Non-standard workers and freedom of association: a critical analysis of restrictions to collective rights from a human rights perspective*

Valerio De Stefano

* Previously published as WP C.S.D.L.E. "Massimo D'Antona".INT – 123/2015

1. Introduction.

This article deals with the collective labour law aspects of the labour protection of non-standard workers. It aims at contributing to further the debate on the need to adapt existing regulatory frameworks and policy strategies to face the growth of the non-standard workforce in recent decades. Arguably, a vast part of this debate has concentrated on issues related to individual employment law and social security[1743]. Less attention has been given, instead, to the questions that the emergence of non-standard work in modern labour markets poses to the regulation of collective rights[1744], and in particular of collective action.

This article argues that many of the existing limitations and restrictions to the right to collective bargaining and the right to strike disproportionately affect non-standard workers. Indeed, in some cases, these restrictions go as far as denying, legally or as a matter of fact, access of non-standard workers to collective rights. This article, thus, is meant at reorienting part of the current legal and policy debate on non-standard work on its collective dimensions. It provides examples of limitations that hamper the exercise of collective rights in a way that fails to keep pace with the changes occurred in labour markets and societies at large in recent decades, such as the increased number of workers involved in non-standard forms of employment, but also globalisation and some of the related consequences on business and work organisation. It also examines whether these limitations, many of which were formulated to address the economic and legal landscapes existing at the time of their enactment, are still fit to govern current labour markets or whether they have become unreasonably burdensome for the present. In doing so, constant reference will be to a legal development that has occurred since some of the existing standards on collective action were introduced, namely the evolution of the rationale of the right to strike "from being a weapon in collective bargaining into an individual human right", remarked by Professor Sir Bob Hepple QC, in one of his last works[1745]. In this perspective, this article argues that existing regulations of the right to strike should be reassessed to investigate whether they are compatible with the "human right" status of the right to strike and in particular whether they are necessary, in democratic societies, to ensure the fulfilment of other basic needs, in particular the exercise of other human rights.

[1743] Extensive references and data are provided in ILO, *Non-standard forms of employment. Report for discussion at the Meeting of Experts on Non-Standard Forms of Employment* (Geneva, 16–19 February 2015) (Geneva, ILO: 2015). The scientific literature on this debate is extremely vast: see A. Supiot, *Beyond Employment. Changes in Work and the Future of Labour Law in Europe* (Oxford: Oxford University Press, 2001); G. Bosch, 'Towards a new standard employment relationship in Western Europe' (2004) 42 *British Journal of Industrial Relations* 617-636; L. Vosko, *Managing the Margins Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford: Oxford University Press, 2010); G. Standing, *The Precariat: The New Dangerous Class* (London: Bloomsbury, 2011); M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations* (Oxford: Oxford University Press, 2011); J. Fudge, S. McCrystal and K. Sankaran, Challenging the Legal Boundaries of Work Regulation (Oxford: Hart, 2012); K. V. W. Stone and H. Arthurs (eds.), *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (New York: Russell Sage Foundation, 2013); Z. Adams and S. Deakin, 'Institutional Solutions to Inequality and Precariousness in Labour Markets' (2014) 52 *British Journal of Industrial Relations* 779-809; J. Rubery, 'Reregulating for inclusive labour markets', ILO Conditions of Work and Employment Series Working Paper No. 65.

[1744] See, however, the contributions published in C. Thronley, S. Jeffreys and B Appay (eds.), *Globalisation and Precarious Forms of Production and Employment: Challenges for Workers and Unions* (Cheltenam, Edward Elgar, 2010) and in *Meeting the challenge of Precarious Work: A Workers' Agenda* (2013) 5 *International Journal of Labour Research*; A. J. S. Calvin, 'Organizational Primacy: Employment Conflict in a Post–Standard Contract World' in Stone and Arthurs (n. 1).

[1745] B. Hepple, 'The Freedom to Strike and its Rationales' in B. Hepple, R. le Roux and S. Sciarra (eds.), *Laws against strikes. The South African Experience in an International and Comparative Perspective* (Milano: Franco Angeli, 2015).

Section 2 will discuss non-standard forms of employment as they were recently described by the International Labour Organisation and how the label "non-standard work" is preferable to some of its counterpart such as "precarious" and "atypical" work. It will be argued that reference to the distinction between "standard" and "non-standard" work is still meaningful as the standard employment relationship (SER) is still a central institution in modern labour markets both from an empirical and from a regulatory standpoint and that this distinction is also useful to investigate about the endogenous role of regulation, and also collective labour regulation, in the growth and spread of non-standard work arrangements. Section 3 will discuss some general problems that may affect non-standard workers in effectively exercising freedom of association and related collective rights. Section 4 will move from the consideration that the right to strike has evolved into an individual employment right and that this has a particular significance in assessing the existing restrictions to collective rights that may disproportionately affect non-standard workers. The other sections will analyse specifically examples of these restrictions. Section 5 will discuss the obstacles that regulation on strike ballots may pose to non-standard workers. Section 6 argues that existing standards on secondary action have grown outmoded as a consequence of the disintegration of the vertical firm and the related fissurisation of the workplace occurred in the last decades. Section 7 examines how antitrust regulation could prohibit some parts of the non-standard workforce to accede to collective bargaining and therefore to exercise freedom of association. Section 8 argues that the distinction between political and economic strikes fails to keep pace with policies that materially affect non-standard workers such as those aimed at shifting the focus of labour protection from the enterprise to labour markets as a whole. Section 9 concludes.

2. Non-Standard Work, the Enduring Role of the SER and the endogeneity of regulation in the growth of non-standard arrangements.

Non-standard forms of employment were recently described by the International Labour Organisation to "include, among others, fixed-term contracts and other forms of temporary work, temporary agency work and other contractual arrangements involving multiple parties, disguised employment relationships, dependent self-employment and part-time work". It is arguably an open description as the list of the possible work arrangements that are indicated as "non-standard" is a non-exhaustive one: nonetheless, it conveys a rather comprehensive picture of the various possible non-standard types of employment in formal economies across the globe. In this article, I will use the term "non-standard" work and use this description as a point of reference. This is not only because they were both adopted in the Conclusions of an ILO meeting of national experts selected on a tripartite basis, which were endorsed by the Governing Body of the ILO[1746], and therefore have met a significant consensus at the international level, but also because the term non-standard work is theoretically preferable to other terms that are often used to refer to similar phenomenon.

[1746] ILO, Governing Body, 323rd Session, Geneva, 12–27 March 2015, *Conclusions of the Meeting of Experts on Non-Standard Forms of Employment* (Geneva: ILO, 2015) available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meeting document/wcms_354090.pdf (Accessed 8 October 2015). The Conclusions start at page 50.

One of the terms most frequently used as counterparts of "non-standard employment", "precarious work", for instance, for as evocative as it is, it arguably extends much beyond the borders of non-standard work[1747]. A worker may very well experience precariousness also when they are in a SER, for instance when regulation against unfair dismissal is so scarce that she is not effectively protected against arbitrary acts of the employer or when a long length of service is necessary to qualify for labour protections such as maternity leave, redundancy pay or action against unfair dismissal. In addition, not every non-standard worker is precarious, as there could be non-standard work contracts that nonetheless afford sufficient stability of employment and income, such as some form of fixed-term or part-time contracts.

The expression "atypical work", instead, presents non-negligible flaws in legal terms: in some civil law traditions "*contratto atipico*", *contrato atípico*" or "*atypischer Vertrag*" technically refer to contracts that are not specifically regulated: this is not true for a vast number of non-standard contracts[1748]. On the contrary, fixed-term work, temporary agency work, dependent self-employment and part-time work are explicitly regulated in a vast number of legal systems, at the international, regional and national level[1749].

