies in the world, while the US demonstrates the opposite. In short, under the Parental Leave Act (*Föräldraledighetslagen*)[75] and Social Insurance Code (*Socialförsäkringsbalk*)[76], a Swedish couple is entitled to share 480 days of paid parental leave in the event of the birth or adoption of a child. In the US, each parent has a statutory right to 12 weeks of unpaid parental leave under the condition that the parent works in an enterprise with more than 50 employees, according to the FMLA.

Consequently, there is a huge gap between the two countries in respect of the availability and actual take-up rates of paid parental leave. All Swedish employees are entitled to paid parental leave, and almost all of them use it (Duvander et al. 2016).In contrast, paid parental leave is beyond the reach of the vast majority of American working families, although there have been a few states providing partial wage replacement for parents around the birth or adoption of a child (IWPR 2013). According to the Bureau of Labor Statistics (2016), only14 percent of all the American employees had access to paid family leave (paid parental leave included) in 2016. For the remaining 84 percent, parental leave and other types of family leave were unpaid. In line with the data drawn from a 2000 U.S. Department of Labor survey, employees who used unpaid family leave totaled 35 million, and among these people merely 26 percent took unpaid leave to care for a new child or for maternity disability reasons. In addition, few of them took the maximum amount (Vahratian and Johnson 2009; National Partnership for Women & Families n.d.).

When almost the whole world presumes paid parental leave to be indispensable, the US has insisted on the exceptionalism, staying with Oman and Papua New Guinea as the only countries that do not require employers to provide paid time off for new parents (ILO 2014). Only recently, the administration started making efforts to change the situation and embarked on planning what president Trump had proposed on his campaign trail – introducing six weeks of paid leave for mothers of newborns, and for fathers and new adoptive parents in the future (*NPR* May23, 2017). Although this would be a milestone in the improvement of American working conditions and would remove the country from the 'exception list', there are still doubts surrounding the rationality of passing the proposal (*NPR* May23, 2017). It is thus intriguing to examine what the US may lose or win by closing

75 Parental Leave Act (Föräldraledighetslagen), codified as SFS 1995:584.

76 Social Insurance Code (Socialförsäkringsbalk 2010:110) is a coherent and comprehensive social security law that replaces over thirty previously existing social security statutes such as the laws on child allowance, housing allowance, national insurance and occupational injury insurance. It is now codified as SFS 2017: 232.

the door upon the introduction of paid parental leave. Meanwhile, as a country that mandates subsidized and considerably lengthy periods of parental leave for all employees, Sweden has succeeded in maintaining high employment and sustainable economic growth since the 1990s, provoking reflections on the possibilities of concerting generous parental benefits into robust impetuses for economic transformation.

This chapter firstly offers a brief description of the two different models of parental leave established by the existing legislation of Sweden and America. Following this is an analysis of the predominant thoughts that drive the two countries to follow these present routes that are poles apart. By taking stock of the actual effects on business performance, social responses, and financial feasibility, the last part of this chapter reveals that a generous and well-structured parental leave system is far superior to a 'money-saving' one that only offers unpaid leave, and that the time is ripe for introducing a national policy of paid parental leave in the US.

2 Different Models Erected by Sweden's Parental Leave Act & Social Insurance Code and the United States' FMLA

2.1 The Swedish Model

Paid parental leave was first introduced in Sweden in 1974, replacing the previous maternity leave. Since then Swedish family policy has continued to be reformed on the basis of the dual-earner model, with the aims of facilitating work-family balance and strengthening gender equality (PERFAR 2014). The current domestic legislation, mainly consisting of the Parental Leave Act (hereafter 'PLA') and the relevant provisions included in the Social Insurance Code (hereafter 'SIC'), constructs a comprehensive system of parental leave featuring both generosity and high levels of flexibility.

This generosity is reflected in many an aspect. In the first place, all parents are entitled to leave from work in the event of a child's birth or adoption, irrespective of the size of the enterprise, the accumulated working hours of the parent, or any other conditions. Unlike in the US, where only biological and adoptive parents or other legal guardians of a child have the right to unpaid parental leave,[77] Sweden extends the entitlement of paid parental leave to an employee who resides permanently with a parent provided that the employee is, or has been, married to, or has, or has had, a child with the parent.[78]

77 In accordance with the FMLA § 2611(12), the 'son or daughter', the birth or placement of whom is the ground for an employee taking the 12 weeks of unpaid parental leave (FMLA § 2612(a)(1)(A)and(B)), refers to ''a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in *loco parentis*.…"

78 See Section 1 (SFS 2006: 442) of the PLA.

In terms of duration, a parent is entitled to full-time leave from work until the child is 18 months old, or as long as full parental benefit is paid under the SIC.[79] Therefore, each parent is eligible to 240 days of paid leave, among which 195 days entail wage replacement at the sickness benefit level or the basic level and 45 days at the minimum level (*Försäkringskassan*[80] 2017). For a child born in 2016 or later, 90 days paid at the sickness benefit level are reserved for each parent and cannot be transferred to the other parent, while the remaining 105 days and the 45 days paid at the minimum level may be transferred (*Försäkringskassan* 2017). For children born or adopted from 2014 onwards, the paid leave benefit can be used up before the child is 12 years old, with a maximum of 96 days can be claimed after the child is four years old; for children born or adopted earlier than 2014, the paid leave benefit may be used up before the child is 8 years old (*Försäkringskassan* 2017).

In principle, parental compensation at the sickness benefit level means that a parent is paid around 80 percent of the previous income while on parental leave, with a ceiling of SEK 942[81]per day. For a parent who worked less than 240 consecutive days before childbirth, parental benefit is paid at the basic level (a flat rate of SEK 250[82] per day) for the first 180 days. After this, the parent is eligible for a wage-related benefit at no less than SEK 250 per day. A parent who has had low or no income, such as a job seeker or a student, is also entitled to the basic level of parental benefit.[83] The minimum level is SEK 180[84] per day for parents of children born from 1 July 2006 onwards, or SEK 60[85]per day if the child was born before 1 July 2006. All parental leave benefits, no matter whether income-based or flat-rate, provide pension credits.

A 'Gender Equality Bonus' (*jämställdhetsbonus*) has been adopted to promote gender-equal parenting. Both parents receive a tax refund of SEK 50 per day each, for each day that the parent who has taken the fewer days of parental leave after the reserved 90 days takes leave. The bonus applies to the 390 (195+195) days of income-related leave, after both parents use up their reserved days (90+90). A complete equal use of parental benefit may bring the family a combined bonus of SEK10,500 (Duvander et al. 2016).

In addition to the general parental leave, Swedish law provides narrow-sense maternity leave and temporary benefit days in connection with a child's birth or adoption. Maternity leave means that a female employee

79 See Section 5 (SFS2014:948) of the PLA.
80 The Swedish Social Insurance Agency.
81 Approximate to €97.7, based on the exchange rate on Apr. 21st, 2017.
82 Approximate to €25.9, based on the exchange rate on Apr. 21st, 2017.
83 https://www.forsakringskassan.se/privatpers/foralder/nar_barnet_ar_fott/foraldrapenning/!ut/p/z0/04_Sj9CPykssy0xPLMnMz0vMAfIjo8ziTTxcnA3dnQ28_U2DXQwczTwDDcOCXY1CDc31g1Pz9AuyHRUBTbm8uw!!/ (accessed 5 January 2017).
84 Approximate to €18.7, based on the exchange rate on Apr. 21st, 2017.
85 Approximate to €6.2, based on the exchange rate on Apr. 21st, 2017.

is eligible for full leave associated with childbirth during an uninterrupted period of more than 7 weeks ahead of the expected date of delivery and 7 weeks after the delivery; it is obligatory to take two weeks of maternity leave before or after delivery; the employee also has a right to take leave to breastfeed.[86] The employee can decide whether or not to take part of the paid parental leave insurance benefit during the compulsory two weeks, which are not extra benefit days but are counted in the 390 (195+195) days (Duvander et al. 2016). The temporary leave in connection with a child's birth or adoption is a gender-neutral benefit, a substitute for the previously existing 'paternity leave'. At the birth of a child, the non-pregnant parent (used to be defined as 'a father') or a person closely related to the single pregnant mother can receive compensation for 10 days of leave in order to attend the delivery, to take care of other children, or to participate in other childcare affairs. This compensation acts as a temporary parental benefit, approximate to 80 percent of the salary loss during the leave.[87] In the case of adoption, each adoptive parent receives compensation for 5 days of leave to get acquainted with the child on condition that the child is younger than 10 years old; a single adoptive parent is entitled to 10 days of paid leave; the compensation rate is roughly equal to 80 percent of the income loss.[88]

Another major characteristic of the Swedish model is the consistent pursuit of flexibility for the sake of enabling working parents to choose the best way of using parental leave in order to satisfy the needs of the family. Firstly, 300 (105×2+45×2) paid days are left to be freely transferred between the two parents according to their own suitability and plans, while it is evident that the tendency of the legislation is to make increasing efforts to promote gender equality in parenting, from introducing a non-transferable quota of 30 days for each parent in 1995, to extending it to 60 days in 2002, to further extending it to 90 days in 2016 (Duvander et al. 2015). Secondly, expressing the duration of parental leave in actual days, instead of in weeks or months, demonstrates a latent preference for flexible usage of the leave. However, there is a restriction that prevents extreme uncertainty: the whole leave period can be divided into a maximum of three periods for each calendar year,[89] and working parents can elect to take leave in several blocks of time or in one continuous period (Duvander et al. 2016). Thirdly, the Swedish law attempts to enhance the flexibility of paid parental leave by permitting working parents to take time off in the form of reducing normal working hours by three quarters, one half, one quarter or one eighth while receiving the same proportions of the full compensation rate.[90] Lastly, the total length of paid parental leave in relation to a child's birth or adoption is fixed, but the Swedish model embraces several extra types

86 Section 4 (SFS2000:580) of the PLA.
87 See https://www.forsakringskassan.se/privatpers/foralder (accessed 5 January 2017).
88 *Id*.
89 See Section 10 of the PLA.
90 See section 6 (SFS 2006: 442) of the PLA.

of (paid or unpaid) parental leave, such as the aforementioned maternity leave, temporary leave in connection with a child's birth or adoption, leave for an employee's temporary child support, and leave for a parent of child for whom full child-raising allowance is paid. Parents have the freedom to combine the usage of different leave forms in order to serve different purposes. In short, the current approach adopted by Sweden avoids the obvious irrationality of long non-interruptible parental leave, despite posing higher challenges to the management concerning the maintenance of attendance, leave administration, and the reassignment of work tasks.

2.2 The American Model

The FMLA is the first federal legislation that grants American working parents the right to take time off after birth or adoption of a child. By 1990, one half of mothers with infants younger than one year old and two thirds of mothers with children below three years old had to work, and the introduction of parental leave was necessary to maintain the participation rate of women in the labor market (Grill 1996). However, the FMLA fails to address the real problems faced by most American working families, despite filling the void of statutory parental leave. According to the FMLA, it is not obligatory for employers to offer paid parental leave. Should an employer voluntarily provide wage replacement for less than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks do not entail any compensation.[91] An eligible employee may elect, or an employer may require the employee, to substitute any accrued paid vacation leave, personal leave, or family leave for all or part of the twelve-week leave period.[92] Because there is no ensured compensation for income loss during leave, many working parents refrain from taking advantage of the 'benefit', and a lot of those who use it are found to face economic hardships (U.S. Department of Labor 2015).

Under the FMLA, the duration of parental leave is 12 workweeks, which must be claimed within 12 months from the date of the birth or adoption placement of a child.[93] This length is quite short in view of cross-country comparisons. In 2016, the average duration of paid maternity leave plus paid parental leave available to mothers was 55.2 weeks among OECD countries, and paid paternity leave plus paid parental leave available to fathers in these countries averaged out at 8.2 weeks (OECD Family Database 2017). In appearance, the FMLA establishes a standard above the OECD average level that entitles each parent to take 12 weeks of leave,[94] so that a father is able to be equally responsible for the care of a newborn as the mother. In reality, the lack of mandatory compensation during the

91 See FMLA § 2612 (d) (1).
92 See FMLA § 2612 (d) (2).
93 See FMLA § 2612(a) (1)(A)and(B), and § 2612 (a)(2).
94 See FMLA § 2612 (a) (1).

leave forces many fathers to retrench the twelve-week leave period. No recent data is available on how quicker American working fathers return to work from parental leave than working mothers, but a Bureau of National Affairs survey in 1993 recorded that 43 percent of female interviewees and 7 percent of male interviewees would take the full 12 weeks off after the birth or adoption of a child; 4 percent of working women and more than 20 percent of working men would take no leave at all, and the average lengths of parental leave taken by women and men under the FMLA were 8.5 weeks and 2.7 weeks (Grill 1996). It can be seen that the 12 workweeks of leave period available to eligible fathers is undermined more seriously in practice, in comparison to mothers.

The influence of the federal statutory parental leave is further limited by the restrictions on eligibility. The FMLA only applies to an employee who is employed at a worksite in the US or in any territory of the US where the employer employs no less than 50 within 75 miles, and the employee must have worked with the employer for 1,250 hours during the previous 12-month period.[95] Otherwise, an employee will be excluded from the entitlement to the 12-workweek unpaid parental leave. The FMLA further shrinks the benefits package for a couple employed by the same employer; it is legal for the employer to limit the aggregate duration of parental leave that the two parents share to 12 workweeks.[96]

3 Ideas Underlying Route Selection

It is the diverging ideologies that have driven the Swedish and American legislation on parental leave to take different routes. In Sweden, positive explanations prevail, concerning the result of providing generous parental leave. Swedish employers take it for granted that an employee is paid. A few problems have to be managed, such as what strategies should be developed to fill vacancies, but the inconvenience is in general bearable and offset by the societal and economic gains (see Allen 1988: 257-8). Owing to paid parental leave, infants can be better cared for by parents. This is a merit that Swedish employers are willing to sacrifice for, since all society members, including employers themselves, benefit from the increased harmony (Allen 1988: 258). More importantly, it is well recognized in Sweden that the productivity is likely to be improved by paid parental leave, because it can make employees more satisfied and healthy (Allen 1988: 259).

From the perspective of employment policymaking, Swedes believe that paid parental leave has the potential 'to encourage high and continuous labor force participation of men and women, to narrow the gender employment gap and ensure similar patterns of employment over the life course' (Anxo and Niklasson 2008: 11). Denying employees' need for parental leave

95 See FMLA § 2611 (2).
96 See FMLA § 2612 (f)(1)(A).

in the event of the birth or adoption of a child will not evoke greater efforts at work, but cause higher turnover rates, in particular of mothers.

