FLEXIBILITY: POTENTIALS AND CHALLENGES FOR LABOR LAW

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I. "FLEXIBILITY": WHAT, HOW AND WHY?

In recent years, flexibilisation of working life has become a standard slogan in legal and socio-political parlance. Everyone seems to advocate it, though it is looked upon with emotions that range from trepidation—or even outright horror—to delight. Some praise its potentials to set humans free and to open them up to a road toward personal self-fulfilment and self-expression; in short, to liberate humans from the stifling bonds of a rigid labor regime imposed by ideologically motivated political activists, overzealous legislators or ironclad production methods of the factory-style work environment. At the other extreme, flexibility is derided as a cunning device by devious employers to ensnare workers even more efficiently; in short, to induce people to produce more for less. In other words, much depends on whose perspective is applied and whose opinion is asked.

A flexibilisation process is now in full swing in many countries. Manpower arrangements and practices are changing rapidly. Commonly offered reasons are the need to create a more competitive environment for business and an increased reliance on market mechanisms, all with a view of increasing overall productivity. On a completely different note, flexibilisation is seen as an answer to aspirations of workers to experience a more varied and self-fulfilling professional life; *i.e.*, "quality of life." Further, and perhaps most important, consumer demand patterns have undergone considerable

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* This essay summarizes an international study on flexibilisation in working life under the auspices of the International Academy of Comparative Law. The study called for national reports by scholars in various countries and a concluding general report. The national reports are on file in the Lund Law School Library. For the general report, see REINHOLD FAHLBECK, FLEXIBILISATION OF WORKING LIFE: POTENTIALS AND CHALLENGES FOR WORKING LIFE (Acta Societatis Juridicae Lundensis, 1998).

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change as a result of the rising standard of living. Increasingly, consumers want their individual needs immediately to be fulfilled. As a result, producers of goods and services have to become much more flexible to satisfy these demands.

This essay focuses on issues, processes and choices. The thrust is to identify and analyze trends and changes in labor market regulation and administration and in doctrines concerning work. The word "flexibility" is taken in a broad sense. It covers all arrangements and solutions tailored to the specific needs and wishes of the parties concerned, primarily "buyers" and "sellers" of labor, acting in unison or individually. "Flexibility," thus, basically becomes equivalent to the number of options available to "buyers" and "sellers" of labor when dealing with each other, individually or collectively. Defined in this way "flexibilisation" encompasses deregulation, decentralization and privatization since these all increase the potential for arriving at solutions tailored to the specifics of the situation at hand.[1]

A. *Flexibility at the Intersection of Conflicting Interests*

Flexibility is just one of many interests in labor market regulation. Many other legitimate interests exist, some of which clash with flexibility, at least partly. Foremost among those are: (a) social responsibility of employers; (b) objectivity of treatment of workers, including equal opportunity and non-discrimination; (c) transparency in matters regarding manpower and manpower handling; (d) proportionality; (e) predictability (or legal certainty); and, (f) legal protection of employees, particularly employment security. This is a rather formidable gamut of interests. All are part of today's legal debate, all are considered of vital interest and all, consequently, are promoted by various actors at national and international level.

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1. A 1996 ILO report argues that "flexibility" is "a nebulous term and tends to mean different things to employers and employees." See Shauna L. Olney, *Unions in a Changing World: Problems and Prospects in Selected Industrialized Countries* (ILO, 1996), p 42. The ILO report states that "flexibility" for one actor, *e.g.* buyers of labor, may mean the opposite to the other party, *e.g.* sellers of labor. This essay does not take issue with that proposition.

Referring to a 1995 ILO report, the 1996 ILO report also states that "flexibility" and "deregulation" are "more opposite than synonymous"; p 60, note 4. The reason is that "deregulation stimulates labor turnover and a reduction of the core workforce, diminishing the incentive to provide the training needed to raise productivity based on worker innovation." This essay does have difficulties with this statement. Increased labor turnover and smaller core workforces seem *per se* to entail increased flexibility, on the one hand, whereas the incentive to provide training of workers seems to be something (however important) that falls outside both the category of "flexibility" and the category of "deregulation." It is quite another matter that worker skill levels are relevant since higher skill offers wider professional choices, *i.e.* potentially provides "flexibility." However, there seems no need to further develop these terminological issues.