Having said so, it can still be argued that, by referring to "non-standard employment", one acquiesces with a SER-centric vision of labour markets, one that is inevitably becoming outmoded as the SER grows ever more displaced by other forms of work[1750] and social norms traditionally associated with the SER such as the male breadwinner model and the related *gender contract* on the division of labour in the household are receding[1751]. This objection, however, would be at odds with empirical evidence that suggests that "despite the growth of non-standard work in many regions of the world the [SER] remains the dominant form of employment in industrialized countries, accounting for 70 per cent of jobs in Europe and the United States. In emerging economies, such as Brazil and Argentina, most jobs created in the 2000s were formal jobs with indefinite contracts" [1752]. On the one hand, thus, the SER seems far from being vanishing in numerical terms. On the other, notwithstanding the removal or weakening of regulatory barriers against recourse to non-standard forms of work, both in terms of legislation than in terms of unionisation and collective bargaining, the SER maintains its role as a benchmark of employment regulation in most jurisdictions of the world[1753]. Nor should it be taken for granted that the growth of non-

---

[1747] On this point, also for comprehensive references to the debate, see N. Kountouris, 'The Legal Determinants of Precariousness in Personal Work Relations: a European Perspective' (2013) 34 *Comparative Labor Law & Policy Journal* 21-46; M. Paret 'Precarious Class Formations in the United States and South Africa' forthcoming in *International Labor and Working-Class History*.

[1748] See G. De Nova, *Il tipo contrattuale* (Padova: Cedam, 1974); M.C. Gete-Alonso y Calera, *Estructura y función del tipo contractual* (Barcelona: Bosh, 1979). More generally, on the idea of "type" and the law, see H. Wolf, 'Typen im Recht und in der Rechtswissenschaft' (1952) *Studium Generale* 195-205.

[1749] For a comparative overview of this regulation see ILO (n. 1).

[1750] See for instance K.V.W. Stone 'The Decline in the Standard Employment Contract: A Review of the Evidence' in Stone and Arthurs (n. 1).

[1751] See L. Vosko, 'Precarious Employment and the Problem of SER-Centrism in Regulating for Decent Work" in S. Lee and D. McCann, *Regulating for Decent Work: New Directions in Labour Market Regulation* (Basingstoke and Geneva: Palgrave Macmillan and ILO, 2011).

[1752] ILO (n. 1) 4.

[1753] G. Bosch (n. 1); Z. Adams and S. Deakin (n. 1).

standard work is a "natural" and irreversible economic phenomenon that is independent from the relevant regulatory framework: it can instead be argued that regulation plays an endogenous role in the emergence and spread of non-standard work in different countries[1754]. A prominent example in this respect, is the development of the doctrine of *Mutuality of Obligation* and its impact on the spread of casual employment, particularly in the form of zero hour arrangements, in the United Kingdom[1755]. This is not only true for regulation that allows or enlarges the scope of lawful recourse to various forms of non-standard work[1756] but also for regulation that promotes it as a cheap alternative to standard workers. This is arguably the case of some existing social security and unemployment benefit regulation in some European countries such as "mini-jobs" in Germany and "zero hour" contracts in the United Kingdom[1757]. In Italy, instead, the spread of "parasubordinate" work was also arguably an unintended effect of civil procedural rules and social security regulation[1758].

Restrictions and limitations to collective rights that disproportionately affect non-standard workers can be another prominent example of regulation providing undue incentives to recur to non-standard work. Examining these restrictions and advocating their revision, therefore, does not imply an acknowledgement that the erosion of the SER both in empirical terms and as a regulatory model is an irreversible, let alone completed, phenomenon.

A further objection can be that there is no need to adopt a generic "umbrella" term to group the distinct forms of work contract deviating from the SER and that it is instead opportune to analyse and refer to any such form individually. Despite being aware of the potential shortcomings of adopting any generic term to group different legal phenomena, it can however be useful to have

---

1754 See S. E. Gleason (ed.), *The shadow workforce: Perspectives on contingent work in the United States, Japan, and Europe* (Kalamazoo, Michigan: Upjohn Institute for Employment Research, 2006). G. Meardi, 'The Claimed Growing Irrelevance of Employment Relations" 56 *Journal of Industrial Relations* 594-605; Z. Adams and S. Deakin (n. 1). On the general endogenous role of regulation in labour markets see S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford: Oxford University Press, 2005).

1755 See N. Countouris, 'Uses and Misues of 'Mutuality of Obligations' and the Autonomy of Labour Law' LRI WP 1/2014 (March 2015). See also A. Adams, M. Freedland and J. Prassl, 'The "Zero-Hours Contract: Regulating Casual Work or Legitimising Precarity?' ELLN - Working Paper No 5 (March 2015).

1756 See, for instance, also for a review of the economic literature in this respect, M. Aleksynska and J. Berg, Understanding firms' demand for temporary labour in developing countries', forthcoming in the ILO Conditions of Work and Employment Series Working Paper: using data from the World Bank Enterprise Survey of private sector firms in developing countries, the Authors show how firms in countries where fixed-term contracts are prohibited for permanent tasks are statistically less likely to use temporary labour.

1757 See Z. Adams and S. Deakin, *Re-regulating Zero Hours Contracts* (Liverpool: the Institute of Employment Rights, 2014).

1758 See V. De Stefano, 'Smuggling-in Flexibility: Temporary Work Contracts and the "Implicit Threat" Mechanisms. Reflections on a New European Path' (2009) 4 *Labour Administration and Inspection Programme LAB/ADMIN Working Document* (Geneva: International Labour Organization), 24, arguing that the first time Italian law meaningfully regulated parasubordinate relationships or "collaborazioni", "only procedural rules were extended to them". However, "the mere fact that the legislator mentioned them as self-employment relationships on a continuous and coordinated basis, distinct from traditional relationships of that kind, was interpreted by firms as the legislator's consent to firm-integrated working activities not covered by the legal and collective protections of the employment relationship. In 1973, the first elements and practices of Post-Fordism were already starting to gain ground. This resulted in the ever-increasing use of "collaborazioni" as a cheaper alternative to permanent employment relationships […] When, in 1995, modest social security contributions and employment tax were extended to "collaborazioni", this, far from constituting a disincentive, fostered the idea that they were a low-cost substitute for employment, in consequence of which they became more popular than ever".

a general framework to refer to, when dealing with non-standard work. This is the case, for instance, when addressing situations in which two or more "non-standard" dimension sum up: a worker may very well be hired on a fixed-term contract by a temporary work agency and work part-time at the same time. Forms of non-standard work are often associated and should not be regarded only on a discrete basis. In addition, referring to a more general class can prove worthwhile, when it is necessary to examine some common problems that affect non-standard workers. One of such problems is certainly the widespread difficulty to effectively access the Fundamental Principles and Rights at Work, such as freedom of association and the effective recognition of the right to collective bargaining, elimination of all forms of forced or compulsory labour, effective abolition of child labour, elimination of discrimination in respect of employment and occupation.

Examining all these difficulties goes beyond the scope of this article but, it is worthwhile to mention them to stress the point that non-standard work raises issues that relate to human rights besides freedom of association. It is a fact, for instance, that workers in vulnerable categories, which are most at risk of discrimination, are almost systematically over-represented in non-standard work[1759]. Having said so, freedom of association is one of the areas that certainly deserves more attention. The following section will argue that non-standard workers may indeed face peculiar hardships in exercising this freedom.