In addition, the concept of the welfare state is fully developed in Sweden (Grill 1996). Egalitarian redistribution of economic fruits, poverty elimination, gender equality, and full employment have been the ethos of the society. Swedes endorse that the government applies high average and marginal tax rates, various forms of social benefits, and the transfer systems to pursue the forgoing objectives. Thus, two significant obstacles that stand in the way of introducing a generous parental leave policy have been removed. One is the challenge posed to the government's budget to afford a generous parental leave. In Sweden, the parental leave allowance is financed primarily through employer-paid payroll taxes and partly through general government avenues. According to the data for 2016 and 2017, employers pay 31.42 percent on all employees' earnings, of which about 2.2 percent is embarked for parental insurance (Nordisk eTax 2017; Duvander et al. 2016).[97] The government plays a supplementary role by making up any shortfall (Duvander et al. 2016). Such arrangements enable Sweden to bear the high public expenditure on parental benefits while balancing the budget.[98] The other possible barrier is that the public may be unable to reach an agreement on spending taxpayers' money on a matter of personal choice. The Swedish welfare state does not have this problem, in general. As mentioned above, most members of society and taxpayers, including employers, appreciate the benefits brought about by the paid parental leave policy. Childbirth is not deemed to be a complete personal matter, but each family is a 'social unit with primary child-bearing responsibility' (Allen 1988: 268). Thus, government spending on this aspect of public welfare has been well supported.

From the viewpoint of the US, high costs are the most important argument against the introduction of paid parental leave of any considerable length. Mandating publicly-subsidized income replacement for those who take parental leave may cause a huge increase in the fiscal expenditure, therefore, appears challenging for the American government, which faces tax-averse citizens and the pressure to cut down on social expenditure (Grill 1996). Simultaneously, as excessive economic burdens may be imposed on employers, the general employment level and the competitiveness of the economy might be impaired. While evidence to support such estimates is inaccurate and inconclusive (Kistler and Mcdonough 1975), policymakers have chosen to adopt a cautious attitude towards enforcing paid parental leave nationwide.

97 Employers' contributions include general payroll tax and the following charges: old-age pension charge, survivor's pension charge, sickness insurance charge, parental insurance charge, work injury charge, and labor market charge (Nordisk eTax 2017).

98 The OECD Family Database (2017) suggests that the public expenditure of Sweden on maternity and parental leave per child born ranks the fourth highest among OECD countries, following Luxemburg, Norway, and Estonia.

Apart from fearing enormous expenses, there is a worry that providing wage compensations during a long leave period may foster 'policy abuse' (Kistler and Mcdonough 1975). An employee who receives wage replacement during the leave period can be motivated to stay at home until the leave is used up, instead of returning to work as soon as possible. This would more or less reduce the vitality of the labor market.

Moreover, the lack of the welfare state tradition that features high tax and generous benefits, and the nonexistence of a common awareness of collective responsibility for childrearing produce an American tendency to deem pregnancy as a matter of personal choice (Grill 1996). The government therefore has no reason to subsidize working parents during parental leave, nor should employers pay the bill (see Kistler and Mcdonough 1975).

4 What Happens in the Real World?

4.1 In Sweden

Sweden has refuted the worries about the negative effects of a generous parental leave policy by its extraordinary achievement in promoting the employment (in particular of women) and maintaining stable economic growth and competitive power of the country. While paid parental leave is a core element of the social protection system, it has played a positive role in increasing the vitality of the Swedish labor market, which indirectly contributes to the current robust economy of Sweden.

4.1.1 Consistent Participation and Employment of Women

Sweden has the third highest female employment rate (OECD 2017) and the highest maternal employment rate[99] in the OECD (OECD Family Database 2016). Around 83 percent of Swedish mothers with at least one child aged 0-14 are in employment, far beyond the OECD-31 average (66 percent) and the level reached by the US (65 percent) (OECD Family Database 2016). A study conducted by the Australian Government (n.d.) further divides mothers into mothers with the youngest child aged 0-5 and those with the youngest child aged 6-14. It is found that Sweden considerably outperforms OECD average, Canada, the US, New Zealand, the UK, and Australia respecting the employment rate of the first group, and performs the second best (following New Zealand)when it comes to the employment rate of the second group (Australian Government n.d.). What proves particularly interesting is that Sweden distinguishes itself from the other aforementioned countries and the OECD average because its first group has an even higher employment rate than the second group (see Australian Government

99 According to the way OECD uses the term 'maternal employment rate', it refers to the employment rate of for women (15-64 year old) with at least one child aged 0-14.

n.d.). The same study indicates that the smallest difference (about 2 percent) between the employment rates of all females (25-54 years) and those with at least one child under 15 years old is found in Sweden (Australian Government n.d.). Furthermore, Sweden achieves a good balance between the female employment rate and the national birth rate. While maintaining the highest female employment rate, it has the second highest national birth rate among the selected countries. Sweden and the US form the starkest contrast: the national birth rate in Sweden is higher than that of the US, and on the other hand Swedish females are about13 percent more widely employed than their American counterparts (Australian Government n.d.).

In accordance with the research by Thévenon and Solaz (2013) which demonstrates the trends of employment rates in OECD countries from 1970 to 2010, Sweden has an overall high employment level and one of the smallest disparities between male and female employment rates. In the light of the charts they provide, more than 90 percent of Swedish men were employed in 1970, while the labor force participation rate of women was slightly above 60 percent. However, female employment improved steadily in the following two decades. In the economic downturn of the early1990s, the employment rate of women even equaled that of men due to less decline. With the recovery of the macroeconomic and labor market conditions since 1994, the employment rate of men has grown a little faster than that of women, but only a small gap has existed between the two (Thévenon and Solaz 2013).

In addition to the low gender differences in labor market participation, Anxo and Niklasson (2008) find Swedes' high employment continuity over the life course. Contrary to the usual presumption, family formation and having children are positively related to the employment rates of both men and women in Sweden. The birth or adoption of children only exerts short-term effects on male and female labor supply. Mothers, affected more than fathers, typically work full time before childbirth, take parental leave, and resume work on a part-time basis until the children reach a certain age. As children grow up, mothers' working hours increase stably and gradually achieve a level similar to fathers' (Anxo and Niklasson 2008).

Paid parental leave has contributed on two interrelated levels to the prominent employment records experienced by Sweden in the past few decades. Firstly, Sweden is a country with a high concentration of dependent employees around the standard full-time norm (40 hours), due to the high union density and the also high degree of centralization and coordination of collective bargaining (Anxo and Niklasson 2008). A role of paid parental leave is helping the conversion of most women into full-time workers and significant breadwinners. The positive relation between generous parental leave benefits and women's continuous labor market commitments is not difficult to understand: it is a common and desperate need for women to reduce workload around the birth or adoption of a child and when the child is still very young, therefore, meeting the need is the wisest way to keep their full participation in the labor market and reinforce their bargain-

ing power and position, despite the temporary work discontinuity (Anxo and Niklasson 2008).

Secondly, the endeavors made by Sweden to pursue the largest extent of employment equality between the two genders are embodied in the paid parental leave policy. By taking parental leave, fathers share the childcare burden with mothers, whose employment ties can then be strengthened. Once mothers increase their presence at work and improve the concentration on career development, accompanied by fathers' taking more responsibility for child care, the disadvantages of women in the labor market will be reduced. In principle, the more equal the division of parental leave, the greater women's employment level will be improved. The non-transferable 'quota' for each parent and the Gender Equality Bonus adopted by Sweden have promoted male usage of the paid leave benefits. In 2014, men accounted for 45 percent of parental leave benefit recipients in Sweden. The average length of men taking the 10 eligible days of temporary leave at the birth or adoption of a child was 9.2 days (Duvander et al. 2016). As for the paid parental leave, Swedish men have been found to use an increasing number of days. In 2000, fathers took approximately 12 percent of all parental leave days, and the proportion had increased to 25 percent by 2014 (Duvander et al. 2016) and to 26 percent by 2015 (*Försäkringskassan* 2016). Although women are still the main users of the paid parental leave, the number of days taken by men and the percentage of couples who take paid parental leave days equally show a general upward trend.

4.1.2 Effects of the High Labor Participation on Economic Growth

In accordance with the OECD economic surveys of 2017, Sweden's economic growth has been strong in recent years. Both of its output and GDP per capital have grown faster than in most other OECD countries, including the US. Despite the weak global environment, it is very likely that the Swedish economy will remain robust over the coming years (OECD 2017).

The OECD Economic Surveys have also found out the main reasons behind Swedish economic performance. It is firstly attributable to the great emphases placed on scientific research and technological innovation – in particular the development of environment-friendly technologies. Additionally, Sweden gains competitive advantage from its high level of integration in the global value chains, the ability to supply high-value services, and the enhancement of business investment, all of which have pushed up the total factor productivity (TFP). Another important reason for the solid economic growth is the expanding labor force stemming from increasing immigration as well as rising labor participation in recent decades (OECD 2017). The positive effects that generous paid parental leave has wielded on the participation rate of women and on the overall employment level have become favorable conditions for Swedish economic development.

In short, the increase of female labor force participation elevates the total output, and also raises the degree of gender diversity, which according

to growing firm-level evidence, is positively related to innovation and profitability (Noland et al., 2016; Hunt et al., 2015; Curtis et al., 2012; Catalyst, 2011). Moreover, employment equality enables women to receive higher income, more opportunities for self-development, and better access to health and education, breathing new momentum into the economy (OECD 2017).

Simulations based on OECD long-run growth scenarios suggest that even though the gender gap in participation is already significantly small, a country may still have the potential to enlarge the size of the economy by narrowing the gap. In the case of Sweden, if the gender gap in participation can be halved by 2030, the GDP would be raised by 2.3 percent, and closing the gap completely would even raise 4.6 percent (OECD 2017; 2012). Thus, including but not limited to the benefit of paid parental leave, policies that seek to promote female participation in the labor market have been identified as a crucial part of the institutional foundation for a continuous strengthening of the Swedish economy.

4.1.3 Generosity Breeds 'Policy Abuses'?

As analyzed above, Swedish employers and the government are willing to afford the 'generosity' due to the wide social acceptance of a high-tax-high-benefit approach to social equality and the general consensus on the social and economic significance of supporting the reproduction of working families. However, it should be noted that Sweden has developed some 'smart' rules that keep leave-takers active in the labor market rather than breeding abuses of the 'generosity'.

Firstly, notwithstanding the high level of de-commodification and universalism of the Swedish welfare state, employees are not supposed to take the generous parental benefits for granted. As introduced in the previous section of this chapter, the income replacement rate varies with the number of days that are actually taken. Only a minimum level of wage compensation is provided during the last 90 (45+45) days. To receive wage-related compensation during the first 390 (195+195) days, both parents should work full time and have good work history prior to childbirth. Otherwise, just a basic level of compensation is available. This results in a strong incentive for parents to work hard before having a child and to resume work to earn full salary afterwards (Anxo and and Niklasson 2008).

Moreover, the built-in flexibility of the Swedish model leads parents to a more rational usage of the parental leave. Above all, the period in which the paid leave benefits may be used has been extended from 8 to 12 years. It means that parents are encouraged to disperse the paid leave days over a longer period to deal with parenting matters, instead of using the hundreds of days intensively after the birth or adoption of a child. Besides, after the child is 18 months old, a parent is only allowed to take paid parental leave in the form of part time work, which in fact pushes the parent to maintain his or her job attachment and to get prepared for returning to normal working hours.

It is a reality that Swedish parents, not only fathers but also mothers, rarely withdraw from the labor market completely despite benefiting from the paid parental leave. What can be seen from this is that as long as the policy itself is well structured, employees' enthusiasm for work is not reduced by the ease brought on by parental benefits.

4.2 In the US

4.2.1 American Families are not Less in Need of Paid Parental Leave

That most American families manage to survive with unpaid parental leave gives rise to the illusion that the entitlement to paid time off from work at the time of childbirth is not so imperative in the US as in the rest of the world. Nevertheless, the fact is that hundreds of thousands of American employees, in particular low-wage earners, struggle painfully between the responsibilities of parenting and 'bringing home the bacon' (U.S. Department of Labor 2015). Working parents are not so much capable of coping with such a serious bind as they are compelled to confront it by all means. Paid parental leave is one of the deepest needs of American families.

In general, the past half century saw the substantial increase of American female labor force participation, from 33.9 percent in 1950 to 57 percent in 2014 (IWPR 2015).Women now comprise nearly half (48.6 percent) of the US labor force (U.S. Bureau of Labor Statistics 2015). It is particularly noticeable that the participation rate of women with children has increased significantly. Only 18.6 percent of married women with children under 6 years of age took part in the labor force (Grill 1996). As of 2016, the labor force participation rates of mothers with children under 6 years and those with infants under a year old were respectively 64.7 percent and 58.6 percent (U.S. Bureau of Labor Statistics 2017).

The US is on its way to a 'full employment society' that expects all adults to work (Allen 1988: 273). The 'traditional male-breadwinner / female-homemaker model of family life' is becoming an exception (Gornick and Meyers 2004: 2). Instead, a dual-earner and dual-carer model prevails, under which the majority of families depend on the income of both spouses to make ends meet (Grill 1996) and have to find private solutions concerning the internal division of the caregiving duty (Gornick and Meyers 2004:2). Such a model is not unique to the US. However, in few other industrialized countries do working parents have to balance work and family to the same extent as in the US, due to ungenerous family policies with the FMLA at the core.

American families 'make valiant efforts' to accommodate, through 'reducing the employment ties of one parent' (overwhelmingly the mother), taking turns to be the carer, or leaving a child at daycare (Gornick and Meyers 2004:2). None of these strategies is satisfying: reducing work attachments may negatively influence the earning level and career development of a parent (usually a mother), and gradually marginalize this parent in the

job market; 'split-shift parenting' increases the chance of family conflict and instability; the high expenses[100] of daycare do not entail a high quality of caregiving, but spur parents to keep working hard in order to sustain it (Gornick and Meyers 2004:2-3).

Taking unsubsidized parental leave is the last resort that working families turn to, and this only occurs when there is no other alternative. In particular, the first few months immediately following the birth or adoption of a child are the foremost period that parents should spend together with the child. In the event of childbirth, at least the mother needs to stay home for a certain span of time, in order to recover from delivery and to take care of the physical and emotional well-being of the newborn. As for adoption, parents also need time to get acquainted with the child and cultivate parenthood. However, the price of taking unpaid leave is income loss that can substantially worsen the living standards of a family. The 2012 FMLA survey by the Department of Labor discloses that over 60 percent of employees who took unpaid or partially paid leave (including parental leave) found it somewhat or very difficult to subsist during the leave period (U.S. Department of Labor 2015: 15; Klerman et al. 2012: 106). Eighty-four percent reported cutting down spending, 37 percent relying on savings, 36 percent putting off paying bills, 30 percent accumulating debt, and 15 percent seeking public assistance (U.S. Department of Labor 2015: 16; Klerman et al. 2012: 105). Parents taking unpaid leave to care for a new baby were found to be especially representative of those whose family budget suffered a devastating impact, due to the combination of a sharp increase of expenses and the lack of income replacement (Department of Labor 2015: 16).