The emerging law of the EU provides a prime illustration at supra-national level. EU law is based on a number of overriding general principles. Flexibility is not one of those. However, several of the interests mentioned above are, and express such overriding principles, in particular (b), (c), (d) and (e). Furthermore, some of these interests have materialized in various legal acts adopted by the EU. Suffice it to mention the equal treatment directives (non-discrimination),[2] the "Cinderella" directive (transparency),[3] the directive on posting of workers (legal certainty),[4] and, the directive on transfers of undertakings[5] (legal protection of employees as well as social responsibility of employers). Conspicuously absent from the EU legislative agenda, however, are considerations providing for flexibility.

Is there really any room for flexibility when confronted with all these other interests? Not much, one might be tempted to surmise. Many Europeans would concur, adding, however, that flexibility is nevertheless a highly regarded goal. The European countries all present the picture of nation-states struggling to accommodate flexibility and employee interests. A U.S. observer, on the other hand, would find worries about the potential for flexibility somewhat unrealistic. With one notable exception (equal opportunity and non-discrimination) the interests mentioned have little or no relevance in labor ordering in today's U.S.

The actual room for flexibilisation largely depends on where observers focus their attention. Flexibility is closely linked to a variety of externalities and it is necessary to take into account how different elements operate in a dynamic relationship to each other. Flexibility takes one meaning when, as in the former communist countries, the point of departure is one of very strict and rigid regulation. It assumes a rather different meaning when, as in the U.S., the legal environment is characterized by the absence of regulation coupled with a very strong tilt in favor of individual freedom of contract. Collective bargaining there is on the demise and has virtually disappeared as a potent force, individual freedom of contract prevails and statutory regulation, though far from non-existent, does not much limit contractual freedom. Employment is basically "at will." Consequently, the courts will honor a regime where the employer is (or, at least, can contractually arrange to be) under few legal constraints in employ-

2. Primarily Council Directive 75/117, art. 1, 1975 O.J. (L45) 19, and Council Directive 76/207, art. 1, 1976 O.J. (L39) 40.

3. Council Directive 91/533, art. 2, 1991 O.J. (L288) 33.

4. Council Directive 96/71, art. 1, 19971 O.J. (L8) 3.

5. Council Directive 77/187, art. 4, 1977 O.J. (L61) 27.

ment matters. Flexibility is at the very heart of the system. Indeed the word "flexibility" is not much used since flexibility is a matter of course, an underlying premise, and one does not often discuss the very premises upon which a system is based. On the other hand, the former communist countries are left with a detailed regulatory structure of the straitjacket type. The word used, "flexibility," is the same but the reality that it represents differs to such an extent that one wonders if the same word should be used at all!

The U.S. is at one end of a "flexibility spectrum" in terms of actual scope of and potential for flexibility.[6] The U.K. comes close to that same end. Former communist countries of Central/Eastern Europe are at the other. Among countries with a tradition of market freedom and private enterprise the Nordic countries (with the notable exception of Denmark) belong to the same opposite end. Sweden, for example, is a country where new statutory rules are enacted on a continuous basis, virtually all restricting flexibility and submitting buyers of work to rules that work to the advantage of sellers of work.

The extremes on the spectrum represent different conceptions of how society should be organized. Sanctity of the principle of freedom of contract competes with sanctity of the principle of quality of life for employees. These are the principles that will govern the actual potential for flexibility. The answer to the question—whether there really is any room for flexibilisation—will greatly depend on the identification of the overriding principle.

B. *Unilateral Flexibility Versus Multilateral Flexibility*

Does flexibility necessarily connote unilateral control by one party? Does, in the labor context, flexibility mean unilateral employer freedom to arrange matters as it sees fit? Many observers would agree. Or is the notion of "flexibility" neutral in this respect, lending itself not only to unilateral but also to multilateral avenues to flexibility? There seems to be nothing intrinsically contradictory in holding that flexibility might also refer to multilateral arrangements. To be sure, flexibility takes on a different shape if it is to be exercised multilaterally, but it is perfectly conceivable that a multilateral system

6. For attempts to quantify "flexibility,"see two yearly Swiss surveys: *The World Competitiveness Yearbook*, prepared by the International Institute for Management Development (IMD, Lausanne), and *The Global Competitiveness Report*, prepared by the World Economic Forum (WEF, Geneva). These surveys are based on official statistics and on answers provided by business executives. For sure, the surveys have elements of subjectivism and discretion but they represent important instruments for comparisons nevertheless. The flexibility indexes permit comparisons, albeit much caution is necessary since the indexes are based on material that is fraught with risk for misunderstandings.

to arrive at flexibility can provide just as much flexibility as a unilateral one. If "flexibility" is defined as "all arrangements and solutions tailored to the specific needs and wishes of the parties concerned," and "to the number of options available to buyers and sellers of labor," then there is indeed nothing inconceivable *per se* in construing "flexibility" as a multilateral system.