3. Freedom of association and non-standard workers.

Notoriously, freedom of association is not only a right in itself but is also an "enabling right" as its exercise may be pivotal in securing the effective exercise of other workers' right[1760]. Collective rights such as the right to collective bargaining and the right to industrial action are arguably some of the key instruments through which labour rights are secured. The right to strike, in particular, and especially when industrial action is allowed for conflicts of rights, may also be a chief tool of private enforcement for labour rights[1761]. This is also why special attention must be paid to the right to strike when dealing with non-standard work.

Indeed, some non-standard workers, and in particular those in temporary relationships, irrespective of the specific type of contract, may be reluctant to exercise some of the labour rights they could be entitled to, in fear that their contract may not be renewed or prolonged at its expiry, should they do so[1762]. This actual or perceived "implicit threat" of losing one's job may cause

---

[1759] See ILO (n. 1) for data in this respect.

[1760] On the role of trade unions in ensuring enforcement and effectiveness of employment rights, see, recently M. O'Sullivan, T. Turner, M. Kennedy, and J. Wallace, 'Is Individual Employment Law Displacing the Role of Trade Unions?' (2015) 44 *Industrial Law Journal* 222-245; on the inadequacy of individual employment law in securing effective labour protection, particularly for non-standard casual workers, see A. Polliert, 'The Unorganised Worker: The Decline in Collectivism and New Hurdles to Individual Employment Rights' (2005) 34 *Industrial Law Journal* 217-238.

[1761] In jurisdictions were industrial action can only be called to deal with conflicts of interests, instead, strike may however be essential in securing rights for non-standard workers such as "stabilisation" plans: I owe credit, without implicating, to Judy Fudge for the observation on conflicts of interest.

[1762] The ILO Supervisory Bodies highlighted how recourse to non-standard forms of work may have a detrimental impact on union rights and collective bargaining. For instance, the Committee of Experts on the Application of Convention and Recommendations (CEACR) reported that "one of the main concerns indicated by trade union organizations is the negative impact of precarious forms

severe decent work deficits as a matter of fact, even when the applicable regulatory framework is not unfavourable to non-standard workers[1763]. The right to strike may be relevant in different and opposite ways in this respect. One the one hand, as an instrument of private enforcement of rights, the right to industrial action can facilitate rendering labour rights effective for non-standard workers without their having to recur to individual enforcement mechanisms such as grievance procedures or judicial claims. On the other hand, the right to strike and other collective rights, including the right to organise in itself may be particularly affected by the "implicit threat" of losing one's job[1764]. This is also because, whilst in some jurisdictions specific statutory remedies may be in place against dismissals originating from industrial disputes and actions, or discriminatory or retaliatory dismissals against union members or workers representative, such remedies may not extend or be easily circumvented for non-standard workers in temporary work, by simply not renewing or prolonging their contracts, or for "on-demand" workers, by "zeroing down" their working hours.

This may also offer an explanation of the difficulties in organising non-standard workers in trade unions, albeit in some cases failure to organise them can be attributable to frictions and reluctance of the "standard" unionised workforce to allow non-standard workers to join or to act on their behalf[1765]. In several countries, however, trade unions have taken steps to secure unionisation and protection, also via collective bargaining, for non-standard workers[1766]. Nonetheless, "implicit threat" effects and the potential shortcomings and loopholes in anti-retaliatory regulation can pose serious hurdles to these efforts.

---

of employment on trade union rights and labour protection, notably short-term temporary contracts repeatedly renewed; subcontracting, even by certain governments in their own public service to fulfil statutory permanent tasks; and the non-renewal of contracts for anti-union reasons. Some of these modalities often deprive workers' access to freedom of association and collective bargaining rights, particularly when they hide a real and permanent employment relationship. Some forms of precariousness can dissuade workers from trade union membership", see ILO, CEACR, *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization*, 2008, Report III (Part 1B), International Labour Conference, 101st Session, 2012 (Geneva: ILO, 2012) 386. The ILO Committee on Freedom of Association (CFA) observed how "in certain circumstances, the renewal of fixed-term contracts for several years may alter the exercise of trade union rights: see Chile – CFA, 368th Report, Case No. 2884.
http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3128139 (Accessed 8 October 2015).

[1763] See V. De Stefano (n. 16).

[1764] V. De Stefano (n. 16); J. Holdcroft, 'Implications for union work of the trend towards precarization of work' *Meeting the challenge of Precarious Work: A Workers' Agenda* (n. 2) 43 reports that "the most important reason for precarious workers not joining trade unions stems from a legitimate fear of losing their job. Whenever unions conduct surveys to discover why such workers do not join unions, this is the principal reason given". See also E. Hatton 'Temporary Weapons: Employers' Use of Temps Against Organised Labour' (2014) 67 *ILR Review* 86–110.

[1765] Holdcroft (n. 22) discusses cases in which unions had to reform their statutes to allow non-standard workers to join and strategies to overcome hostility from existing members.

[1766] See, for instance, R. Gumbrell-McCormick, 'European trade unions and 'atypical' workers' (2011) 42 *Industrial Relations Journal* 293–310; S. Hayter and M. Ebisui, 'Negotiating parity for precarious workers' *Meeting the challenge of Precarious Work: A Workers' Agenda* (n. 2); K. Nakamura and M. Nitta 'Organizing Nonstandard Workers in Japan: Old Players and New Players' in Stone and Arthurs (n. 1); M. Keune, 'Trade Unions, Precarious Work and Dualisation in Europe' in W. Eichhorst and P. Marx (eds.), *Non-Standard Employment in Post-Industrial Labour Markets An Occupational Perspective* (Cheltenam: Edward Elgar, 2015); ILO (n. 1); F.L. Cooke and R. Brown, 'The Regulation of Non-Standard Forms of Work in China, Japan and Republic of Korea A Study to the International Labour Organization' ILO Conditions of Work and Employment Series Working Paper No. 64.

As stated above, the debate on the need to adjust existing regulations to take into account the increased share of non-standard workers in labour markets in recent times has commonly being treated from an individual employment law standpoint. The following sections of this article highlight how there are important collective labour law issues that need to be rediscussed to keep pace with the growth of the non-standard workforce in modern labour markets. As mentioned above, some existing restrictions might have disproportionate impact on the non-standard workforce and indeed provide undue incentives to recur to these forms of work as a cheap alternative to standard employment. Some of these restrictions, it will be highlighted below, might indeed have been introduced with regard to models of business and work organisation no longer dominant. In analysing these restrictions to assess whether they are still reasonable for the present, however, not only new trends in the economic landscape but also significant legal developments in the theoretical construction of labour rights, and in particular the rights to collective bargaining and to take collective action, occurred in relatively recent times, must be taken into account. These developments will be examined in the next section.

4. Collective labour rights as human rights and implications for non-standard workers.

In one of his last works Professor Hepple gave account of the evolution of the right to strike from a tool in collective bargaining to a human right[1767]. This issue forms part of the general debate on the construction of labour rights as human rights[1768] and has gathered significant attention in connection with recent landmark decisions of supranational and national supreme courts[1769].

[1767] B. Hepple (n. 3). The same argument was hold by S. Sciarra ''Heritage and Adjustment': Some Concluding Remarks' in B. Hepple, R. le Roux, S. Sciarra (n. 3). See T. Novitz, *International and European Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union* (Oxford: Oxford University Press, 2003); K.D. Ewing, 'Myth and Reality of the Right to Strike as a "Fundamental Labour Right"' (2013) *International Journal of Comparative Labour Law and Industrial Relations*, 145-165.