The desire of dual-earner and dual-carer families for the right to paid parental leave does not vary by country. What varies is the extent to which the legal and political reforms of a country take account of such a common need. As opposed to Sweden, whose family policy has been molded into what helps both parents achieve a good balance between work and family, the US has continued underestimating the significance of introducing paid parental leave in the federal level of policymaking.

4.2.2 Increasingly More Employers Favor Paid Parental Leave

Despite the standard set by FMLA, some American enterprises provide generous paid parental leave voluntarily (Levmore 2007). 'From Amazon (20 weeks) and Abobe (26 weeks for new birth mothers) to ZestFinance (six months)', these employers offer paid time-off benefits as they realize that the cost of doing so is outweighed by that of losing talented employees and finding and training new hires (*Fast Company*, Jan 28, 2016). In the book

100 See the 2016 overview of American daycare system at: http://usa.childcareaware.org/wp-content/uploads/2016/07/2016-Fact-Sheets-Full-Report-02-27-17.pdf (accessed 3 May 2017).

Work Rules! Insights from Inside Google That Will Transform How You Live and Lead, the senior vice president of Google's People Operations (HR) describes:

> "*The attrition rate for women after childbirth was twice our average attrition rate. Many moms coming back to work after twelve weeks felt stressed, tired, and sometimes guilty. After making the change in leave, the difference in attrition rates vanished. And moms told us that they were often using the extra two months to transition slowly back to work, making them more effective and happier when the leave ended. When we eventually did the math, it turned out this program cost nothing* (Bock 2015: 215)."

According to the estimation by the American Management Association (2006), the direct cost of replacing a lost employee reached roughly a quarter of, to up to five times, of the annual salary of the employee, regardless of the indirect losses. Offering paid parental leave is conductive to retaining existing employees because it prevents the severing of workforce attachment. Parents may have stronger motivation to work before taking leave, and face less difficulty in returning to work. It is found that women who quit jobs prior to delivery are less likely to have paid leave than are those who continue to work, and that women who take paid parental leave after childbirth tend to work averagely one month longer than their counterparts who quit (Guendelman et al. 2006). Moreover, women who take paid leave demonstrate a significantly higher likelihood of returning to work for the current employer compared with those who do not take any time off (See Klevens et al. 2015; Appelbaum and Milkman 2013; Houser and Vartanian 2012).

Aside from avoiding unnecessary recruitment expenses, the adoption of paid parental leave has been recognized by many employers to have positive or nonnegative influence on the general performance of a business. To be specific, California, Hawaii, New Jersey, New York State, and Rhode Island have had disability insurance programs that give women 'temporary' or 'short-term' insurance benefits during time off taken before or immediately after delivery (Houser and Vartanian 2012). Among these states, California, New Jersey, and Rhode Island have successively implemented legislation to provide paid family leave, on top of the disability insurance benefits, for parents to bond with a newborn or adopted child. The legislature of New York has adopted a new paid family leave program, to take effect in 2018 and be fully implemented by 2021(National Partnership for Women & Families 2016[b]). One additional state, Washington, took a similar legislative activity in 2007, but the program has not been implemented yet due to the lack of funding mechanisms (Montana Budget & Policy Center 2015). Hence, California, New Jersey, and Rhode Island are the jurisdictions enforcing the most generous local parental leave policies in America so far. Surveys conducted in these three Sates present strong evidence that employers widely acknowledge the positive or neutral effects of paid leave on enterprise performance, disproving the general presumption that mandating paid parental leave will stir up resentment among employers.

California passed the nation's first comprehensive Paid Family Leave (PFL) program in 2002. This program operates through the preexisting State Disability Insurance (SDI) system, which typically grants mothers up to four weeks of paid leave before delivery plus up to six/eight weeks of paid leave afterward at a doctor's discretion (Appelbaum and Milkman 2011:2). The PFL program supplements the SDI benefits with an additional six weeks of paid leave postpartum for infant-parent bonding(Houser and Vartanian 2012). The PFL program is available to both women and men, and nearly all private-sector (and nonprofit sector) workers are embraced, regardless of the size of an enterprise (Appelbaum and Milkman 2011). However, the initial fear that employers would hold grudges against such a policy has not materialized. The California Society for Human Resource Management, a group of human resources professionals who objected to the passage of California's PFL law, has admitted that the law is 'less onerous than predicted' (National Partnership for Women & Families 2016[a]; Redmond and Fkiaras 2010). Few enterprises have been challenged by workers taking leave (Appelbaum and Milkman 2011). In the survey by the Center for Economic and Policy Research, which interviewed 253 California employers from both private companies and nonprofit organizations, most employers reported that PFL had either a 'positive effect' or 'no noticeable effect' on productivity (89 percent), profitability/performance (91 percent), and employee morale (99 percent)(Appelbaum and Milkman 2011). Moreover, small businesses report even more positive or nonnegative outcomes than large enterprises, despite being anticipated to suffer extraordinary hardship due to the introduction of the paid leave law (Appelbaum and Milkman 2013).

New Jersey enacted paid family leave in 2009, under the Family Leave Insurance (FLI) Program. Akin to California's PFL, New Jersey's FLI is an extension of its Temporary Disability Insurance (TDI) system (Houser and Vartanian 2012). Women and men are entitled to wage replacement for a period of six weeks, when taking family leave for up to 12 months after the birth or adoption of a child or at any time for the care of a seriously ill family member (Houser and Vartanian 2012). It is found that local businesses have experienced little difficulty adapting to the FLI law, regardless of size (National Partnership for Women & Families 2016[a]). In line with a survey by Rutgers University in 2012, around 69 percent of the sample businesses with employees who had taken advantage of the paid leave benefits reported a positive or no effect on business (*Fortune*, Feb 5, 2015). According to another study interviewing several New Jersey employers, the FLI program reduces employee stress and improves morale among 'leave-takers' and their colleagues (Lerner and Appelbaum 2014).

Rhode Island enacted Temporary Caregiver Insurance (TCI) in 2013, which was also built on the TDI program of the state and designed to provide both medical and family leave benefits. What is worth mentioning is that the program of Rhode Island has improved upon those of California and New Jersey. Employees have the reassurance of reinstatement to return

to work and to be protected from negative workplace retaliation for taking time off (National Partnership for Women & Families 2016[a]). Researchers of Columbia University conducted a study involving small- and medium-sized food service and manufacturing employers in Rhode Island. The findings indicate that the paid leave program has exerted no negative influence on employee workflow, productivity or attendance (See National Partnership for Women & Families 2016[a]).

Because of the above benefits for businesses, American employers have become increasingly supportive of nationwide paid leave policies. A survey by Small Business Majority shows that a plurality of enterprises with fewer than 100 employees strongly or somewhat support paid leave programs (National Partnership for Women & Families 2015[a]; Small Business Majority 2013). Besides, an increasing number of small and large businesses from states ranging from Florida to Wisconsin have offered testimonials in favor of paid leave, advocating the introduction of a national paid family and medical leave insurance program (National Partnership for Women & Families 2015[a]; Better Workplaces, Better Businesses n.d.).

4.2.3 Financially Feasible

Whether paid parental leave is affordable for the US is the most crucial question that makes the federal legislature hesitant to introduce a national policy, despite the positive results of the legislation in California, New Jersey, and Rhode Island. By means of the existing tax structures and employee-paid contributions, these three states demonstrate the absolute feasibility to sustain the paid family leave programs.

To conclude, California, New Jersey, and Rhode Island all establish two separate insurance pools to fund disability insurance and family insurance. Benefits for medical leave and family leave come out of these insurance pools respectively (Montana Budget & Policy Center 2015). In California and Rhode Island, medical and family leave allowances are financed completely through employee payroll contributions. In New Jersey, disability insurance relies on both employee and employer contributions, but the paid family leave program is solely funded by employee-paid contributions (National Partnership for Women & Families 2015[b]).

Typically, payroll taxes are set at a fixed percentage of an employee's annual earnings, which however cannot surpass a threshold (Montana Budget & Policy Center 2015).[101] Provided an employee's annual income exceeds the threshold, the excess part will not be taxed. As of 2017, California workers contribute 0.9 percent of their annual earnings with a taxable

101 Establishing a taxable wage base is necessary for ensuring insurance benefits for program participants who really need them. The reason is that high-wage earners, if contributing premiums based on their entire income, "could potentially claim large benefit amounts during leave, leaving less for low- and middle-income individuals…"(Montana Budget & Policy Center 2015:4).

wage ceiling of $110,902 (California Employment Development Department 2017), and Rhode Island employees contribute 1.2 percent of their annual income up to $68,100 (RI Department of Labor and Training 2017). These employee-paid contributions fund both local medical and family leave programs. In New Jersey, employees contribute 0.1 percent on the first $33,500 of their annual wage to fund the Family Leave Insurance program (New Jersey Department of Labor and Workforce Development 2017[a]). The cost of DTI is shared by employees and employers. The former contribute 0.24 percent of their annual income up to the first $33,500, and the latter contribute between 0.1 and 0.75 percent into the disability insurance pool (New Jersey Department of Labor and Workforce Development 2017[b]).

Accordingly, the maximum worker contribution per year is $998 in California, $817 in Rhode Island, and $114 (34+80) in New Jersey. Based on the data disclosed by the U.S. Census Bureau (2013), the median annual earnings are slightly above $30,000 in California and Rhode Island, and close to $40,000 in New Jersey. Thus, median-wage earners in the three states respectively contribute around $23, $32 and $9.5[102] per month. While it sounds like a heavy burden for employees to fund all or a part of paid leave programs, payroll deductions are very insignificant indeed (Montana Budget & Policy Center 2015). New Jersey employers are obliged to fund a part of the disability leave program, but their actual contributions are also minimal, ranging from $ 3 to $21 per month for each employee.

The seemingly small contributions made by employees have managed to ensure that working parents receive a substantial income during leave. California provides an allowance equal to 55 percent (increasing to 60 and 70 percent in 2018) of the previous earnings of the leave-taker, New Jersey 67 percent, and Rhode Island 55 percent (Isaacs et al. 2017). It means that they equal many OECD countries in terms of the wage replacement rates during parental leave (See OECD Family Database 2017).

Furthermore, the paid leave programs based on payroll contributions have succeeded in embracing more employees in comparison with the FMLA. In California, Rhode Island and New Jersey, employees who need time off to bond with a new child, care for a sick family member, or recover from illness are in principle eligible for paid leave benefits, no matter how large or small the enterprises (Montana Budget & Policy Center 2015). However, all of the three states have adopted strategies that are analogous to the Swedish legislation. Employees should maintain good work history prior to taking leave, otherwise, may lose eligibility for paid leave benefits. For instance, an individual in New Jersey must have earned more than $8,300 in the past 12-month period or have worked for 20 weeks with a weekly wage of at least $165. Similarly, the condition for an employee in Rhode Island to receive paid leave is earnings of $10,800 in the previous 12-month period; alternatively, earnings in the past 12 months must amount to $3,600, with no

102 In New Jersey, the median annual earnings surpass the taxable wage base of $33,500, therefore, the calculation is based on latter, rather than the former.

less than $1,800 for each quarter, and the total amount should outnumber the highest quarter earnings by at least 150 percent (Isaacs et al. 2017). To summarize, making good use of the existing tax-collection structures to finance the insurance pools may be a feasible approach to implementing paid parental leave programs throughout the country. This method proves to be more operable and less defective than providing paid leave through private insurers or motivating employers to give paid leave voluntarily by tax preference (Montana Budget & Policy Center 2015). The main challenge is that non-TDI states need to come up with alternatives to address operational and administrative issues (Montana Budget & Policy Center 2015).

5 Final Remarks

Sweden and the US represent the most and the least adequate parental leave policies in the world. The regulations of these two countries diverge seriously in terms of the adoption of mandatory paid parental leave and the corresponding wage replacement, the length of the leave period, and the flexibility and coverage of the benefits. Such differences stem from the almost opposite views held by policymakers. Swedes believe that the social and economic benefits brought by a generous parental leave policy far outweigh the ensuing cost, while in the US, federal and most state legislatures caution against any economic turmoil that may result from the implementation of paid parental leave.

This is all very well in theory. In practice, however, Sweden may have taken a wiser route. This is demonstrated by the maintenance of its strong economic competitiveness and enviable equal gender employment, partly owing to the high level of work-family balance achieved by dual-earner households. The US, which insists on being an exception when paid parental leave is ubiquitous in today's world, is outperformed by Sweden in many evaluations concerning economic growth, competitiveness, and employment. A more crucial fact is that not only American employees are in sore need of paid parental leave, but increasingly more employers begin to call for the adoption of paid parental leave throughout the country because of its significance for retaining employees and the positive or nonnegative influence on productivity. In addition, the current experiences of the states that have guaranteed paid parental leave above the federal standard have nullified the pessimistic presupposition that paid parental leave would cause resistance from employers and pose challenges to the government's budget.

Responding to the nearly obsolete question of whether paid parental leave needs to be provided becomes important again for the US, given that it has never been closer to the introduction of paid parental leave at a federal level than it is now. However, even if the US does take the first step towards a paid parental leave policy, its success cannot be ensured unless continuous endeavor is made to improve the efficiency of the policy. The

US may not transplant the Swedish model considering the differences in national conditions. To be brief, many factors such as the welfare state tradition and the production system – heavy dependence on large enterprises and multinationals – have given Sweden an advantage in implementing a generous parental leave policy. Due to a lacking in these favorable conditions, the US needs to develop a paid parental leave policy that is adaptive to its domestic economic and social environment. Despite all this, Sweden sets a good example in establishing rules that have managed to coordinate the actual need of working families and the national economic objectives.

6 Coordinating the 'three channels' of employee participation? Focusing on the British practices

Abstract

Concentrating upon the experiences of Great Britain, this chapter reflects on the possibility of coordinating the three channels of employee participation, for the purpose of balancing the dual goals of higher productivity and greater employee voice. The recent attempts seen in Great Britain to align representative and direct participation is indeed based on these two channels respectively possessing some attributes which enable them to complement each other. However, the picture is far from complete. The 'third channel' – financial participation – may further enhance the representative and direct participation, and itself will become more efficient when united with the other two channels. In theory, the three channels are likely to form a self-complementary system, but a practical difficulty is that they rarely coexist and overlap in practice because of the different levels of popularity.