A "flexibility actors model" might look like the following:

TABLE 1. UNILATERAL VERSUS MULTILATERAL SYSTEMS FOR FLEXIBILITY

Unilateral	***Bilateral***	***Trilateral***	***Multilateral***
Buyer alone	Buyer and seller *or* and organization of sellers, *e.g.* a union	Buyer and seller plus a third party, *e.g.* the government *or* a government agency	A system where more than three parties must agree to an arrangement entailing flexibility

The U.S. is firmly positioned at one end. Flexibility and unilateral employer decision making are basically two sides of the same coin. It is true that buyers of manpower in the U.S. may have to contract with sellers for unfettered flexibility. However, such bargains are more or less a foregone conclusion since buyers simply would not contract with sellers unless these agree to unilateral buyer control. (In the unionized sector of the economy unilateral buyer supremacy is largely replaced by a bilateral regime, but the unionized sector is small in relative terms—and shrinking.) The United Kingdom has moved strongly towards a unilateral model as a result of the "Thatcher revolution" in labor matters. Previously a bilateral model prevailed. Instances of a trilateral regime also existed, *e.g.* the now abolished Wages Councils (with the exception of the Agricultural Wages Board). Collective bargaining has lost much of its influence. The coverage of collective agreements has decreased dramatically from some 80-85% of employees in 1980, to around 37% in 1996. Legislation plays a limited role in labor regulation and has not to any great extent stepped in to fill the vacuum created by the decline of collective agreement regulation. Neither does individual negotiation play much of a role; as in the U.S., standardized terms are laid down unilaterally by the employer. In addition, these are often vague, leaving much to employer discretion.

European countries have mostly opted for the bilateral or trilateral model. France might be an exception. Unions are very weak and

so is collective regulation. The government provides a minimum level for everyone. Apart from that, employers by and large decide unilaterally. The Nordic countries, Denmark in particular, have primarily chosen the bilateral approach. Within the employment area the actors in the Nordic region are primarily, on the one hand organizations of buyers of labor or individual buyers of labor and, on the other hand, organizations of sellers of labor (trade unions). The scope for individual contracts between employers and employees is small, indeed very small, and the government traditionally is supposed not to interfere.

In Spain, the 1997 Interconfederal Agreement for Job Stability and Collective Negotiations (*Acuerda Interconfederal para la Estabilidad en el Empleo y la Negociación Colectiva*) is a bilateral achievement of epochal proportions by the two sides on the labor market. Apparently, it will serve as a tractor for legislative reform. The agreement might herald the advent of a genuine bilateral regime.

Examples of a trilateral regime are not wanting. The Netherlands seems to be a prime example. The Labour Foundation (*Stichtung van de Arbeit*) is a private bilateral body for discussion and cooperation between the labor market parties. It also serves as a forum for contacts with the government. Such trilateral discussions may result in agreements that shape the labor policy of the country. An example of that is an April 1996 master agreement between the foundation and the government on Flexibility and Security which has given rise to a number of legislative amendments. The 1990s have seen Italy also embark on a trilateral route. The epochal Tripartite Framework Agreements from 1992 and 1993, testify to that. This development has come about as a result of several concurrent factors. Soul searching in unions concerning attitudes towards government reform programs is one. A more unified employer front as the Confindustria has become a true representative of virtually the entire Italian employer community (partly as a result of extensive privatization of publicly held companies) is another. Concerted government efforts to arrive at more orderly procedures for collective bargaining and wage settlements (to a great extent dictated by the convergence criteria for the new European currency) constitute yet a third. The former communist countries also have heavy doses of trilateralism. So has South Africa where the idea seems to have become a well-established legal slogan. At the heart of this trilateral system, the National Economic, Development and Labour Council primarily comprises representatives from the government, the employer community and organized labor.

A model involving more than three actors is also conceivable, but is seems reasonable to presume that consensus building on such a broad scale is difficult to achieve. No functioning model seems to exist.