[1768] Comprehensive contribution and references to this debate are provided in C. Fenwick and T. Novitz, *Human Rights at Work: Perspectives on Law and Regulation* (Oxford and Portland, Oregon: Hart, 2010). See also D. Kolben, 'Labor Rights as Human Rights?' *Virginia International Law Review* (2010) 50 450-484; V. Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 *Europan Labour Law Journal* 151-172. J. Fudge 'The New Discourse of Labour Rights: From Social to Fundamental Rights?' (2007) 29 *Comparative Labour Law & Policy Journal* 29-66 and V. Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' *Human Rights Law Review* (2013) 13 529-555 argue in favour of the recognition of labour right as human rights; contrary to this recognition, A. Arthurs, 'Who's afraid of globalization? Reflections on the future of labour law' in J.D.R. Craig and S.M. Lynk (eds.), *Globalization and the Future of Labour Law* (Cambridge: Cambridge University Press, 2006); an intermediate approach is followed by H. Collins, 'Theories of Rights as Justifications for Labour Law' in G. Davidov and B. Langille (eds.), *The Idea of Labour Law* (Oxford: Oxford University Press, 2011).

[1769] European Court of Human Rights (ECtHR), *Demir and Baykara v Turkey*, 12 November 2008, Application no. 34503/97; ECtHR, *Enerji Yapi-Yol Sen v Turkey*, 21 April 2009, Application no. 68959/01; ECtHR, *Danilenkov and Others. v Russia*, 10 December 2009, Application no. 67336/01; ECtHR, *Sindicatul "Păstorul cel Bun" v Romania*, 31 January 2012, Application no. 2330/09; ECtHR, *RMT v United Kingdom*, 8 April 2014, Application no. 31054/10. Constitutional Court of South Africa, *Bader Pop (pty) Ltd v NUNMSA*, 2002 Industrial Law Journal (South Africa) 104 (LAC); Supreme Court of Canada, *Dunmore v Ontario (AG)*, [2001] 3 S.C.R. 1016, 2001 SCC 94; Supreme Court of Canada, *Health Service and Support – Facilities Subsector Bargaining Assn. v British Columbia,* [2007] SCC 27; Supreme Court of Canada, *Ontario (AG) v. Fraser*, [2011] SCC 20. On the decisions and their implications see Langille B. (2008). Can we Rely on the ILO? (2007) 13 *Canada Journal of Labour and Employment Law* 273-300; S. van Eck, "Constitutionalisation of South African Labour Law: An Experiment in the Making' in Fenwick and Novitz (n. 26); K.D. Ewing, J. Handy, 'The Dramatic Implications of Demir and Baykara' (2010) 39 *Industrial Law Journal*, (2010) 2-51; F. Dorssemont 'How the European Court of Human Rights gave us *Enerji* to cope with *Laval* and *Viking*' in M.A. Moreau (ed.), *Before and after the economic crisis: what implications for the 'European Social Model'?* (Cheltenham: Edward Elgar, 2011); J. Fudge, 'Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the *Fraser* Case' (2012) 41 *Industrial Law Journal* 1-29; T. Novitz, 'The Internationally Recognized Right to Strike: A Past, Present, and Future Basis upon Which to Evaluate Remedies for Unlawful Collective Action?' (2014) 30 *International*

Whilst examining the reasons for considering labour rights, and the right to strike in particular, as human rights goes beyond the scope of this article, this question is strongly interrelated with the issue of securing effective access of non-standard workers to collective rights.

Categorising workers' right to take industrial action as a human right, actually, must prompt a reflection on the legal restrictions posed to this right. It goes without saying that the right to strike, as any other right, including human rights, can be limited. Indeed, no legal system recognises an entirely unrestricted right to strike, even when this right is protected at the constitutional level[1770]. Nonetheless, considering the right to strike a human right also calls for these restrictions to be limited only to those strictly necessary in securing the exercise of other human rights. Allowing broader restrictions, indeed, may endanger not only the right to strike: a severely limited human right to industrial action would imply tolerance for unnecessary limits to human rights and put in jeopardy, or at least water down, the entire human rights discourse. Reviewing current restrictions, as already mentioned, is also essential to ensure that the possibility of meaningfully exercising collective labour rights is granted to all workers, as existing limits to unionisation, collective bargaining and industrial action may pose significant barriers for increasing portions of the workforce and in particular for non-standard workers.

There are several important aspects that call for a joint analysis of the classification of labour, and in particular collective rights as human rights and the access of non-standard workers to those rights.

A rationale for approaching labour rights in connection with human rights lies with managerial prerogatives[1771]. The employment relationship is notoriously based on the social and legal power of one party *vis-à-vis* the other. In any jurisdiction, laws, customs and practices grant employers with extensive rights on workers, such as the power to direct and control their working activity and the power to discipline them in case of breach of their duties: managerial prerogatives are therefore not only a result of economic phenomenon such as inequality of bargaining power but are also enshrined in regulation that vest employers with an authority over their workers that goes beyond social norms and is also recognised from the legal standpoint[1772]. These prerogatives and this authority may affect the workers' dignity as human beings and, therefore, their limitation and rationalisation – which is one of the core concepts of labour law – is also relevant from the

---

Journal of Comparative Labour Law and Industrial Relations 357–379; A. Bogg and K.D. Ewing, 'The Implications of the RMT Case' (2014) 43 *Industrial Law Journal* 221-252; V. Velyvyte, 'The Right to Strike in the European Union after Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence' (2015) 15 *Human Rights Law Review* 73-100.

[1770] On the limitations in national constitutional traditions see H. Cheadle, 'Constitutionalising the Right to Strike' in B. Hepple, R. le Roux, S. Sciarra (n. 3); a related analysis concerning international and regional systems is carried out by T. Novitz, 'The International and Regional Framework' ibid. A comprehensive comparative review of national regulations of the right to strike is contained in ILO, *Background document for the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level (revised) (Geneva, 23–25 February 2015)* (Geneva: ILO, 2015); see also B. Waas (ed.), *The Right To Strike. A Comparative View* (Alphen aan den Rijn: Kluwer Law International, 2014).

[1771] V. De Stefano, La protezione del diritto di sciopero nella dialettica tra corti e organi di supervisione internazionali (2014) *Giornale di Diritto del Lavoro e di Relazioni Industriali* 461-494.

[1772] See R. De Luca Tamajo, *La Norma inderogabile nel diritto del* lavoro (Napoli: Jovene, 1976); A. Supiot, *Critique du droit du travail* (Paris: PUF, 1994)*;* E. Dockes, 'De la supériorité du contrat de travail sur le pouvoir de l'employeur' in *Analyse juridique et valeurs en Droit social, Etudes offertes à Jean Pélissier* (Paris : Dalloz*,* 2004).

human rights' perspective[1773]. Non-standard workers are arguably exposed to some mechanisms that may magnify employers' managerial prerogatives such as "implicit threat" [1774] effects as well as "extended entry tournament" effects[1775]. Reinforcing instruments to counter the potential enhancement of managerial prerogatives is therefore essential to secure protection of their human dignity at the workplace. Since the rights to collective bargaining and action represent a chief instrument of limiting and rationalising managerial prerogatives[1776], granting access of non-standard workers to these rights is also pivotal to provide effective safeguard of their human rights. Moreover, coupling the labour rights' and human rights' discourses in this respect is also opportune for addressing other dimensions of vulnerability of non-standard workers given the mentioned over-representation of, among others, women, immigrants, young people and senior workers among the non-standard workforce[1777].

The construction of collective rights as human rights, therefore, can undoubtedly have specific beneficial effects for non-standard workers that must be given adequate attention when reassessing restrictions to the right to collective bargaining and the right to strike in order to keep pace with the growth of the non-standard workforce. In the following sections, I will highlight some of the areas in which this reassessment seems especially needed in light of what has been discussed so far.