Key Words: Great Britain; Employee Participation; Coordination; Productivity; Employee Voice

1 Introduction

'Employee participation' in all its kaleidoscopic guises is underlain by an invariable ultimate purpose: to allow employees to 'exert influence over their work, over the conditions where they work, and over the results of their work' (Poutsma 2001). The various forms of employee participation fall into three basic channels. The first channel can be summarized as representative participation (hereafter RP), as participation is achieved by the representation of formal institutions, such as trade unions, works councils or board-level representatives. The second channel is direct participation (hereafter DP), embracing informal and direct voice schemes like quality circle[103], employees' self-management, and autonomous work groups. Distinct from the preceding two channels whereby employees mainly have a say on working conditions or work content, the third channel – financial participation (hereafter FP) – gives employees access to the fruits of their work through employee share ownership plans or profit sharing schemes. This is believed to be capable of contributing to greater economic democracy at work (D'art, 2003).

Despite the homogeneity in the nature of RP, DP and FP, they have rarely been taken as comparable channels of employee participation, and the interactions between the three have scarcely been examined in a balanced way. As shown by literature, some studies probe into the relationship between FP and DP, both of which are comparatively vibrant in promoting the productivity of enterprises (e.g. Pendleton and Robinson, 2010; McNabb and Whitfield, 1998); some look at how typical voice arrangements – RP and DP – interact to enhance labor protection and job satisfaction (e.g. Gonzalez, 2010; Dundon et al., 2006; Wood and Fenton-O'Creevy, 2005); a few others are devoted to investigate the position and impact of representative institutions on the introduction and implementation of the other two channels (e.g. Pendleton and Poutsma, 2004; McHugh et al., 1999; Eaton and Voos, 1989). Apart from the divergent perspectives from which certain channels are connected, previous research has put forward two opposite directions about how the channels in question might interact with each other. One direction can be concluded as 'substitution', indicating that (a) certain channel(s) can substitute for other redundant ones for they have overlapping functions. The other can be called 'complementarity', meaning that plural channels may coexist in a system and strengthen each other for congruent objectives.

This chapter proposes that neither higher organizational efficiency nor greater employee voice alone, but the balance between these two goals, ought to be enshrined in the reflection on possible connections between different channels of employee participation. In the past several decades, globalization has posed huge challenges to enterprises that struggle to

103 A quality circle refers to a small group of employees 'who work together and volunteer to meet regularly to solve job-related problems, generally in their own work area' (Dale 1984).

survive the volatile global market, and productivity is becoming a crucial determinant to make or break situations. In the meantime, fighting for labor rights, no matter fundamental labor rights (e.g. the right against unfair dismissal) or the right to be heard in organizational decision-making, has never stopped in modern workplaces.

Given that each of the three channels of employee participation touches upon limited aspects in an enterprise's reaching the dual objectives, it makes better sense to look at the possibility of cultivating their symbioses in one system. However, the urge to jump into so abstract an exploration is tempered by the realization that the three channels must be materialized and placed in context before the connections can be virtually discerned. Therefore, this study focuses on the practices in Great Britain[104] since it has experiences in developing all of the three channels. Based on a brief introduction of the specific patterns of RP, DP and FP growing in the British soil, it firstly takes stock of the potential of RP and DP to join hands for better results, because of which there has been a perceptible tendency to interlock them two in recent years. Yet, RP and DP cannot complement each other in all respects. This chapter advances the idea that the manner FP influences power sharing and the redistribution of economic fruits is what the participation system requires. Provided FP is included in the 'alliance', it stands a good chance of remedying the drawbacks of RP and DP, and *vice versa*. Nevertheless, this conclusion is likely to be thwarted by the reality, since even in Britain the three channels have little or no overlap in many workplaces due to the low prevalence rates and coverage of RP and FP. A general observation is then provided in relation to why legislation can hardly change this situation.

2 British Patterns of the 'Three Channels'

2.1 RP

In Britain, union representation has traditionally been the core of the RP channel. Prior to 2005, recognized unions even had a monopoly on worker representation in British enterprises.[105] No second force could deprive

104 As is well known, the 'UK' and 'Great Britain' are two different geographical concepts. The UK includes Great Britain, Northern Ireland and some smaller islands. This chapter focuses on the practices in Great Britain, instead of the UK, because the existing data concerning employee participation basically come from Great Britain, few from Northern Ireland or other parts of the country. While the legislation of the UK is implemented nationwide and some statistics cited in this chapter are valid for the whole country, the relevant practices in Great Britain are the major part that the author attempts to observe.

105 According to the UK's legislation, employees in general have no legal right to be represented at the board-level. This has not been changed. With regard to the chances of employee representatives being informed and consulted about work issues, the year of 2005 is the watershed due to the ICER's coming into force, as explained in this section.

unions of the leading position in exerting influence over British employment relations or act more vibrantly in safeguarding the workers' voice. Yet, a noticeable phenomenon over the last 40 years is that the dominant role of unions has been seriously fading. In stark contrast to the peak of over13 million union members throughout the UK in 1979, merely 6.5 million employees were trade union members in 2015, approximate to 24.7 percent of the whole working population (BIS[106], 2016). The density of union members in the private sector was below 14 percent, while that of the public sector was considerably higher – close to 55 percent (BIS, 2016). For Britain, there were only 6.3 million union members in 2015, accounting for 24.4 percent of all employees.[107]

The reality that a high proportion of employees are not covered by unions and that few other legalized representation methods could make up for the widening unionism gap (e.g. national works councils and board-level representation) create the need for alternative approaches to RP. Two major methods have been developed in Britain: joint consultative committees (JCCs) and stand-alone non-union representatives.

In relevant discourse JCCs are used interchangeably with works councils or representative forums, which function as information and consultation platforms. JCCs had existed in some British employment relations prior to the enactment of the Information and Consultation of Employees Regulations (hereafter ICER) in 2004 – a consequence of transposing the EU directive on national level information and consultation (2002/14/EC). The ICER formally entitles all employees working in an enterprise that comprises more than 50 employees to request the employer to set up a consultative body. Simultaneously, enterprises are given considerable freedom to select the information and consultation procedures by negotiating an agreement with employees. If a valid pre-existing agreement (PEA) has already made certain arrangements concerning the information and consultation process within an organization, and employees do not request to change it, the employer need not even negotiate a new one. From multiple points of view, the obligation to inform and consult employee representatives is more flexible and adaptable in the UK, and consultative bodies established under the ICER are not as onerous as the typical continental European works councils. However, despite the enterprise-friendly provisions, the ICER has not given rise to a blossoming of consultative bodies in British workplaces since its implementation. The Workplace Employment Relations Survey (hereafter 'WERS') for 2011 reveals that the prevalence of JCCs dropped between 1998

106 The abbreviation for 'the Department for Business, Innovation and Skills' of the UK.

107 Data concerning the total amount of British union members in 1979 and about the density of union members in the private and public sectors in Great Britain are not available. However, the consecutive statistics from 1989 to 2015 (see BIS 2016) suggest that the trade union membership level of Great Britain has always been slightly below that of the UK, in terms of both the total amount and proportion of union members. The scale of British unionism in 1979, and the present density of British union members can be generally reckoned based on the data for the UK.

and 2004 but remained the same between 2004 and 2011, with only 7 percent of workplaces having JCCs (Van Wanrooy et al. 2013: 14-15).

Another avenue of representative voice is the stand-alone non-union representation. The appointed representatives do not connect with a trade union or sit on a JCC, but perform the general representative function on behalf of employees. At present, there is no formal legal structure for this representative method. In practice, it is introduced as seldom as JCCs. Workplaces with the presence of stand-alone non-union representation accounted for 7 percent of all workplaces in both 2004 and 2011, in accordance with the WERS 2011. An exception to the general trend is that 10 percent of workplaces belonging to large private sector enterprises had stand-alone non-union representation in 2011, in comparison with 6 percent in 2004. (Van Wanrooy et al. 2013:15).

2.2 DP

DP methods vary from time to time, from enterprise to enterprise. It is not possibly to maintain stable and universal patterns of DP, because this comparatively innovative idea is employed by enterprises voluntarily, and management strategies are usually altered fast to adapt to internal reforms and the changing external environment. This is different from RP, for which the profound social and legal foundation provides the necessary environment for growing longstanding apparatuses like trade unions and works councils. Thus, in lieu of delineating the forms and coverage of DP in current British workplaces, what follows contextualizes the advent of the main DP methods as from 1979 and demonstrates the general trends in this regard.

On the whole, the dramatic changes in the political and legal environment of the UK since 1979, particularly the learning from the US neo-liberal model of employment relations in the 1980s and the reorientation towards a European social partnership model from the end of the last century (see Ewing 2003; Marchington 1998), have strongly impacted the evolution of every single channel of employee participation. However, in comparison with RP, of which the strength and scale have been influenced more notably than other aspects, DP can derive its own varying patterns and even the occurrence in British enterprises from the above social background.

To simplify, the year of 1997 is a cut-off point, dividing the last four decades into two distinct phases (See Ackers et al., 2003). From 1979 to 1997, the Conservative Government was in power, and insisted on weakening trade unions and withdrawing support for some collective bargaining structures, accompanied by the fall of employment in highly unionized sectors and the alteration to management policies, gave rise to trade unions' sudden decline as of 1979. Meanwhile, the deepening globalization and worsening recession forced enterprises to try fresh means to improve organizational performance. Due to growing recognition of the value of human resources during this period (see Storey 1992; Guest 1989), many enterprises actively

brought in what can be seen as early forms of DP in order to supplant the antagonism in employment relations and improve employee motivation and commitment to business success (Marchington and Wilkinson 2005). However, the methods were confined to top-down information sharing and bottom-up problem solving schemes, and employees had no substantial right to participate in decision-making at higher levels (Wilkinson 2001). According to a 1992 Marchington et al. study that depicts the 1980s and 1990s employee participation initiatives in Britain on the basis of observing 25 company cases,[108] the downward information sharing was basically by means of newspaper and briefing systems, and upward problem solving apparatus in the main referred to suggestion schemes and customer care/ total quality management (TQM). Employee reports and quality circles were occasionally seen in a small number of enterprises.

The Labour Party's leadership by a landslide victory in 1997 started a new period of employee participation. Under the name 'New Labour', a bunch of policy changes and legislation following the election reshaped participation methods markedly post-1997. A closer engagement with European social policy, more active governance of the labor market, and a renewed attention to employee representation (in particular through unions and consultative bodies) as an essential approach to social partnership are the most significant characteristics of the legal and political environment of this period (Ackers et al. 2003). This is the well-known backdrop of the increasing public concern with the large representation gap over the past two decades and the context of the enactment of the ICER in 2004, but the effects on the development of DP are also perceptible.

Overall the DP has been more widely adopted by British enterprises since 1997, however, in no way wedded to the initial ways of downward communication and upward problem solving. In accordance with the 2003 Marchington et al. study, methods embracing all employees and making for management briefing, such as regular meetings with entire workforce, began to be substituted for previous localized or elitist techniques, for example the quality circles(Ackers et al. 2003). In line with the findings of 2004 WERS, slightly more enterprises started utilizing *regular newsletters* than in 1998, with the application of *suggestion schemes* dropping a little in general. However, neither of these two methods was found to be in a dominant position. A further spread of *systematic use of management chain* could be seen, but what really came to the front was the broad introduction of *noticeboards* and *employee surveys* (See Kersley et al. 2006: 17-19). The abrupt prevalence of modern electronica media, including email and intranet (See Kersley et al. 2006: 17-19), had tended to supplement and even replace the traditional paper and oral methods, and more importantly, the one-way information sharing and problem solving had gradually been fused by these new methods.

108 This is indeed a part of the longitudinal research conducted by Marchington et al..

DP has a high level of presence in the current British workplaces. In particular *meetings with entire workforce or team briefings* were adopted by 90 percent of workplaces in the private sector and 97 percent in the public sector, according to the 2004 WERS. As the second and third most popular methods, the coverage of *noticeboards* and *systematic use of management chain* respectively reached 86 percent and 81 percent in the public sector, and 72 percent and 60 percent in the private sector. *Suggestion schemes* were the least prevalent, but still were introduced by 30 percent of workplaces in both private and public sectors (See Kersley et al. 2006: 18).

2.3 FP

It is the favorable legislation offering both employees and employers tax incentives that has underlain the introduction of the first FP schemes and their expansion in the UK since 1978 (Poutsma 2000). The Labor Party was in alliance with employer associations and trade unions against the adoption of any FP form, but the rise to power of the Conservative party in 1979, which followed the Liberal Party[109] in approval of FP, successfully cleared the obstacles standing in the way of FP's advancement. In consequence, different types of statutory profit sharing, share ownership and share option schemes together with a variety of non-statutory schemes have been developed in practice, and the UK becomes one of the European countries with the highest incidences of FP (Wilke, Maack and Partner 2014).

Two categories of FP have been prevailing in British enterprises. The first category comprises profit sharing schemes called Profit-Related-Pay (PRP), which connect a part of employees' payments or bonuses to changes in the profit levels of their organizations (Wilke, Maack and Partner 2014; WERS 2011; Poutsma 2000). The second category encapsulates four types of employee share ownership plans.[110] The most prevalent ones are the Save-as-You-Earn (SAYE) Share Option programs, in which employees who pay fixed monthly contributions for a certain duration are offered an option to buy shares of their enterprise at a fixed (and often reduced) price free of income tax or simply get the savings back in cash. Additionally, Share Incentive Plans (SIP), another kind of tax efficient and all-employee schemes, are becoming particularly popular with small and medium-sized enterprises (SMEs) that are incapable of offering their own share option schemes. Under SIP, SMEs can tailor plans to suit their own organizational conditions and objectives. SIP actually replace the approved Share-based Profit Sharing Schemes in existence between 1978 and 2002. In addition to the aforementioned all-employee schemes, Company Share Option Plans (CSOP) and Enterprise Management Incentives (EMI) have been imple-

109 The Liberal party merged with the Social Democratic Party (SDP) in 1988, forming today's Liberal Democrats.

110 See https://www.gov.uk/tax-employee-share-schemes/overview (accessed 18 May 2017).

mented. CSOP permit an enterprise to provide selective employees – usually key managers and employees – at its discretion with a chance to buy shares with discount on the stock market price. Similarly, EMI programs purport to facilitate smaller and risk-exposed enterprises' recruitment and staff retention via offering tax-sheltered share options to selected employees (Wilke, Maack and Partner 2014; Poutsma 2000).

3 A tendency to interlock the DP and RP in a binary system

Closely linked with the government's reemphasis on employee representation after 1997, a transformation of employee participation in British enterprises is that the erstwhile model of separating DP and RP has gradually been abandoned. Instead, efforts have been made to bridge their divisions (Ackers et al. 2003), as it is found that optimal results are achieved when the two go hand in hand (Purcell and Hall, 2012). The practicability of allying the direct and representative methods of employee participation stems from the fact that their different inherent attributes enable them to complement and strengthen each other in many ways.