Do these bilateral and trilateral models actually provide "flexibility" equivalent to unilateral models? Only detailed examination of similar issues can provide comprehensive substantive answers. In principle, however, they have the potential of producing the same kind of result. For example, it certainly is true that the Nordic model provides for far-reaching flexibility by means of collective agreements. The Dutch experience is somewhat different. The reason seems to be that Dutch law will not allow for as much flexibility as does the U.K., U.S., and Nordic law because labor law is *Schützenrecht* (protection law), so protection of workers is its focal aim. The Nordic countries would also subscribe to that thesis; but, an outstanding feature of "the Nordic model" is the fact that unions are very strong, with unionization rates of between 80% and 90% of the working population in Sweden. Precisely because of that much territory can be surrendered to bilateral flexibilisation.

Unilateral and multilateral flexibility systems may differ in various respects. Suffice to mention actual potential for arriving at some result entailing flexibility, swiftness to arrive at it, efficiency from a business point of view, transaction costs for arriving at a similar result (*e.g.* costs for negotiations), and incremental costs, but that is another matter. That is a difference of route, time and cost rather than of kind.

II. Flexibilisation as a Challenge to Entrenched Notions

A. *Just the Regular Ebb and Flow—Or?*

Flexibilisation of labor arrangements as a legal concept is of recent origin. Before the advent of extensive labor regulation in the 1960's and 1970's, flexibilisation was not an issue because labor regulation was flexible. Today's call for flexibility is rooted in the soil created by rules enacted some decades ago. Seen from this perspective, the present drive toward flexibility might be nothing more exciting than yet another instance of the constant and ever-recurring ebb and flow of human ideas and institutions: Now regulation, now flexibility, now this, now its opposite. Is flexibility just old wine in new bottles, or a fad that will be forgotten some ten or twenty years from now?

Perhaps. However, the law today operates in an environment that is different from the one existing when the flow of regulation in-

undated the legal landscape. Today's environment is characterized by a much more varied demand for and supply of manpower than traditional labor supply arrangements (primarily full time employment by regular employees). In other words, the character of demand for manpower has undergone radical change. The same is true with regard to the supply side because worker aspirations to have a more fulfilling working life have increased considerably in the last decades, partly as a result of higher education levels in most countries and also of an increasingly individualistic mode of thinking.

B. *Have "Holy Cows" Been Slaughtered and Legal Shibboleths Overturned?*

Let us first examine the notion of work as commodity. The 1914 U.S. federal antitrust statute known as the *Clayton Act* emphatically states that "the labor of a human being is not a commodity or article of commerce."[7] Though the words are intended to fend off the application of antitrust legislation to organized labor, they do proclaim an important principle. That principle, of course, was not new at the time and it has been reiterated time and again afterwards. Does flexibilisation question the principle and—if so—to what extent?

Temporary work perhaps poses the most serious threat to the integrity of the "non-commodity" principle. It is precisely in this context that the principle has been evoked most often in recent years, to promote or to resist it. At the same time, it is in the area of temporary work that the most profound conceptual shift in the structure of manpower arrangements has taken place. Temporary work has been legalized or seen its scope widened in many countries where it had previously been banned or severely restricted.

Sweden perhaps represents the most dramatic turn-around in this respect. The 1993 Act on Private Employment Exchange and Hiring Out of Employees marks the end of an extremely restrictive regulatory structure that had existed for nearly sixty years. With only some very marginal exceptions, the previous system outlawed temporary manpower arrangements completely. The 1993 statute is an archetypal exponent of deregulation and decentralization. It removes virtually all restrictions on temporary work arrangements. Freedom of contract is the faith of the act. Not surprisingly, critics of the statute have branded it as nothing less than the legalization of the notion that labor is indeed a commodity. Less drastic but nevertheless quite significant changes of a similar nature have taken place in several other

7. 38 Stat 730 (1914) (current version at 15 U.S. § 18 (1994)).

countries. Significant in this respect is that the single biggest—or one of the biggest—employer in many countries in terms of the number of employees is the leading temporary work agency, *Manpower*. Significant is also that the number of temporary work firms has mushroomed in recent years. Publicly traded temporary work firms have seen their shares become hot investments. This is so in particular with the increasing number of firms specializing in market niches, supplying specialized workers.[8]

On the other hand, it must also be stressed that temporary workers make up only a very small proportion of the total workforce in the various countries. Not even in the U.S., where temporary work has always been allowed to a great extent, do "temps" account for more than about 2% of the entire workforce. This means that the true significance of temporary work in the present respect is not to be found in its prevalence—it is indeed rather marginal everywhere—but in its existence and acceptance at all. It reflects a rather profound change in attitude towards the procurement of manpower.