5. Fragmented societies and collective rights: non-standard workers, minority unions and strike ballots.

Compelling arguments to justify the right to strike where famously presented by Professor Sir Otto Kahn Freund[1778] in the 1970s and were recently re-examined by Bob Hepple[1779] in light of developments that have occurred since those arguments were first outlined. In this analysis, a

---

[1773] See L. Mengoni, 'I poteri dell'imprenditore' in L. Mengoni, *Diritto e valori* (Bologna: il Mulino, 1985. The essay is dated 1975); H. Collins, 'Utility and rights in Common Law Reasoning: Rebalancing Private Law through Constitutionalization' LSE Law, Society and Economy Working Papers 6/2007; O. De Schutter, 'Human Rights in Employment Relationships: Contracts as Power' in F. Dorssemont, K. Lörcher, I. Schömann (eds.), *The European Convention on Human Rights and the Employment Relation* (Oxford: Hart Publishing, 2013).

[1774] De Stefano (n. 16).

[1775] D. Marsden, 'The growth of extended "entry tournaments" and the decline of institutionalised occupational labour markets in Britain' in Lee and McCann (n. 9), describes extended entry tournaments as mechanisms emerged in modern labour markets whereby workers are constrained to engage in several short-term and project-based work arrangements used by firms as screening processes before having the opportunity to be employed on a long-term basis, this also for occupation and in sectors where access to stable employment was formerly more direct.

[1776] See O. Kahn-Freund, *Labour and the Law* (London: Stevens 1972); S. Liebman, *Individuale e collettivo nel contratto di lavoro* (Milano: Giuffrè 1993).

[1777] Exemplary in this respect are the issues raised by the Swedish *Lex Laval*, which was hold by the European Committee on Social Rights (ECSR) to violate not only Articles 6§1 and 6§4 of the European Social Charter, protecting the rights to collective bargaining and strike, but also the rights of migrant workers not to be discriminated against in respect to "remuneration and other employment and working conditions " and "membership of trade unions and enjoyment of the benefits of collective bargaining", under Article 19§4 of the same Charter. See *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Svezia*, 3 July 2013, Complaint No. 85/2012; De Stefano (n. 29).

[1778] O. Kahn-Freund and B. Hepple, *Laws against Strikes* (London: Fabian Research Series 305, 1972).

[1779] B. Hepple (n. 3).

chief development is globalisation that, together with freedom of movement of capitals, magnifies employers' managerial prerogatives by allowing them to delocalise production. I will return to the particular significance of globalisation with regard to freedom of association and non-standard work in section 6 below.

Besides globalisation, however, the world of work has endured other profound transformations that have also driven changes in other sectors of society. It is an obvious statement that societies are more complex and uneven than they were when some of the existing regulation of unionism and collective action were devised. One does not need to subscribe entirely to Guy Standing's argument that the growth in non-standard work originated a class, "the Precariat", which is structurally separated and distinct from other sectors of the workforce[1780], to recognise that the world of work, particularly in industrialised countries, is now more composite and fragmented than it was four decades ago. This also calls into question some existing forms of labour representation. Most representative unions and union confederations remain pivotal institutions within labour markets and are fundamental in promoting solidarity across different sectors of the workforce and at combating inequality[1781]. Indeed, one of the potential effects of policies aimed at the decentralisation of collective bargaining is arguably that decentralisation could weaken labour solidarity at the expenses of the weakest part of the workforce, and in particular of "outsider" non-standard workers[1782]. More complexities in societies and in the world of work, however may also result in the emergence of minority unions or other more "fluid" forms of workers' movements: this process may very well also regard non-standard workers, given their abovementioned possible reluctance to join tradition unions or difficulties in doing so.

Reassessing some of the existing regulation on unionisation and collective action may thus be necessary to better govern labour relations and avoid more severe social unrest. Several commentators have underlined how high numbers of non-standard workers, the fragmentation of the workforce through subcontracting, and its link with rivalry and violence between different unions, had a part in the notorious event in Marikana[1783]. It would certainly be an exaggeration to suggest that these tragic incidents are an inevitable outcome of the so-called fissurisation of the workplace and the deriving limitations in workers' representation[1784]. Nonetheless, these

---

[1780] See G. Standing (n. 1); G. Standing, *A Precariat Charter: From Denizens to Citizens* (London: Bloomsbury, 2014).

[1781] See M. Ebisui, 'Non-standard workers: Good practices of social dialogue and collective bargaining"' Dialogue Working Paper No. 36 (Geneva: ILO, 2012); S. Hayter and M. Ebisui (n. 24); S. Hayter, 'Unions and Collective Bargaining' in J. Berg (ed.), Labour Markets Institutions and Inequality: Building Just Societies in the 21st Century (Cheltenham and Geneva: Edward Elgar and ILO, 2015).

[1782] V. De Stefano, 'A Tale of Oversimplification and Deregulation: The Mainstream Approach to Labour Market Segmentation and Recent Responses to the Crisis in European Countries' (2014) 43 *Industrial Law Journal*, 253-285.

[1783] C. Chinguno, 'Marikana: fragmentation, precariousness, strike violence and solidarity' (2013) 40, *Review of African Political Economy* 639–646; K. Forrest, 'Marikana was not just about migrant labour', 13 September 2013 *Mail & Guardian*, available at http://mg.co.za/article/2013-09-13-00-marikana-was-not-just-about-migrant-labour (Accessed 8 October 2015). On the Marikana massacre, more in general, see contributions in B. Hepple, R. le Roux and S. Sciarra (n. 3) and in particular J. Berg and S. Howell, 'Running the Gauntlet: Understanding Policing Responses and Strategies to Strike Action'. See also T. Ngcukaitobi, 'Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana" (2013) 34 *Industrial Law Journal* (South Africa) 836- 858.

[1784] See D. Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge, Massachusetts and London: Harvard University Press, 2014). On the disintegration of vertical firms and its effects on workplaces and labour regulation see the landmark study H. Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (1990) 10 *Oxford Journal of Legal Studies* 353–380.

phenomena call for action to prevent and solve inter-union, or other intra-workforce, conflicts that may occur as a consequence of fissuring practices.

The recognition of the right to strike and collective labour rights as human rights should play a prominent role in these efforts. Safeguarding human rights is complete and effective only if those rights are also afforded to and protected for minorities; the regulation of collective bargaining and collective action should not be so restrictive to irremediably impede minority unions to accede to those rights[1785]. Also very importantly, it should be verified whether existing restrictions impose disproportionate hurdles for non-standard workers to unionise, bargain collectively and go on strike lawfully.

A first limitation that may pose excessive burden to some non-standard workers is strike ballots. Strike ballots normally require the presence of well-organised unions and a significant union density within the relevant bargaining unit. Moreover, the relevant regulations may also require unions to provide detailed information on the procedure followed, the electorate, the turnout etc. All this can prove extremely burdensome when material numbers of non-standard workers may be interested in striking.