3.1 Defects of RP

The operational mechanisms of trade unions have been established upon the presupposed antagonism existing between employers and organized labor, which naturally entails the rigidity of dispute settlement and personnel practices. This disagrees with the volatile global market and enterprises' need for higher efficiency. In another respect, unions' uppermost mission is the so-called 'redistributive' function – fighting against employers who try to monopolize all the surpluses. Yet, the common pursuit of flexibility in recent decades makes it increasingly difficult for union alliances to realize redistributive objectives through protective labor legislation combined with industry-wide or sectoral collective bargaining (Estreicher 2009). Redistributive bargaining has been undergoing an inevitable weakening and decentralization in the UK and many other countries around the world (see Katz 1993; Freeman and Gibbons 1993), giving way to firm-based negotiations and other plant-level instruments that promote workers' objectives in a manner favorable to enterprises' competitiveness (Estreicher 2009).

Compared with unions and collective bargaining, JCCs and stand-alone non-union representation are 'softer' ways of representation possessing little power to affect managerial decision-making and profit redistribution, because they do not hold labor's main weapon – organizing strikes to threaten more advantaged employers. The intention behind JCCs and stand-alone non-union representation is to foster labor and management cooperation with the purpose of enlarging the enterprise 'pie', rather than increasing workers' earnings at the expense of the total surplus (Freeman and Lazear, 1995).

A defect shared among all representative methods is that the formal procedures, no matter collective bargaining or meetings with different types of representatives, better suit problems which have a relatively significant bearing on employees' interests and can be solved by representatives' dealing with the employer (e.g. an envisaged threat to employment, substantial changes in contractual relations, occupational safety and health, etc.). This means that the need of an organization for informal daily communication cannot be met through representative structures. This problem is especially serious when it comes to the SMEs. The rapid expansion of SMEs has been seen in the UK and most other parts of the world. However, the fact that representative methods are inherently designed for the resolution of big formal issues limits their own practicability in SMEs, where quick and straightforward exchange of opinions between the employer and employees is more requisite than representative communication. In line with the 2004 data, 94 percent of all private sector enterprises in the UK fell into the scope of SMEs,[111] but merely 7 per cent of employees in small enterprises and 10 percent in medium-sized enterprises were members of trade unions (Forth et al. 2006: 49). Furthermore, there was a slight drop in the union coverage of SMEs and other workplaces with more than 5 employees from 2004 to 2011, corresponding to the general downward trend reflected by the official statistics covering all employees (Van Wanrooy et al. 2013:14). Meanwhile, British SMEs have shown weak reliance on non-union representation. The WERS 2004 suggests that just 10 percent of workplaces belonging to SMEs were covered by consultative bodies, and 6 percent had a stand-alone non-union representative (Forth et al. 2006: 49-50).

3.2 DP Complements RP by Adding Flexibility and Diversity

As RP methods are not always effective in reaching better organizational performance and greater employee voice, DP – a mild and flexible channel of employee participation – has a role to play and breathes new life into the employee participation system. Firstly, expressing ideas and exchanging information face to face lower the cacophonies in employment relationships, and help enterprises adapt to the current economic environment in favor of cooperation.

Secondly, whilst time or money-consuming channels – like collective bargaining or meetings between the management and employee representatives – function periodically to cope with significant collective problems, most routine matters can be tackled through multiple forms of DP. To put it another way, when the representative tools stick to those underlying principles or 'common rules' of working life, employees' direct involvement brings innovation, experimentation and diversity (see Strauss and Hammer 1987).

111 There are no globally universal definitions of SMEs. In the UK, small firms are defined as those employing fewer than 50 employees and medium-sized firms are defined as those employing 50–249 employees.

Thirdly, the challenges that the special situation of SMEs poses to representative methods highlight the meaning of DP in these workplaces. It is true that SMEs are less likely to have representative tools or other formal social dialogue at the company level (Voss and Wilke, Maack and Partner 2009), but employers that seek to address problems in a democratic way within the company can still resort to employees' direct involvement. Moreover, from the point of the issues that different participation channels are concerned with and the practical results, DP, by nature, is a better 'fit' in small enterprises than RP (Forth et al. 2006: 51).

3.3 The Merits *versus* the Achilles' Heel of DP

As concluded by extensive studies(e.g. Bhatti et al. 2011; EPOC 1999; Wallace 1995; Randall 1990), DP can reinforce employees' attachment, commitment and allegiance to their organization, which then give rise to greater endeavor, less absenteeism, reduced sickness and other positive effects on productivity. It is particularly noticeable that a five-year EPOC[112] survey interviewing managers in around 5,800 workplaces of 10 European countries, including the UK, indicates that the positive effects of DP on throughput time, cost, output and quality were present in most of above investigated undertakings. More importantly, these effects were intensified as the concrete forms of DP increased and the scope of each form was enlarged (Sisson 2000).

The above potential of DP stems from the likelihood that it promotes job quality from multiple perspectives. On one hand, delegating some discretion to employees or offering them multiple mechanisms for information sharing and communication does result in better work relations (Gonzalez 2010), high levels of autonomy (Valeyre et al. 2009), increased job satisfaction (Bauer 2004), and greater sense of achievement and trust (Green and Tsitsianis 2005; Ramsay, Scholarios, and Harley 2000). The experiences of British workplaces specifically disclose that employee direct involvement leads to superior labor productivity because of the higher managerial responsiveness to worker voice in related programs (Bryson et al. 2006).

On top of spiritual incentives that make a job feel more decent, DP may bring benefits in such aspects as salary level, job security and career prospects (Gonzalez 2010). These are areas where employees usually show the greatest concern. By rights, committed employees who make special contributions to organizational innovations or productive efficiency in DP programs should have access to promotion or bonuses. When the organization's productivity is elevated, at least a part of the additional surplus should be used to improve employees' remuneration (or keep wage level unchanged, or at least reduce salary cut) and guarantee employment sta-

112 EPOC is the abbreviation for a research project titled 'Employee Direct Participation in Organisational Change', which was carried out by the European Foundation for the Improvement and Living and Working Conditions from 1993 to 1998.

bility (or minimize job loss) (Strauss and Hammer 1987). Provided that an enterprise makes these efforts to keep DP mutually beneficial, employees' enthusiasm for participation is more likely to be sustained. In light of the findings by Forth and Millward (2004) based on the data from WERS1998, British DP practices had an 8% wage premium in comparison with traditional management, and the wage premium was only in existence under the condition that employees' involvement was supported by job security guarantees. An earlier study by Fernie and Metcalf (1995) reveals that the endeavors made by British enterprises to increase employees' interest in DP contributed to the employment growth between 1984 and 1990.

However, it cannot be guaranteed that an employer must value the sustainability of the cooperative relationship in DP programs by sharing the surplus outcomes with employees. After all, DP is a high performance strategy adopted by the management on a voluntary basis, and the law is unable to oblige the employer to distribute the growing profits in a 'fair' way. It is quite probable that productivity improvement is appropriated by the enterprise itself to gain greater flexibility in crew sizes, production standards and job assignment, which can result in more lay-offs, decreasing wages, and the deterioration of job quality (Gonzalez 2010; Levitan and Werneke 1984). This is the Achilles' heel of DP, where the opportunities to take part in managerial decision-making and influence organizational changes may be turned into 'traps' for employees.

3.4 RP Underpins the 'Healthy' Growth of DP

Early in 1977, the UK Bullock committee foresaw that participation at top level or representative organizations would facilitate the development of lower levels of participation (see Dickson 1981). This prediction has proved true by different evidence. The EPOC survey indicates that either work councilors or workplace trade union officials, depending on specific conditions of targeted EU member states, can be crucial actors for the successful introduction of DP. The amount of forms, scope of each form, and economic performance of DP are positively influenced (Sisson, 2000: 10). Data from all the ten involved countries are persuasive, including the UK. To be concrete, 26 percent of the investigated British workplaces with RP found employee representative involvement 'very useful' in the introduction of DP, and 61 percent 'useful' (Sisson, 2000: 10).

RP can play a positive proactive part in sculpturing DP programs for the following reasons. Firstly, employee representatives inform the management of collective rather than individual viewpoints on the design and operation of DP plans, which helps address issues of common concern in the earliest stages (Eaton and Voos, 1989). Furthermore, possessing relatively more expertise and experiences, employee representatives often bring necessary legitimacy to the introduction of innovative programs and provide the management with constructive suggestions (Cutcher-Gershenfeld et al., 1988). Lastly, this involvement reduces employees' feeling that DP

plans *per se* are the products of imposition from above (Elden, 1976), hence lays a good normative foundation for worker participation (Witte, 1980: 155).

As to the result, Wood and Fenton-O'Creevy (2005) reveal that the overall level of employee voice is lower in British workplaces that foster DP without the presence of RP than where DP is endorsed by indirect voice via trade unions or other representative bodies. Purcell and Georgiadis (2007) further point out that not only the 'sonority' of employee voice should be based on the complementation with workplace representation, but also the realization of the maximum value of direct, face-to-face communication.

As already stressed, the most salient defect of DP is the risk that employers might increase the flexibility in job assignment and in labor costs after exclusively absorbing the productivity improvement that is supposed to benefit not only enterprises but also employees. Active workplace representation may play a positive role in this scenario.

Firstly, at a general level, collective bargaining, consultation, and serious dialogues between stand-alone representatives and the management are all conducive to reaching an agreement on how to avoid or at least reduce compulsory redundancy and wage reduction. The function of trade unions is especially worth specifying. In line with the study by Bryson (2004: 481), many British trade unions bargain over employment levels as well as wages. This is different from the usual understanding that the two parties bargain over wages while leaving employment levels decided by the employer unilaterally. In consequence, collective bargaining over employment levels and wages is found to reduce the occurrence of existing employees being dismissed (Bryson 2004: 494-5).[113] From this perspective, the danger embedded in DP is ameliorated.

Another intriguing point is that some British trade unions have been found to take part in 'managing' job reduction. Relying on the bargaining power, job security guarantees are imposed that forbid compulsory redundancies (White and Bryson 2013: 857-9).[114] The aforementioned study by Forth and Millward (2004) emphasizes that the productivity improvement brought about by DP merely gives rise to a wage premium in workplaces where job security guarantees exist, and that there is a positive relation between union strength and the amount of the premium.

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113 This argument does not contradict most empirical evidence suggesting that in the UK union presence has negative effects on workplace employment because of increasing labor costs. According to Bryson (2004), what has positive effects on workplace employment is the collective bargaining over employment levels as well as wages, for which the forgoing relationship between workplace dismissal and union presence is weakened.

114 White and Bryson (2013:859) add that Job security guarantees entail a promise not to impose compulsory redundancies, but the side effect is that they push up labor adjustment costs and discourage employers to hire more labor. However, this just implies the negative influence on employment fostering. The current employed 'insiders', including participants of DP programs, are the beneficiaries of job security guarantees.

Should the above internal solutions fail, trade union officials and other employee representatives can still intervene 'externally'. To be specific, employees are usually provided with judicial remedies or arbitration procedures to protect their own employment rights. In the British context, an employee is entitled to complain to an employment tribunal that the dismissal is unfair and that the wage reduction is a breach of the employment contract, provided this employee is laid off or receives a significant pay cut as a consequence of the employer abusing the additional surplus. In this situation, employee representatives can offer support to the involved employees by making and presenting their claims, representing them at the tribunal hearing, or assisting with other legal matters.

4 The Necessity to Incorporate FP into the 'Alliance'

Because of the traditional doctrine that FP is not germane to employee voice, the relevant discussions over the relations between voice schemes rarely include how FP interacts with RP and DP. However, when attention turns to the subject of 'employee participation', it is hard to disconnect FP from the other two channels. As is defined at the very beginning of this chapter, the essence of employee participation is to wield influence on managerial decision-making and organizational changes. FP certainly serves this purpose but in a different manner from that of RP and DP. The way FP affects power sharing and the redistribution of economic results is an advantage that can complement RP and DP opportunely. In the meantime, FP has limitations that need remedying by the other two channels. This arouses enlargement of the current binary 'alliance'.

4.1 FP Helps Relieve the Fading Redistributive Function of Unions

Consistent with the general global trend, British trade unions' involvement in pay determination becomes increasingly feeble. In both private and public sectors, the coverage of collective bargaining over pay has declined dramatically in the past three decades. By 2011 only 7 percent of private sector workplaces bargained with unions over employee pay, and just 16 percent of private sector employees had the pay set by collective bargaining. In comparison, in the public sector, 57 percent of workplaces bargained over pay, and 44 percent of employees had pay set by collective bargaining (Van Wanrooy et al. 2013: 22). This means that the vast majority of private sector employers and nearly half of public sector employers determine pay unilaterally. What is interesting is that in the private sector, where pay bargaining was extraordinarily infrequent, a proportion of workplaces introduced FP – 33 percent had PRP schemes and 10 percent had share plans (See Van Wanrooy et al. 2013: 25).

For employers, FP is a part of the systematic performance and appraisal management that aims to share risks with employees and encourage greater

commitment. From the perspective of employees' interests, however, FP may provide extra opportunities to share organizational success, especially in the situation where the traditional negotiation mechanism has lost ground. FP enables employees to acquire payoffs through capital income or profit sharing that are calculated by a formula or a rate, depending on the agreements of different schemes. This differs from collective bargaining, which seeks to absorb profits in order to improve employees' regular wages, pensions, bonuses and other fringe benefits (Mishel and Walters 2003). If enterprises make a profit, financial participants will receive a supplement to the fundamental remuneration. Equally, when enterprises suffer a loss, participants gain a reduced premium or no premium, which has no impact on the normal wages or benefits. Therefore, FP is a flexible reward instrument that promotes the pluralism of compensation tools (Gevers and Cludts 2002).

Yet, one practical problem is that many FP schemes are designed exclusively for managerial employees, significantly limiting the potential of FP to remedy the weakness and rarity of collective bargaining. The WERS 2011 shows that 84 percent of British workplaces where PRP were adopted and 93 percent of workplaces with share schemes covered 0 percent of non-managerial employees (Van Wanrooy et al. 2013: 25), whose incomes especially need supplementing by additional means in the absence of pay bargaining. A saving grace is that the majority of the remaining workplaces with PRP or share schemes had 100 percent of non-managerial employees covered (Van Wanrooy et al. 2013: 25). In these workplaces, the positive meaning of FP as an alternative tool for profit redistribution between employers and employees has been maximized.

4.2 Employee-Owned Shares with Voting Rights May Make up for the Lack of A Statutory Right to Board-level Representation

There is no statutory basis for employee representatives in the UK to participate at board level, for which employees lose access to company information and top-level policies that might not otherwise be available to them in other occasion (Kassalow, 1989). In theory, employee share plans may change this situation.