As recently argued by Luisa Corazza and Emma Fergus, ballot regulation may impose material obstacles for non-unionised workers to initiate a strike[1786]. Since, as discussed above, unionisation of non-standard workers can be difficult or scarce, also because they may be reluctant to unionise, in fear of retaliation, or difficult to reach by existing unions, regulation mandating strike ballots can disproportionately affect non-standard workers. This requires attentive scrutiny when assessing compliance of this regulation with the principles of freedom of association and of contrast to discrimination, including indirect discrimination, given the over-representation of women, immigrants, youth and seniors among non-standard workers[1787]. Moreover, organising strike ballots and providing precise information on the relevant workforce can become excessively onerous in relation to very "casualised" workplaces. Highly volatile non-standard work arrangements such as job-on-call, zero-hour contracts and marginal part-time work, together with extremely flexible schedules, are increasingly spreading in developed countries[1788]. This renders

---

[1785] According to the ILO CEACR, the recognition of most representative unions and the grant of specific advantages and rights to these unions is compatible with the principles of Freedom of Association enshrined in the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), provided that this does not entail 'the effect of depriving those trade unions that are not recognized as being amongst the most representative of the essential means of defending the occupational interests of their members': see, ILO, CEACR (n. 20) 36.

[1786] L. Corazza and E. Fergus, 'Representativeness and the Legitimacy of Bargaining Agents' in B. Hepple, R. le Roux, S. Sciarra (n. 3).

[1787] Notoriously, the UK regulation mandating strike ballots passed the ECtHR's scrutiny under the lenses of freedom of association in the *RMT* case (n. 27), despite the fact that the ILO CEACR had expressed concern on this regulation. In *RMT*, the Court was content with the fact that the workers eventually managed to organise a successful strike, since "the Court can only examine complaints in light of their concrete facts": see A. Bogg and K.D. Ewing (n. 27). RMT, therefore, does not prevent regulations on strike ballots from being reassessed on the basis of other circumstances, such as the significant impediment that such regulations may impose to non-unionised workers and in particular non-standard workers in the exercise of the right to strike.

[1788] See, J. Berg and V. De Stefano, 'Beyond "casual work": old and new forms or casualization in developing and developed countries and what to do about it', presentation at the 4th Conference of the Regulating for Decent Work Network (Geneva, 8-10 July 2015) available at http://www.rdw2015.org/download (Accessed 8 October 2015); J. Messenger and P. Wallot, 'The Diversity of Marginal Part-Time' INWORK Policy Brief No. 7 (Geneva: ILO, 2015).

the presence within a particular work unit unstable and workers more detached from their workplaces and from existing workers' representatives. Workforces are more scalable and dependent upon peaks in demand and therefore more variable: in these circumstances, organising a ballot and providing accurate information thereof could prove impossible, as a matter of fact. This could deprive workers of access to the ability to strike lawfully, encouraging wildcat strikes and illegal forms of collective action. The result may well be increasing tensions at the workplace and also within the workforce and prove far more disruptive for societies at large than less restrictive strike laws. In such a case, removing or relieving those hurdles would not only be just but also likely prevent unfairness from stirring unnecessary conflicts[1789].

6. Promoting solidarity: secondary action, fissured workplaces and non-standard workers.

Fostering solidarity among different workers and trying to counter the most detrimental effects of workforce's fragmentation is another way to prevent conflicts. Very recently, for instance, the United States National Labour Relations Board refined its joint-employment status making it easier for workers of subcontractors to be recognised as employed by the principal company jointly with the subcontractor for the purpose of collective rights (*Browning-Ferris Industries of California, Inc.*)[1790]. This decision, adopted avowedly "to better effectuate the purposes of the Act in the current economic landscape" can prove a landmark one also for other future decisions on other fissuring practices such as franchising. Another case pending before the NRLB[1791] will determine whether it is possible to include both employees employed solely by the user firm and jointly-employed employees in a same bargaining unit without both employers' consent: a positive answer to this question would be pivotal in supporting non-standard workers' collective right and promote solidarity with other workers.

But also reviewing the standards for secondary actions and sympathy strike may be essential to foster solidarity and prevent conflicts. Existing restriction to these forms of industrial action may fail to keep pace with the changes in workplace's organisations driven by vertical disintegration of businesses, and related fragmentising practices such as subcontracting. The Italian case is exemplary in this respect: secondary action in Italy is still criminally sanctioned under an article of the Penal Code enacted in 1930 by the Fascist Regime. In 1962 the Constitutional Court declared that sympathy strikes are legitimate when secondary actions are adopted in support of a pending primary strike carried out by workers in the same sector, when the relevant workers' interests are affine to an extent that it is presumable that these interests would be frustrated in lack of a joint effort[1792]. It is evident that any such standard is no longer suited to operate in a modern

---

[1789] On the risk that restrictive laws on strikes may prompt unlawful collective action and cause more severe unrest than the one they are meant to avoid see M. Ford and T. Novitz, 'An Absence of Fairness… Restrictions on Industrial Action and Protest in the Trade Union Bill 2015' (2015) 44 *Industrial Law Journal*, discussing a current bill aimed at tightening the regulation of union action and collective rights in the United Kingdom. For an analysis of the ineffectiveness of regulation of industrial action in essential services in South Africa, see T. Cohen and R. le Roux, 'Limitations of the Right to Strike in the Public Sector and Essential Services' in B. Hepple, R. le Roux and S. Sciarra (eds.) (n. 3).

[1790] NRLB, *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015) Case 32–RC–109684.

[1791] NRLB, *Miller & Anderson, Inc.*, Case No. 05-RC-079249.

[1792] Corte Costituzionale, 28 Dicembre 1962, n. 123 in *Foro Italiano*, 1963, I C. 5 (n. 14).

labour market and can be particularly detrimental to non-standard workers. Workers of a principal business, for instance, would not be able to go on strike in support of workers of a subcontractor unless they carried out a strike in the first place[1793]. If these latter workers were scarcely unionised or reluctant to call an industrial action in fear of retaliation from the subcontractor or the principal business, the current standard would impede action from other workers. Moreover, in the current economic landscape of vertical disintegration, being able to act in secondary strikes only to support workers in the same sector is far too limited, as the production may be fissured among companies of several sectors. This is particularly true in the Italian industrial relation system, where a sector is normally defined by making reference to the national collective bargaining agreement applied. As several of such agreements may apply in the same production chain, the current standard for sympathy strike would prevent secondary action to a much greater extent than in the 1960s, neutralising solidarity in favour of the weakest parts of the workforce, in particular non-standard workers[1794].

The same or even worse problems could be faced when cross-border production and supply chains are involved. Domestic standards for sympathy actions were chiefly devised before globalisation, and the related steep increase in commercial and production exchanges, occurred[1795]. As such, they could be ill-suited to serve in modern times: cross-border solidarity may be pivotal in supporting decent work standards in countries where weak labour organisation exist[1796], also via action from stronger national labour movements[1797]. This is all the more relevant when codes of conducts, international framework agreements and other commitments are in place, which are not legally binding or not easily actionable in court. Less restrictive secondary action standards would enable workers to better monitor the compliance with these commitments and, where necessary, to sanction their "breach" by means of industrial disputes and collective actions. This would enhance enforcement of businesses' commitments that may otherwise remain merely voluntary in nature and may be pivotal in securing compliance with other fundamental human rights' objectives such as the effective ban on discrimination and child and forced labour. Freedom of association and collective rights might thus also act as enabling rights on a cross-border basis:

[1793] Also the French standard, set out by *Cour de Cassation*, Crim. of 12 Janvier 1971, D. 1971 129, requires that a lawful primary strike is carried out to proceed with a secondary action.

[1794] In this respect, it seems that the conclusions of the ECtHR in *RMT* (n. 27), deeming a ban on secondary action compatible with art. 11 of the European Convention on Human Rights, by distinguishing between primary and secondary elements of freedom of association when assessing the legitimacy of the ban, overlooked the severe hardships that an increasing number of workers, most notably non-standard workers, face to organise in unions and exert their collective rights at present times. In such circumstances, a ban on secondary action could go as far as neutralising the sole realistic way of providing those workers with meaningful voice or bargaining power: the distinction between primary and secondary elements of freedom of association appears therefore to be artificial in this respect, also considering the comments of the ILO supervisory bodies and the ECSR with regard to the UK ban on sympathy action.

[1795] See, however, the discussion already done in Lord Wedderburn, 'Multi-national Enterprise and National Labour Law' (1972) 1 *Industrial Law Journal* 12-19 and O. Khan-Freund, 'A Lawyer's Reflections on Multinational Corporations' in (1972) 14 *Journal of Industrial Relations* 351-360.

[1796] In this respect, also for further references and for a discussion of a potential role of the EU in the protection of secondary action, see P. Germanotta and T. Novitz, Globalisation and the Right to Strike: The Case for European Level Protection of Secondary Action' (2002) 18 *International Journal of Comparative Labour Law and Industrial Relations* 67-82; for a recent analysis that takes into account the developments at the EU level in this regard, see F. De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford: Oxford University Press).

[1797] On transnational collective action see W. Warneck, 'Transnational Collective Action – Already a Reality?' in F. Dorssemont, T. Jaspers and A. van Hoek (eds), *Cross-Border Collective Actions in Europe: A Legal Challenge* (Antwerpen-Oxford: Intersentia, 2007).

reassessment and revision of existing national standards on solidarity actions, conceived in an era when international business exchanges were far more limited, seems therefore essential to keep pace with the modern reality of the global economy.

7. Legal restrictions to unionisation and collective bargaining of non-standard workers: the case of antitrust regulation.

Solidarity, of course, is not expressed only by means of industrial action: it can also be exerted by other collective actions not involving a strike, in particular unionisation and collective bargaining. In the last decades, as mentioned above, traditional unions have undertaken strong efforts in organising, and negotiating on behalf of, non-standard workers in many countries. These initiatives are pivotal to serve the aim of more inclusive labour market institutions and outcomes. Nonetheless, some existing legal obstacles may hinder this trend. In some jurisdictions non-standard workers may be prevented from joining unions[1798], or unions of their choice[1799]. In other legal systems, collective bargaining can be restricted or banned in favour of self-employed workers for anti-trust reason[1800].

This, for instance, may occur in the European Union, as an outcome of the recent decision of the European Court of Justice (ECJ). In 1999, the ECJ famously granted collective bargaining of subordinated employees a partial immunity from competition law, in its *Albany* case[1801]. The 2014 ECJ

[1798] This is the case for workers with contracts shorter than 6 months in Viet Nam, pursuant to Directive 02/2004/TTR-TLD, issued by the Viet Nam General Confederation of Labour on 22 March 2004. See I. Landau, P. Mahy, R. Mitchell, 'The Regulation of Non-Standard Forms of Employment in India, Indonesia and Vietnam. A Study prepared for the International Labour Office, Geneva Switzerland' ILO Conditions of Work and Employment Series Working Paper No. 63. In Poland, the judgement of the Constitutional Tribunal, 2 June 2015, declared that Article 2(1) of the Trade Unions Act of 23 May 1991 allowing only employees to establish and join a trade union only was unconstitutional: according to the Tribunal, freedom of association to trade unions applies to all individuals performing paid work. In 2012, the ILO CFA requested the Government of Poland "to take the necessary measures in order to ensure that all workers, without distinction whatsoever, including self-employed workers and those employed under civil law contracts, enjoy the right to establish and join organizations of their own choosing within the meaning of Convention No. 87": see Poland – CFA, Report No 363, Case No, 2888 available at http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3057194 (Accessed 8 October 2015).

[1799] See *Republic of Korea* – CFA, Report No. 363, Case No. 2602 available at http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3237652 (Accessed 8 October 2015) with regard to self-employed workers in the Republic of Korea. See also Shin, K. 2013, 'Economic Crisis, Neoliberal Reforms, and the Rise of Precarious Work in South Korea', *American Behavioral Scientist*, 57(3), 335–353. F. L. Cooke and R. Brown (n. 23) also report that "in Korea, the law allows only employees 'working for the same employer' or 'in the same description of work' to form a union, which limits the ability of contract workers to join unions".

[1800] See. C. Rubiano, 'Precarious Workers and Access to Collective Barganing: What Are the Legal Obstacles?' *Meeting the challenge of Precarious Work: A Workers' Agenda* (n. 2); S. McCrystal, 'Organising Independent Contractors: The Impact of Competition Law' in J. Fudge, S. McCrystal, K. Sankaran (n. 1).

[1801] ECJ, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, 21 September 1999, C-67/96. A very recent analysis of the relationship between labour law and completion law is provided by S. McCrystal, P. Syrpis 'Competition Law and Worker Voice: Competition Law Impediments to Collective Bargaining in Australia and the European Union' in A. Bogg and T. Novitz (eds.), *Voices at Work: Continuity and Change in the Common Law World* (Oxford: Oxford University Press, 2014). See also T.J. St Antoine 'Connell: Antitrust Law at the Expense of Labor Law' (1976) 62 *Virginia Law Review* 603-31; G. Minda, 'The Common Law, Labor and Antitrust' (1989) 11 *Berkeley Journal of Employment & Labor Law* 461-539; P. Ichino, 'Collective Bargaining and Antitrust Laws: An Open Issue' (2001) 17 *International Journal of Comparative Labour Law and Industrial Relations* 185–198.

case *FNV Kunsten*[1802] regarded a collective bargaining agreement negotiated in favour of both subordinated employees and self-employed workers in orchestras. The latter worked as substituted members of the regular orchestra players and, given their more unstable employment status, were afforded a premium compensation rate of c. 16%. The ECJ held that collective bargaining on behalf of self-employed workers could not be exempted from the application of competition law and therefore falls within the scope of Article 101(1) TFEU. A very problematic issue is that it is not clear what tests the ECJ would apply, when classifying work relationships for the purpose of application of antitrust rules to collective bargaining. In a paragraph of the decision, the ECJ states that: "*As far as concerns the case in the main proceedings, it must be recalled that, according to settled case-law, on the one hand, a service provider can lose his status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking.* This definition is based on antitrust concepts regarding independent activity on the market[1803] and may include some categories of genuine self-employed workers such as para-subordinate workers in Italy, *arbeitnehmerähnliche Personen* in Germany and *trabajadores autónomos económicamente dependientes* in Spain, as it is arguable that they do "*not determine independently* [their] *own conduct on the market*"[1804]. Nonetheless, the ECJ's ruling in *FNV Kunsten* continued by stating that the term "employee" must be construed on the basis of definitions provided under its juridprudence on employment matters, that is centred on a much stricter definition. The exemption would apply when *"the essential feature of that relationship is that for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration"*[1805]. The need for "direction of another person" recalls the employment-law test of "legal subordination" rather the "independence on the market" test of antitrust law mentioned above. A mere economic dependency would likely not be sufficient to meet the legal subordination test under the ECJ reasoning. Therefore, under this tight definition, the abovementioned categories of "dependent" self-employment such as para-subordinate workers in Italy, *arbeitnehmerähnliche Personen* in Germany and *trabajadores autónomos económicamente dependientes* in Spain would not be classified as "employees" and thus they would not be exempted from antitrust laws for the purpose of collective bargaining. According to the ECJ only "false" self-employed workers would able to bargain side-by-side with employees and to benefit from cooperating with established labour unions. Genuine

---

[1802] ECJ, *FNV Kunsten Informatie en Media*, 4 December 2014, C-413/13. For an analysis of this judgement and of the insufficient attention paid to workers' voice mechanisms such as collective bargaining in the current EU's discourse on sustainable development, see T. Novitz, 'The Paradigm of Sustainability in a European Social Context: Collective Participation in Protection of Future Interests?' (2015) 31 *International Journal of Comparative Labour Law and Industrial Relations* 243-262.