Participants of employee share schemes have no statutory voting rights in the UK. Employee shareholders' voting rights and the conditions under which they can vote are determined at the enterprise's discretion. Provided an enterprise renders full or substantial voting rights, employee shareholders will be allowed to vote all or a wide range of issues as non-employee shareholders. In this case, employees have certain leverage to affect business decisions at general meetings of shareholders, and may be able to nominate representatives to company boards.

However, as mentioned above, the concentration of employee shares in the hands of managerial employees is a realistic problem. In the overwhelming majority of workplaces with employee share plans, non-managerial employees are completely excluded. There is no given opportunity to send

representatives to company boards by virtue of the voting rights carried by shares. Only in the tiny minority of workplaces where share plans carrying voting rights embrace non-managerial employees, might the composition of board members be altered.

4.3 FP May Enhance Employees' Enthusiasm for DP

In DP, outstanding individuals may get promotions or salary raises, but these rewards are at the discretion of the management. The lack of established mechanisms to share company results poses a challenge to the sustainability of employees' motivation, because 'economic men' in the modern society demand decided financial incentives for long-term commitment, innovative ideas, and the disclosure of production-relevant information. In the words of Levine and Tyson (1990: 209), "sustained effective participation requires that employees be rewarded for the extra effort which such participation entails, and that they receive a share of any increased productivity or profits…"

FP may provide a solution to this issue in that it distributes productivity gains within a comparatively larger scope and in a fixed way. This indirectly converts part of the organization's success resulting from employee involvement into expectable and reified feedback for participants. However, this assumption is again subjected to the query as to how widely a FP scheme covers non-managerial employees. Whilst DP methods are usually applied to most or all of non-managerial employees, it is very probable that FP schemes are just available to a small part of non-managerial employees, or none. The meaning of FP as an incentive mechanism for DP is out of the question when the two have no overlap at all. With this fact in mind, it would be more pragmatic to limit the discussion here to enterprises whose FP programs let in non-managerial employees. In these workplaces, FP may strengthen employees' enthusiasm for DP on a second level: in addition to functioning as a channel for profit feedback, FP makes sense to the control of the risk that productivity improvement due to DP adversely threatens employees' job security and wage levels. The reasons are as follows.

First of all, DP is believed to be particularly risky in the UK and other liberal market economies because the widespread short-termism amplifies employees' distrust and impels employers to break promises (Godard 2004). In fact, in an enterprise where non-managerial employees are covered by share plans – an extreme example is an employee-owned business[115], a (large) proportion of employees become the capital owners themselves. The problem with employees' trust is unlikely to be very serious. On the contrary, employees who are also capital providers may have stronger inclination towards the use of DP, since its potential to improve organizational

115 In an employee-owned business, employees don't necessarily possess extremely high percentage of shares, as long as they can control the corporate effectively and the stocks are dispersed widely.

efficiency and performance has been perceived. In some cases, employee shareholders are endowed with substantial voting rights and, therefore, are able to wield influence on collective redundancy and wage reduction at the general meeting of shareholders or by the action of their representatives on company boards. Thus, the chance of deterring abuses of the increased surpluses grows.

Secondly, both employee share plans and profit sharing schemes disperse profits and dilute the probability that increased surpluses are all absorbed by the management to raise the flexibility of crew sizes. If an employee is eventually dismissed, benefits from FP will become a 'silver lining'. For participants of profit sharing schemes, there are usually multiple ways to take out their benefits after the employment relationship is terminated, depending on the rules set forth by scheme documentation. For participants of employee share plans, more actions can be taken. Choices include holding the shares to get periodical dividends, making a profit by selling the shares to the former employer, or trading with someone else if there is no agreement requiring these shares to be sold back to the employer. The employer can also be taken to court on grounds of claims that the dismissal violates the fiduciary rights of the employee shareholder, in which case, employers must prove to the court that there are business justifications and that the dismissal is not an excuse to freeze the employee shareholder out of the investment.

4.4 FP Is More Effective When Combined with DP

As suggested earlier, FP schemes are open to non-managerial employees in the minority of British workplaces. These workplaces may benefit from the motivational influence of FP on productivity. The reason is that enhanced employee interest in collective success and in long-term organizational performance is likely to cause greater work effort, lower turnover, long-term commitment, reduced absenteeism and so forth. Yet, these positive productivity effects are unlikely to happen unless employee qualms and inertia are eliminated.

In the first place, an inclination to shirking or 'free-riding' is easily bred, because each participant of profit sharing schemes is only offered a small fraction of additional profits (Vaughan-Whitehead, 1995). Without efficacious mechanisms for mutual monitoring, this kind of participant indifference is likely to become serious. The same is true of employee share plans and all other group-based incentive systems facing the '1/N problem' (Pendleton and Robinson, 2010).

Moreover, employees are cautious about taking responsibility without having corresponding rights to participate in managerial decision-making. To some extent, employees are more acquainted with production-relevant information. When they are granted few opportunities to give suggestions on the business, the hesitance to bear relevant risks is imaginable (Robinson and Wilson, 2006).

DP is a potential 'antidote' for the above issues. Firstly, direct communication and information exchange strengthen the connection between individual performance and company success, and simultaneously make up for the insufficient power of non-managerial participants to influence decision-making in FP. This has been well capsulized in the study of Levine and Tyson (1990: 209): 'Just as participation can lead to demands for profit sharing, profit sharing can lead to demands for participation. When there is profit sharing, workers' incomes depend on the decisions of the firm, and workers want to have a say in these decisions.' Secondly, through teamwork and cooperative behaviors, DP programs produce positive peer pressure (Conyon and Freeman, 2004) and help eliminate the tendency of shirking (Vaughan-Whitehead, 1995). In other words, DP fosters the relevant cognitive potential of employees as well as a work climate that repels shirking (Dong-One, 2005). Finally, letting risk-averse employees directly take part in business operations is an essential way to provide reassurance, because more control rights are needed in order to limit personal exposure to risks (Pendleton and Robinson, 2010).

4.5 RP Drives the March of FP

In general, FP schemes are introduced by British employers on a unilateral basis, in a favorable environment provided by the government. While not being so crucial actors, trade unions, JCCs and other methods of employee representation have played a part in shaping relevant schemes. To start with, the introduction and design of FP are usually considered significant activities that change the economic situation of an enterprise, therefore, subject to consultation with employee representatives. One merit of formal dialogues between management and employee representatives is that integrated opinions on FP are transmitted so that the legitimacy and efficiency of FP schemes can be improved and employees' fear of unreasonable risks is more or less reduced.

Above the company level, the transforming positions and approaches of the national union confederation have had important impact on the routes taken by member organizations. British trade unions used to take a negative stance against the introduction of FP because of a lack of trust in its prospects and effects and a fear of losing employee support for independent representation. However, most unions adopted a disinterested approach, with no specific policies made on profit sharing or employee share plans (Poutsma 2001: 95). The major trade union confederation in Britain – Trade Union Congress (TUC) – did not take a quite positive view of FP until the 1990s, when many state-run enterprises were privatized and some trade unions were actively engaged in defining employee share schemes(Wilke, Maack and Partner 2014).

Although the TUC is a typical weak union confederation, it has been committed to the development of FP in recent decades. By formulating broad guidelines, it has endeavored to assist lower levels of unions in judg-

ing FP proposals from employers and to promote the spread of schemes that meet safeguards centering on equal opportunities for all employees to participate, protection of employees from unreasonable risks, prohibition of wage substitution and the consent of employees and employee representatives (Pendleton and Poutsma 2004). Meanwhile, it has stressed that FP should be introduced alongside other channels that improve cooperation and trust between the management and employees and facilitate participation in decision-making (Pendleton and Poutsma 2004). With these sensible and encouragement-oriented ideas seeping gradually into lower levels of the collective bargaining system, many affiliated unions have experienced a shift in attitude towards FP, from outright opposition to conditional acceptance. Some local unions even take the initiative to propose schemes that conform to the principles put forward by the TUC (Wilke, Maack and Partner 2014). In addition to providing constructive guidance, the TUC used to get involved in relative legislation on FP by virtue of its nominee on the Inland Revenue Advisory Group that helped to design the Share Incentive Plan and Enterprise Management Incentives (Pendleton and Poutsma 2004). Undoubtedly, it was a golden opportunity to propagandize its main ideas regarding the implementation of FP.

Notably, what the TUC has insisted on is conductive to minimizing the threats that the inappropriate design of FP schemes poses to participants' economic security, forming sustainable cooperative relationship between employers and employees, and restructuring workplace participation via allying FP with other means. In particular demanding to open FP schemes to all employees concerns the elimination of the serious participation inequality between managerial and non-managerial employees in Britain. Such inequality is a significant barrier hindering FP playing a due role in improving economic democracy and collaborating with other participation channels to produce ideal results. While TUC involvement is not an immediate portrait of union intervention at the company level, it helps mold the relevant policy and framework nationwide and has profound meaning for the orientation of workplace practices.

5 Coordination Rests on the Overlap between the Three Channels

From the above analyses, the three channels of employee participation are not necessarily mutually independent or exclusive. Rather, these channels can penetrate into each other's growth and play complementary roles in one system. By virtue of its dominant position and profound social basis, RP functions as a 'safety valve' that controls unreasonable risk lurking inside the other two channels and safeguards employees' fundamental interests. DP provides 'grassroots' employees with 'hands-on' tools to exchange information and participate in decision-making, greatly remedying the inefficiency of representative communication. FP displays very mixed func-

tions. It offers an extra avenue for profit feedback on top of traditional redistributive bargaining, strengthens the influence of board-level representation by giving employees a chance to send more representatives to company boards, and reduces the risk that increased productivity derived from DP threatens employees' economic security.

RP demands the supplementation of DP and FP, both of which stimulate a greater internal productivity growth, broaden the concept of 'participation', and enable employees to feel valued at various levels. The other way round, DP and FP as emerging channels may be rendered fragile by conflict embedded deeply in an employment relationship (Godard, 2004). The expansion of them both requires the underpinning of traditional vehicles that rely on collective power and constitute the strongest counterbalance to employers' might.

A fundamental presupposition of the coordination between RP, DP and FP is that all of these three channels exist in the workplace and overlap. In the circumstance that a channel is absent, or that the three channels only serve to cover completely different employees, the construction of a self-complementary ternary system will be brought to naught. This is often the case in reality.

While DP features a high prevalence in British workplaces, and relevant methods embrace all or most employees, the presence and coverage of RP and FP are significantly lower. Workplaces with any union members and those with any recognized unions respectively accounted for 23 percent and 22 percent of British workplaces, according to the 2011WERS. Fifty-two percent of employees were union members in the former cross-section of workplaces, and 47 percent in the latter (Van Wanrooy et al. 2013: 14). Non-union employee representation is more infrequent in Britain, while representing all employees in the workplace. As mentioned previously, in 2011, 7 percent of workplaces had JCCs and 7 percent had stand-alone non-union representatives (Van Wanrooy et al. 2013: 14-15). With regard to FP, the absolute prevalence rate is not high in Britain, though exceeding that of many other European countries. The few enterprises with profit sharing schemes or share plans are mainly concentrated within the private sector, as pointed out earlier. In the public sector, the percentages of workplaces that used profit sharing schemes and employee share ownership plans in 2004 were both 1 percent, and the corresponding figures increased to 5 percent and 4 percent in 2011(Van Wanrooy et al. 2013: 25). The problem is that RP (especially unions and JCCs) is in particular scarce in the private sector, and DP is also less prevalent than in the public sector (see Kersley et al. 2006: 18). Moreover, even within the private sector only very small proportions of enterprises give non-managerial employees the access to profit sharing schemes and share plans, which has been reiterated several times in this chapter. It is conceivable that the overlap between the three channels of participation is indeed nonexistent or little in many workplaces. Is some sense, this is a more intractable issue that needs to be figured out ahead of attempting to bridge the three channels.

6 Legislative Difficulties

Overall, the existence of overlapping RP, DP and FP is rare in the British workplace. Different methods are like jigsaw puzzle pieces scattered in the minority of workplaces, among which the structure and influence of employee participation vary significantly. Employees elsewhere may not have access to any vehicle of participation.

The legislative difficulties concerning how the situation can be changed are evident. Despite the perceivable significance of aligning FP with RP and DP, it is unrealistic that the huge gaps between the prevalence levels of the three channels can be filled via direct legal measures, let alone building a common structure for employee participation. To be concrete, the currently low and continuingly descending density of union membership, particularly in the private sector, is largely attributable to the decline in union recognition since the 1980s (Blanchflower and Bryson2008). It seems that union recognition is not entirely up to employers – when an employer does not voluntarily recognize a union, it may still apply for 'statutory recognition' as long as possessing sufficient bargaining power. However, the dominant position of employers in making employment-related choices and the capability to decide to 'go' or 'remain' a non-union establishment still enables a turn back on trade unions (See Blanchflower and Bryson2008; Bryson et al. 2004). This is fundamentally related to the lack of equilibrium between the capital and labor power in the employment market, and no legislative steps seem to be able to 'turn the tables' promptly enough. As union support is often unavailable at the moment, there is no reason why JCCs and stand-alone non-union representation should prevail. Both have to rely on the spontaneous election by employees who want to be represented.

Compared with RP, the introduction of DP and FP belongs more to what is at employers' own will. DP blends the functions of the management and ordinary employees, and FP blurs the boundary between capital and labor. A paternalistic employer might revolt against any change to the conventional management wisdom, whereas an opportunistic employer may regard new participation forms as viable excuses to bypass union officials and other employee representatives. It is also possible that FP or DP is brought in because the employer does have discerned the chances of enhancing employee motivation and improving organizational performance. The uncertainty of the angle from which an employer observes and understands FP and DP is hard to address. While the UK's legislation is favorable in offering tax incentives and has laid a solid foundation for the dissemination of FP across the country, opt-out enterprises are still in the majority. DP basically remains a 'grey area' in policy and legislation, but most enterprises have been attracted to practice it due to its easiness, plasticity and not touching upon the capital structure or highest levels of discretion.

There is little immediate prospect of legislative reform being able to re-boost the popularity of employee participation, and the way in which

an employer chooses to utilize the vehicles of employee participation often goes beyond the bounds of policy. However, policymakers should insist on guiding the practice by creating favorable conditions. It is worth contemplating the feasibility of adjusting the current legal arrangements in order to increase the efficiency and vitality of each participation channel. Possibilities include, but are not limited to, the following: further incentives and support should be provided so as to encourage enterprises to develop profit sharing schemes and share plans that let in non-managerial employees; with a view to keeping the prevalent DP methods on the right track, a legal framework needs to be established, rewarding enterprises that use productivity improvement to benefit employees with tax preferences and setting out different rules and conditions for workplaces where the intervention from unions and other representative bodies is absent and present respectively; the ICER reflects a sensible principle that the establishment of a consultative body in the workplace should depend on the willingness of employees, but it is probably more rational to set a statutory structure of election by all employees.