[1803] ECJ, *Confederación Española de Empresarios de Estaciones de Servicio*, 14 December 2006, C-217/05.

[1804] A comparative analysis of the regulation on dependent self-employment is provided in the articles published in the (2010) 32 *Comparative Labor Law & Policy Journal* Issue 2, Winter 2010 and in A. Perulli, 'Subordinate, Autonomous and Economically Dependent Work: A Comparative Analysis of Selected European Countries' in G. Casale (ed.), *The Employment Relationship A Comparative Overview* (Geneva: ILO, 2011).

[1805] ECJ, *Allonby* v *Accrington and Rossendale College*, 13 January 2004, C-256/01.

dependent self-employed workers, a significant component of the non-standard workforce[1806], would be prevented from doing so even if their weaker status in labour markets is recognised under the national regulation. In the ECJ's perspective, this would also likely have significant effects on their ability to go on strike, as this right is mainly seen as functional to collective bargaining in the Court's jurisprudence[1807].

Recognising the right to strike and the right to collective bargaining as human rights would also call to review this limitation, as it would not make sense to preclude access to a human right on the basis of an individual's employment status[1808]. Once again, the rise of some forms of non-standard work seems to be at odds with traditional limitations on union rights such as the rights to collective bargaining and action.

8. The distinction between political and economic strikes: the shfit from "job-based-protection" to "market-based-protection" and collective rights.

A further limitation in strike laws that was already described as inadequate almost 25 years ago[1809] and that in the current world of work is becoming increasingly arbitrary is the distinction between economic and political strikes. Giovanni Orlandini has recently shown how a vast amount of collective actions were called in Europe in recent years to protest against austerity measures[1810]. This is one of the areas in which the boundaries between economic and political strikes are most blurred and his chapter reports of several actions in jurisdictions where political strikes are traditionally banned. Even if one assumes the phase of protests against austerity policies to be only contingent, the distinction between economic and political industrial action will likely blur in the future as a consequence of more structural trends in labour market.

It is almost commonplace that the model of job-for-life is receding in almost all sectors and occupations. At the same time, mainstream policy narratives have long been advocating the substitution of "job-based-protection" for "market-based-protection", namely a system of protection centred on workers' employability on the market and supported by unemployment benefits and

---

[1806] Eurofound, *Self-employed or not self-employed? Working conditions of 'economically dependent workers'. Background paper*, (Dublin: Eurofound, 2013); OECD, *OECD Employment Outlook* (Paris: OECD, 2014).

[1807] ECJ, *International Transport Workers' Federation and Finnish Seamen's Union v Viking* Line, 11 December 2007, C-438/05; ECJ, *Laval v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettane e Svenska Elektrikerförbundet*, 18 December 2007, C-341/05.

[1808] The CEACR had expressed concern over the case litigated in FNV Kunsten in *Netherlands* – CEACR, Observation, 2011 available at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2327798,102768,Netherlands,2010 (Accessed 8 October 2015) The right to freedom of association and collective bargaining, enshrined in two of the Eight Fundamental Conventions of the International Labour Organisation are universal and applicable to all workers. According to the ILO Supervisory Bodies, these principles and right also apply to self-employed workers, see *Turkey* – CEACR, observation, 2010 available at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2331273,102893,Turkey,2010 (Accessed 8 October 2015); *Senegal* – CEACR, direct request, 2011 available at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2329671,103013,Senegal,2010 (Accessed 8 October 2015). See also ILO CFA (57).

[1809] Lord Wedderburn, 'The Right to Strike: Is there a European Standard?' in Lord Wedderburn, *Employment Rights in Britain and Europe: Selected Papers* (London: Lawrence & Wishart, 1991).

[1810] G. Orlandini, 'Political Strikes' in B. Hepple, R. le Roux and S. Sciarra (n. 3).

active labour market policies to replace systems based on job stability[1811]. Without entering into the debate on the opportunity and risks connected to these policies, if this is the scenario we are moving towards, the centre of protection would shift from the enterprise to labour markets as a whole. Since, as recently reminded by Silvana Sciarra, strikes are a fundamental means for workers to exercise their social power[1812], if the pivot of labour protection shifts, industrial conflict would need to re-shift accordingly. In such a situation, if strike were to be restricted as a mere means of collective bargaining and for individual workplaces' issue, workers' power to influence labour protections and policies at large would be severely curtailed, preventing them from recurring to a fundamental instrument of workers' voice to influence policies that would affect their labour and social rights. Once again, non-standard workers, being normally more detached from their employers and mobile in labour markets, would be the ones bearing most of the brunt of these developments.

9. Conclusions.

This article has argued that some existing restrictions to collective rights and in particular to the right to strike are failing to keep pace with the growth of non-standard workers experienced in many labour markets in recent years and that these restrictions need to be revised. It has been argued that advocating for this revision does not imply to subscribe to the view that the Standard Employment Relationship (SER) is irreversibly disappearing in industrialised economies and or that it is not fit anymore to serve as a fundamental benchmark of employment regulation. Rather, it has been discussed how regulation is endogenous to the increase of non-standard work in many jurisdiction as such increase has certainly driven some legislative reforms in recent times but was also spurred by regulatory mechanisms and loopholes in existing regulation. It was argued that some existing collective labour regulation are prominent examples in this respect as they may impose obstacles that disproportionately affect, or prevent, the exercise of collective rights by non-standard workers and therefore provide undue incentives to recur to non-standard work arrangements. Several of these restrictions have been examined, such as regulation imposing strike ballots, limitation to secondary industrial action, antitrust standards that prevent some non-standard workers from bargaining collectively and the distinction between political and economic strike. A revision of these restrictions has been advocated to keep pace with the increasing spread of the non-standard workforce and the issues that it poses to existing labour market institution. As argued in the article, these issues have primarily been examined from the individual employment law standpoint and an extensive analysis of the relevant collective labour issues has been missing. This article has tried to fill some of these gaps but further engagement with these issues is needed from all the branches of labour studies.

In assessing the suitability of existing collective labour regulation, this article moved from the classification of the right to strike as a human right, a perspective adopted by many scholars and courts in recent times[1813]: It has been argued that this classification calls for a revision of existing restrictions and limits to the right to strike and other collective rights to ensure that they are compatible with a human rights approach to these rights. It has also been argued that the human

---

[1811] For a critical analysis of these narratives and references, see V. De Stefano (n. 40).

[1812] S. Sciarra, (n. 25).

[1813] See notes 25 and 27.

rights perspective in this regard is pivotal to ensure that the weakest parts of the workforce, and especially non-standard workers, who may be particularly subject to the employers' managerial prerogatives and belong to the most vulnerable groups in labour markets, are not denied effective access to fundamental labour rights and protection of human dignity at the workplace. Special attention must thus be paid to make sure that regulation of collective rights keeps pace with the profound transformations that have occurred in labour markets in recent decades, particularly were those regulations were adopted with reference to past models of business organisations. Indeed, access to collective rights can be barred not only as a matter of fact, and attention should also be paid to how to remove or reduce practical obstacles in this regard, but also as a consequence of legal regulations that are increasingly outmoded in the current economic landscape. It has also been argued that removing legal and practical barriers would not only enhance fairness in labour markets but also remove reasons of more bitter frictions and risks of disruptive conflicts. In this perspective, collective rights recognised and enforced as human rights would also ultimately contribute to underpin the rule of law, playing an important role in building more just and democratic societies in times of globalisation.