7 Final Remarks

Britain is representative of countries that have cultivated RP, DP and FP – the three main channels of employee participation. Existing in more than one fifth of workplaces, unionism is the most common way British employees are represented, despite the dramatic decline since 1979. As alternatives to unions, the percentages of workplaces introducing JCCs and stand-alone non-union representation are lower than one third of that of unions. Regarding FP, diverse profit sharing schemes and employee share plans have been developed due to favorable legislation offering tax incentives and the ample growing space ensured by the government. However, workplaces that have introduced FP are still in the minority on the whole, particularly the schemes embracing non-managerial employees. In contrast, *meetings with entire workforce or team briefings*, *noticeboards*, *systematic use of management chain*, and other DP methods have been prevailing among British enterprises with the highest prevalence rates. A probable reason is that DP is an easy, adaptable and harmless tool for the employer to improve organizational performance.

Since the end of 1990s, a tendency to connect RP and DP in order to produce better results has gradually replaced the erstwhile model of isolating the two from each other. This transformation by and large results from two facts. One is that DP is capable of making up for the inflexibility, formalism, inefficiency of RP in communication and alleviating the conspicuous scarcity of RP in SMEs. The other is that RP has played a crucial role in strengthening DP and reducing the risk that productivity improvement resulting from DP threatens the job security and wage levels of employees. Yet, neither RP nor DP can remedy each other in every aspect, producing

the necessity to covert FP into the third element that should be aligned with RP and DP. FP may serve as an additional compensation tool and help relieve the weakening 'redistribution' function of trade unions. Employee-owned shares carrying substantial voting rights may enable employee shareholders to send representatives to the boards to compensate for the absence of a statutory right to board-level representation. Simultaneously, profit sharing and dividends may enhance employee enthusiasm for DP by providing a relatively fixed way of sharing the productivity improvement, and additionally, dilute the probability that it is all absorbed by management to increase flexibility of crew sizes and working conditions. FP also needs reinforcement by the other two channels. DP helps to overcome the 'free-riding' tendency and the lack of peer monitoring in FP, and reassures employees who fear to take financial responsibilities before exerting influence on managerial decisions. RP can play a crucial part in designing profit sharing schemes as well as employee share plans in order to reduce the risks faced by participants and improve the legitimacy and efficacy of FP. In this case, RP, DP an FP coordinate with each other in a ternary system and make a good balance between greater voice and higher organizational performance.

However, the above deduction is likely to be frustrated by the actual prevalence rates and coverage of the three channels in the UK, which imply that they have little or no overlap in most workplaces. It is perhaps more realistic to reexamine the subject by starting with the query of how to promote the substantial spread of the three channels, in particular RP and FP. Employer understanding as to the real influence of the three channels is the key to the issue, but from the legislative perspective no measure would help immediately. On the positive side, there is room for adjustment in the legal arrangements to maintain the vitality and efficiency of each channel.

7 Conclusion

1 Main Findings

This research demonstrates several of the multifarious challenges for contemporary countries to legislate on domestic working conditions in times of globalization. Through dissecting the particular situations in which divergent stances, defective mechanisms and practical straits are entangled, it reveals where the vitality of working conditions law lies in the changing economic world. This research plays a part in the effort to depict the global impasse in terms of working conditions legislation, but there has been no ambition to examine all relevant problems. The whole thesis consists of five in-depth topics. The main findings of the five independent studies are as follows:

Chapter 2 suggests that working conditions legislation can gain a foothold in deepening globalization, despite the criticisms and doubt from opponents. Firstly, respecting the justifications for working conditions law, the instrumental value approach and human rights approach are both found to be defective. However, an alternative interpretation based on Kantian legal philosophy may overcome the drawbacks of the above primary approaches. Now that people, who are born with free will, are the ends of law, and the paramount goal of the law is to preserve the inherent freedom of individuals to the greatest degree, it is appropriate for the law to create various conditions needed by individuals to realize these freedoms, including necessary level of working conditions. Apart from the intrinsic legitimacy, it has been found that the effectivity of regulations on working conditions has been more or less underestimated, while the threats to the competitive power and to the employment level have been overestimated. It is argued that a country which is active in improving domestic working conditions is likely to achieve stronger internal growth, and has access to more international cooperation and preferential trade deals, with the increasing attention paid by the international community to CSR and the worldwide adjustment of FDI strategies. Moreover, the negative effects of working conditions law on employment are not as clear as is asserted by many economists. Lastly, it is put forward that working conditions legislation can gain a reliable foothold in globalization only by making an unflagging effort to approach the balance point where the economic and social benefits are bound in perfect unity.

Chapter 3 analyzes how legislative deficiencies have worsened the antipathy of potential laborers towards construction jobs and have played a

negative role in the ongoing labor shortage in China's construction industry. This section also reflects on solutions that may bring about fundamental improvement. To summarize, Chinese legislation associated with construction safety features low practicability and insufficient comprehensiveness, giving little consideration to the plight of millions of rural migrant workers, the primary construction workforce in China. A sound liability system and effective accountability mechanisms to deter various violations of construction safety obligations are also lacking. Five reformative measures are raised to ameliorate the current crisis: generalizing the IT system platform that has already been applied in a few provinces so as to facilitate the management of national construction labor, strengthening the combination of liabilities and incentives to guide hesitant building enterprises, attaching importance to absorbing migrant construction workers into unions, guaranteeing workers easy access to post-accident remedies, and promoting the role of NGOs.

Chapter 4 questions the momentum and efficiency of the German wage floor introduced in 2015 from a legislative perspective. By inspecting the German Minimum Wage Act in relation to the general minimum wage rate, flexibility in application, adjustment method and frequency, and its system of implementation, this section concludes that this legislation is an incomplete breakthrough which has a huge potential for improvement. Firstly, the entry point (8.5 euros) of the German minimum wage is not a very proper one. In line with the Kaitz index measurement, 8.5 euros is far from being able to curb the nationwide in-work poverty. A less pessimistic conclusion is reached by an evaluation in terms of PPS among EU countries, though. The main beneficiaries of the new wage floor are the serious poor, in particular female mini-jobbers, while the average poor can hardly benefit from it. In addition, the lack of successful coordination between the minimum wage law and the preexisting income support and tax and contribution collection systems may also detract from the appropriateness of the entry point of the German minimum wage. Secondly, the German Minimum Wage Act has established a distinct model regarding the flexibility within the general wage floor – only a standard rate is applied, and strict restrictions in relation to vocational training and education are put on the exempted groups. Such a system is easier to implement compared with those comprising several minimum wage rates, and in good cooperation with the dual vocational training for young people. The disadvantages are also obvious: it is difficult to exert actual influence on different levels of working poor, and one the other hand, the ethical and legal concerns faced by multi-rate systems cannot be avoided. In the meantime, Germany is unique within the EU by its adoption of a bipartite negotiation method of determining adjustments of the national minimum wage, and the biennial rhythm of adjustments is consequently fixed. This adjustment mechanism is unable to ensure timely and efficient adjustments in Germany. Lastly, the implementation system of the German minimum wage is found defective. There is no comprehensive guidance over the calculation of an employee's hourly remuneration or over the measurement of working hours. The FKS is responsible for checking

employer compliance with the minimum wage, but its present staff level is far from adequate to undertake the responsibility. German employees also face a higher risk of having to turn to judicial proceedings to protect personal interests, since the legislation fails to force offenders to repay wage arrears.

Chapter 5 makes a comparison between Swedish and American legislation on parental leave, clarifying the differences between the models, underlying ideas, and results in practice. The two countries are poles apart on the adoption of mandatory paid parental leave, the length of the leave period, and the flexibility and coverage of the benefits. Practically opposite philosophies are held by the two countries giving rise to the divergent institutional arrangements. The Swedish policymakers insist that the social and economic benefits brought by a generous parental leave policy make up for the costs, whereas in the US, the federal and most state legislatures are afraid that the implementation of paid parental leave will result in economic turmoil. In reality, Sweden has obtained strong economic competitiveness and managed to maintain high employment of both men and women, partly due to the great level of work-family balance achieved by dual-earner households. As one of the few exceptions that have failed to introduce paid parental leave, the US has been outperformed by Sweden in many areas with regard to economic growth, competitive power, or employment. In fact, the American federal legislation overlooks that paid parental leave is desired not only by most American employees but also by increasingly more employers. Based on the experiences of the states that guarantee paid parental leave above the federal standard, employer resistance and government budget crises are not likely to be caused by a national policy mandating paid parent leave.

Chapter 6 observes the possibility of coordinating the three channels of employee participation in the British context. The three channels are representative participation (RP), direct participation (DP), and financial participation (FP). These channels can constitute a self-complementary system if coexisting in the workplace, because they all possess some attributes that enable complementation. In theory, the 'alliance' that has been built between RP and DP in recent years should be further enlarged to encompass FP, which would enhance the aforementioned two channels and increase its individual efficiency as a stand-alone channel of employee participation. When RP, DP, and FP interact in a ternary system, a better balance is likely to be made between employee voice and organizational performance. However, such an ideal conception has been thwarted by a practical difficulty that is hard to figure out by legal measures. This barrier illustrates that even in Britain, a jurisdiction which features relatively rich experiences in developing RP, DP, and FP, huge gaps exist between the prevalence rates and coverage of the three channels. The three channels rarely coexist and overlap in practice.

2 Messages behind the Kaleidoscopic Scene of the Current Global Impasse

Two central research questions are presented in the 'Introduction'.

1) What is the main dilemma facing the regulation of working conditions in times of globalization?

Based on the above review of the five studies included in this research, the main dilemma always rests in the tension between labor protection and the economic objectives of countries and enterprises, although the challenges facing legislation on working conditions take on a variety of appearances. However, such a conclusion is not to restate the simple conflict between product prices, which are partially affected by labor costs, and a country's competitive position in comparison with other countries producing the same products. On the contrary, a 'zero-sum' approach to understanding the relation between labor protection and the economic performance of a country has been argued against in this book. From the author's point of view, the 'tension' between labor protection and the realization of economic objectives has two extra implications at the current stage of globalization. Firstly, reducing labor costs does not necessarily result in better economic performance, in particular in the long run, since many more factors have started to play important roles, such as the capability of integrating global resources, the productivity level, technological advantages, international cooperation and enterprise reputation. Policymakers ought to realize the growing significance of the new factors that influence global competition. Secondly, labor protection is not always in conflict with economic objectives. Policymakers should not be charmed by the idea that there is a direct and unchangeable negative relation between labor protection and the realization of economic objectives, but should perceive the potential to combine the two goals.

2) How effectively have policymakers reacted to the foregoing dilemma?

In general, many policymakers fail to emancipate themselves from the way of thinking before tackling the practical challenges. For instance, the German legislation on minimum wage implies that it is difficult for policymakers to get rid of the existing pattern of thinking, despite the significant changes to the institutional framework. The cautious stance that held back the introduction of a national wage floor continues to constrain the legislature from establishing an efficient minimum wage regime. As a result, the primary purpose of enacting the Minimum Wage Act has been partly brought to naught.

Analogously, the stark contrast between the American and Swedish legislation on parental leave suggests that political ideologies play a crucial part in countries' setting up models and formulating rules for regulating domestic working conditions, sometimes transcending the role of the objective environment required for the enforcement of the law.

Chinese law on construction safety exemplifies another type of inappropriateness of legislators' perceptions of reality. There are a variety of chronic issues obstructing the overall efficiency of the legislation on construction safety, but the severity of these problems has been long underestimated in the culture centered on economic prosperity. It is noticeable that the economy has recently begun to pay the price for the serious labor shortage in the construction sector due to the generally unacceptable working conditions, in particular the poor protection of construction safety. National policymaking is expected to respond at once. There is a very real prospect that some solutions which have been proposed widely by society would effectively ameliorate the economic and social crises triggered by the construction safety problems. Nevertheless, it is unclear whether the central government is fully aware of the potential effects of these strategies and will take immediate actions through different levels of legislation and implementation.

It has to be acknowledged that under a few circumstances objective barriers, rather than legislators' defective perceptions, play a critical part in restricting the level of working conditions legislation. Take the last study on the three channels of employee participation in the British context, for instance. The rare coexistence of the three channels in the workplace is the first and foremost obstruction to the coordination of them, and this problem is difficult for legislators to cope with. In another word, the existing mechanisms for realizing the employee right to participation are hard to be optimized directly by legislative measures. Instead, the will of employers is the crucial factor that tips the balance, depending on the extent to which the potential effects of the three channels on company- level productivity are understood.

Specific advice is provided in each of the five studies included in this research. However, it is necessary to reiterate a few important points that have been made, in order to illuminate the path in which a country may be able to improve the efficiency of domestic legislation on working conditions in future. Firstly, policymakers should get rid of the outdated stereotype that improving domestic working conditions and promoting the competitive power of the economy must be contradictory. With a view to fitting in with the global trend towards more intensive economic growth, a country needs to recognize the potential of decent working conditions to boost productivity and to facilitate long-term cooperation with other countries. Secondly, this research has no intention to peddle the idea that offering good working conditions is certain to lead to good economic performance, but there is room for national legislators to coordinate the goals of labor protection and economic development by applying appropriate rules and strategies, despite the huge challenges brought about by the advancement of globalization. Lastly, there might be objective barriers prohibiting the law from responding effectively to the changing economic world. However, the legislation should endeavor to guide relevant social actors and create conditions for surmounting these barriers.

Summary

Perspectives on the Regulation of Working Conditions in Times of Globalization
Challenges & Obstacles Facing Regulatory Intervention

Labor law is facing unprecedented challenges, in terms of both its external and internal dimensions. This is the combined result of the vulnerabilities inherent to labor law and the advancement of globalization, which in recent decades has given rise to fundamental changes of global economic structure, management ideas, technologies, and capital-raising models.

Labor law is called into question on many levels. Firstly, the basic ideas and purposes of labor law have become obscured. Furthermore, it has become more complicated to determine the correctness of the methods employed by labor legislation. The worsening ambivalence in terms of the goals and means of labor law has inevitably resulted in an aggravation of the doubts surrounding the actual impact.

Working conditions are the essential elements of employment relationships and the main point that legal interventions have been seeking to mediate. It is no exaggeration to say that working conditions legislation is at the center of the current crisis where labor law is procrastinating and tending to vacillate. Hence this research focuses on the regulation of working conditions in times of globalization.

The research comprises five independent studies: a general discussion on the foundation and feasibility of regulating working conditions in globalization, followed by four parallel studies that deal with specific legislation in certain countries. These studies demonstrate the current multifarious practical difficulties for countries to legislate on domestic working conditions. By dissecting the situations in which divergent stances, defective mechanisms and practical straits are entangled, the crisis of labor legislation in times of globalization is concretized into specific problems while at the same time opportunities for change are revealed. Such an exploration is not a discursive one that collects together the debris of the current broken picture of global lawmaking on working conditions. Rather, a couple of questions continue to hover in the background throughout:

1) *what is the main dilemma facing the regulation of working conditions in times of globalization?*
2) *How effectively do policymakers react to the foregoing dilemma?*

To be specific, in the face of warnings from economists, tenable reasons are needed for regulating the labor market and workplaces in a globalized world. Chapter 2 is devoted to examining the vitality of working conditions law on three levels. Firstly, in answering the question of why regulations on working conditions should not be discarded, the author puts forward an explanation, conquering the vulnerabilities of the mainstream philosophical

justifications. Secondly, by referring to a wide range of economic studies, she points out the cursoriness of the standpoint that regulating working conditions is bound to backfire. Finally, it is put forward that an approach that places stress on the balance or coordination, rather than the prioritization, of economic efficiency and labor protection may enable working conditions legislation to remain viable in today's globalization.

Chapter 3 analyzes how the defective legislation on construction safety aggravates the ongoing labor shortage in China's construction sector, and also, in the legislative dimension, what reformative measures are likely to bring about fundamental improvements. Three levels of description in this chapter show, respectively, the impracticability of the main construction safety rules, the malfunctions of the Labor Contract Law and the regulations about work-related injury insurance, and the undermining of the responsibility system. It may be difficult to construct a more efficient legal framework right away, but immediate efforts can be made to address specific tough issues that are key to ameliorating China's construction safety performance and to decelerating the outflow of the construction workforce. This chapter identifies five reformative measures that should be taken.

Chapter 4 reflects on how appropriately the German Minimum Wage Act – the latest national minimum wage legislation within the EU – has been constructed so as to remedy the fading role of collective bargaining in wage setting and curb the increasing in-work poverty across the country. Based on identifying four fundamental parts of a minimum wage regime, it examines successively the corresponding provisions in the German law, with frequent comparisons with the legislation of several other member states. It is found that Germany has refrained from learning the positive legislative experiences of its EU counterparts, and has developed a minimum wage regime that is distinct in more than one aspect. Such a wage floor, however, loses efficiency and momentum before serving the original purposes of its own introduction.

Chapter 5 compares the models, underlying ideas, and results of Swedish and American legislation on parental leave. It is found that Sweden, where parental leave policy is characterized by generosity and flexibility, has achieved quite positive outcomes respecting economic growth and the employment of both genders. In stark contrast, the US has failed to acquire stronger competitiveness or higher employment rates, despite implementing a much less generous parental leave policy. The presupposed tradeoff between the level of parental benefits and economic performance has contradicted the empirical evidence so far. Paid parental leave is strongly demanded by American society, not only amongst employees but also amongst employers.

Concentrating on the experiences of Great Britain, Chapter 6 reflects on the possibility of coordinating the three channels of employee participation, for the purpose of balancing the dual goals of higher productivity and a stronger employee voice. The recent attempts seen in Great Britain to align representative and direct participation is indeed based on these two chan-

nels respectively possessing some attributes which enable them to complement each other. However, the picture is far from complete. The 'third channel' – financial participation – may further enhance the representative and direct participation, and itself will become more efficient when united with the other two channels. In theory, the three channels are likely to form a self-complementary system, but a practical difficulty is that they rarely coexist and overlap in practice because of the different levels of popularity.

Based on the above studies, it can be seen that for the regulation of working conditions, the main dilemma always rests in the tension between labor protection and the economic objectives of countries and enterprises, although the challenges facing legislation on working conditions take on a variety of appearances. This is a constant puzzle and also the origin of conflict of interest that are taken into account in working conditions legislation. However, many countries are actually failing to adopt adaptive strategies for regulating domestic working conditions in the era of globalization, mainly due to policymakers' improper perceptions of the relationship between labor protection and economic prosperity, and also because of some objective difficulties standing in the way of establishing effective rules. The author suggests that policymakers should get rid of the outdated stereotype that improving domestic working conditions and promoting the competitive power of the economy must be a zero-sum game. Despite the huge challenges brought about by the advancement of globalization, there is room for national legislators to apply appropriate rules and strategies in order to coordinate the goals of labor protection and economic development. When objective barriers exist that prohibit the law from responding effectively to the changing economic world, legislation should endeavor to guide the relevant social actors and create conditions to surmount these barriers.

Samenvatting (Dutch Summary)

Perspectieven op regulering van arbeidsvoorwaarden in tijden van globalisering
Uitdagingen en belemmeringen van regulerende interventie

Het arbeidsrecht staat voor ongekende uitdagingen zowel in intern als in extern opzicht. Dit is het gecombineerde resultaat van de kwetsbaarheden die inherent zijn aan het arbeidsrecht en de voortgang van de globalisering, die in de afgelopen decennia heeft geleid tot fundamentele veranderingen in de wereldwijde economische structuur, management opvattingen, technologieën en verdienmodellen.

Het arbeidsrecht wordt op vele niveaus ter discussie gesteld. Ten eerste zijn de fundamentele ideeën en doelen van het arbeidsrecht vertroebeld. Daarnaast is het moeilijker geworden om de juistheid van de instrumenten van arbeidswetgeving te waarderen. De toenemende ambivalentie over doelen en middelen van het arbeidsrecht heeft onvermijdelijk geleid tot toenemende twijfels omtrent zijn daadwerkelijke invloed.

Arbeidsvoorwaarden zijn essentiële elementen van arbeidsrelaties en het belangrijkste punt waarop juridische interventies proberen te interveniëren. Het is niet overdreven om te stellen dat de wetgeving over arbeidsvoorwaarden centraal staat in de huidige crisis waarin het arbeidsrecht talmt en aarzelt. Vandaar dat in dit onderzoek de focus wordt gelegd op het reguleren van arbeidsvoorwaarden in tijden van globalisering.

Het onderzoek omvat vijf afzonderlijke studies. Dit betreft allereerst een algemene discussie over de grondslag en de haalbaarheid van het reguleren van arbeidsvoorwaarden in tijden van globalisering. Dit wordt gevolgd door vier parallelle onderzoeken die handelen over specifieke wetgeving en bepaalde landen. Deze onderzoeken tonen de veelsoortige praktische problemen waar landen tegenaan lopen bij het opstellen van wetgeving inzake de binnenlandse arbeidsvoorwaarden. Door de situaties te ontleden waarin uiteenlopende standpunten, gebrekkige mechanismen en praktische knelpunten verstrengeld zijn, wordt de crisis van de arbeidswetgeving in tijden van globalisering geconcretiseerd in specifieke problemen. Tegelijkertijd worden er mogelijkheden voor verandering onthuld. Een dergelijke verkenning is geen onsamenhangende verkenning die het puin verzamelt van het huidige versnipperde beeld van wereldwijde wetgeving inzake arbeidsvoorwaarden. In plaats daarvan blijven er een aantal vragen op de achtergrond zweven, zoals:

1) *wat is het belangrijkste dilemma bij het reguleren van arbeidsvoorwaarden in tijden van globalisering?, en:*
2) *hoe effectief reageren beleidsmakers op het voorgaande dilemma?*

In het licht van waarschuwingen van economen zijn er houdbare redenen nodig voor het reguleren van de arbeidsmarkt en arbeidssituatie in een

geglobaliseerde wereld. Hoofdstuk 2 is gewijd aan het onderzoeken van de vitaliteit van de wetgeving inzake arbeidsvoorwaarden op drie niveaus. In de beantwoording van de vraag waarom regels over arbeidsvoorwaarden niet mogen worden afgedankt, stelt de auteur ten eerste een verklaring voor die de kwetsbaarheden van de reguliere filosofische rechtvaardigingen overwint. Ten tweede wijst ze, onder verwijzing van een breed scala aan economische studies, op de vluchtigheid van het standpunt dat het reguleren van arbeidsvoorwaarden een averechts effect heeft. Tot slot wordt gesteld dat een aanpak die de nadruk legt op het evenwicht of op de coördinatie, in plaats van op de prioriteitsstelling van economische efficiëntie en arbeidsbescherming, de arbeidsvoorwaardenwetgeving in het huidige tijdperk van globalisering levensvatbaar kan maken.

Hoofdstuk 3 analyseert hoe de gebrekkige wetgeving inzake bouwveiligheid het aanhoudende tekort aan arbeidskrachten in de Chinese bouwsector vergroot. Tevens wordt geanalyseerd welke wettelijke hervormingsmaatregelen tot fundamentele verbeteringen zouden kunnen leiden. Het hoofdstuk bespreekt drie niveaus, respectievelijk de onuitvoerbaarheid van de belangrijkste veiligheidsregels in de bouw, de tekortkomingen van de arbeidsovereenkomstenwetgeving en de verzekering tegen arbeidsongevallen en het ondermijnen van het aansprakelijkheidsstelsel. Het kan moeilijk zijn om direct een effectiever wettelijk kader op te stellen, maar er kunnen onmiddellijk verbeteringen bereikt worden. Dit kan gebeuren door specifieke heikele kwesties aan te pakken die van cruciaal belang zijn voor het verbeteren van de bouwveiligheid in China en door het vertragen van de uitstroom van de werknemers in de bouwnijverheid. Dit hoofdstuk onderscheidt vijf hervormingsmaatregelen die de moeite van het proberen waard zijn.

Hoofdstuk 4 bespreekt hoe passend de Duitse Minimumloonwet – de nieuwste nationale minimumloonwetgeving binnen de EU – is opgezet om de afnemende rol van collectieve onderhandelingen in de loonvorming te verhelpen en de toenemende armoede onder werkenden in het hele land in te dammen. Achtereenvolgens worden, op basis van vier fundamentele onderdelen van een minimumloonstelsel, de overeenkomstige bepalingen van de Duitse wet onderzocht, regelmatig in vergelijking met de wetgeving van andere EU-lidstaten. Hieruit volgt dat Duitsland geen gebruik heeft gemaakt van positieve ervaringen in de wetgeving van zijn EU-partners, en een minimumloonregime heeft ontwikkeld dat in verschillende opzichten van dat van de andere lidstaten afwijkt. De aldus ingevoerde loonvloer verliest echter aan doelmatigheid en vaart, ten koste van de oorspronkelijke doeleinden die werden beoogd met de invoering ervan.

Hoofdstuk 5 vergelijkt modellen, onderliggende ideeën en resultaten van de Zweedse en Amerikaanse wetgeving inzake ouderschapsverlof. Uit het onderzoek volgt dat Zweden, waar het ouderschapsverlofbeleid wordt gekenmerkt door ruimhartigheid en flexibiliteit, tamelijk positieve resultaten heeft geboekt wat betreft economische groei en de tewerkstelling van mannen en vrouwen. In schril contrast hiermee heeft de VS geen

sterker concurrentievermogen of hogere werkgelegenheidscijfers verkregen, ondanks een veel minder genereus beleid voor ouderschapsverlof. De veronderstelde afweging tussen de omvang van ouderschapsuitkeringen en de economische prestaties is tot nu toe dus in tegenspraak met het empirische bewijs. In de Amerikaanse samenleving is er een sterke vraag naar betaald ouderschapsverlof. Dit speelt niet alleen onder werknemers, maar ook onder werkgevers.

Concentrerend op de ervaringen van het Verenigd Koninkrijk, reflecteert hoofdstuk 6 op de mogelijkheid om de drie wegen van medezeggenschap te coördineren, teneinde het tweeledige doel van hogere productiviteit en een sterker werknemersgeluid met elkaar in balans te brengen. De recente pogingen van Verenigd Koninkrijk om de vertegenwoordigende en de directe participatie op elkaar af te stemmen, zijn er inderdaad op gebaseerd dat deze twee wegen elkaar aanvullen, respectievelijk bevatten enkele onderdelen die hen in staat stellen dit te doen. Het beeld is echter verre van compleet. De 'derde weg' – financiële participatie – kan de vertegenwoordiging en directie participatie verder verbeteren en zal effectiever worden wanneer deze wordt gecombineerd met de twee andere. In theorie vormen de drie wegen waarschijnlijk een zichzelf aanvullend systeem, maar een praktische moeilijkheid is dat ze in de praktijk zelden naast elkaar bestaan en elkaar overlappen vanwege de verschillende maten van populariteit.

Op basis van bovenstaande onderzoeken kan worden vastgesteld dat, voor de regulering van arbeidsvoorwaarden, het belangrijkste dilemma ligt in de spanning tussen arbeidsrechtelijke bescherming en de economische doelstellingen van landen en ondernemingen. De uitdagingen waarvoor de wetgeving inzake arbeidsvoorwaarden staat kennen een grote variëteit aan verschijningsvormen. Dit vormt een constante puzzel voor beleidsmakers en tevens de oorzaak van belangenconflicten die in arbeidsvoorwaardenwetgeving in aanmerking moet worden genomen. Veel landen slagen er momenteel echter niet in om strategieën te vinden voor het reguleren van de binnenlandse arbeidsvoorwaarden in het tijdperk van globalisering. Dit is voornamelijk het gevolg van ontoereikende ideeën van beleidsmakers over de relatie tussen arbeidsbescherming en economische welvaart. Daarnaast staan er een aantal objectieve problemen in de weg aan het ontwikkelen van effectieve regels. De auteur suggereert dat beleidsmakers het verouderde stereotype beeld, dat het verbeteren van de binnenlandse arbeidsvoorwaarden en het bevorderen van de concurrentiekracht van de economie niet verenigbaar zijn moeten loslaten. Ondanks de enorme uitdagingen die de voortschrijdende globalisering met zich brengt, is er ruimte voor nationale wetgevers om passende regels en strategieën toe te passen om de doelstellingen van arbeidsbescherming en economische ontwikkeling te coördineren. Wanneer objectieve belemmeringen ertoe leiden dat het recht niet adequaat reageert op de veranderende economische wereld, moet wetgeving ernaar streven leiding te geven aan de relevante sociale actoren en voorwaarden te scheppen om deze belemmeringen te overwinnen.

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Curriculum Vitae

Qiuyin Hu was a legal counsel in China before starting her study in Leiden University. She obtained a bachelor's degree in law from Chengdu University of Technology, China and a master's degree in civil and commercial law from the law School of Tsinghua University, China. In her two-year career as a legal consultant, Qiuyin applied herself to dealing with labor disputes and providing professional advice to both employers and employees. Supervised by Prof. dr. G.J.J. Heerma van Voss and Prof. dr. B. Barentsen, Qiuyin Hu has conducted her PhD research in Leiden Law School since September 2013.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2017 and 2018:

MI-274 E.J.M. Vergeer, *Regeldruk vanuit een ander perspectief. Onderzoek naar de beleving van deregulering bij ondernemers*, (diss. Leiden)

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