This shift in attitude is reflected in the mode of operation of temporary work firms. No longer are they confined to routine clerical workers such as secretaries or receptionists. Firms are increasingly providing higher and more specialized workers, *e.g.* technicians, engineers, high-end business software programmers, accountants, medical staffers and even lawyers. Temporary work firms are able to find qualified workers willing to become "temps." Apart from the pool of terminated employees available in most industrialized countries as a result of downsizing, an often quoted reason is that we are facing a change in the way people want to work. Work security is increasingly considered to rest with the individual knowledge of the worker himself/herself. This, for sure, represents a process of flexibilisation as reflected in the schematics supplied in Tables 2-4 (below).

If the introduction or liberalization of temporary work does indeed represent something of a "paradigm shift" in working life, is there a catchphrase—even a shibboleth—that can be affixed to it? The answer seems to be that there is, distasteful or not. The expression "just in time" used to be restricted to deliveries to manufacturing plants of goods and semi-finished products. Now the expression is also used in connection with manpower. Workers are also to be supplied "just in time."

8. *See, e.g.*, articles in *International Herald Tribune*, June 13-14, 1998, p. 18 *et seq.*, on Europe, the U.S., and Japan respectively.

Is "just-in-time" employment the order of the day? It would be grossly misleading to say so. The typical employment contract remains both the ideal and the norm. The great majority of employees remains employed for an indefinite period of time. This is so despite that fact that many countries have been smitten by a *cultura de la temporalidad*, as it is appropriately referred to in Spain.

Another feature that might represent a major shift is related to the hierarchy of norms. *I.e.* the role of collective agreements versus legislation. Many statutes provide for deviation by collective agreement, even allowing for less favorable working conditions that otherwise would obtain. This challenges the traditional concept of labor legislation as a basic regulation allowing for collective implementation only to provide enhanced protection. At stake is the very concept of hierarchy between acts by the legislature and private ordering by means of collective agreements. "Derogation in pejus" is an apt description of this phenomenon.

Instances where collective agreements could be used as vehicles for "derogation in pejus" can be found in European labor law statutes before the legislative avalanche of the 1960s and 1970s. The first rule in a Swedish statute to that effect is found in the 1945 Act on Paid Vacation. However, the rule did not come into existence without pain precisely because it represented "derogation in pejus." The European "derogation in pejus" collective agreement is caused and justified primarily by a need for flexibility. The fact that legislation has become quite pervasive and comprehensive has created a need for a safety valve. Legislation is not suited as an instrument for giving rules adapted to specific situations and needs. Collective agreements are much more flexible and adaptable *per se*. This gives them an advantage over legislation. Thus, the very comprehensiveness of legislation provides the justification for allowing collective agreements of the "derogation in pejus" kind.

At the same time, it is difficult not to consider such agreements a contradiction in terms. The primary justification for allowing collective action by sellers of labor is to enhance their bargaining position, thereby empowering them to secure for themselves more favorable terms and conditions of employment than they would otherwise have been able to obtain. Sellers of labor are more often than not "the weaker party" and history demonstrates the devastating effect that can accompany unfettered competition between sellers of labor. The very idea to allow—not to mention actively encourage—combinations of sellers of labor to lower the standards established by society represents something very strange. Both from an ideological and a histori-

cal point of view such conduct can easily be looked upon as downright perverse. Allowing such agreements can be seen as a paradigm shift. However, "derogation in pejus" collective agreements have become an established phenomenon in Europe. No one seriously challenges them. They have become part of the orderly and well-kept legal landscape.

The "derogation in pejus" collective agreement is primarily a Western European phenomenon. It does not exist in the U.S. To some extent, the reason is that there is less need for such agreements since existing labor legislation is either very modest in scope or set very low minimum standards (or both); and, collective agreements derogating from statutes would probably raise serious constitutional questions. However, this does not mean that agreements setting aside statutes are unheard of. If freedom of contract is the all-prevailing principle, any and all substantive legal rules do limit that freedom. Contracting around the law becomes a temptation. In the U.S., it is a reality.

Contracting around the law of this kind does not bear much resemblance to "derogation in pejus" agreements. In the U.S., it is an individual agreement; in Europe, a collective one. Second, the reasons differ. In Europe, flexibility provides the justification. Freedom of contract does not *per se* enter into the picture at all and the fact that flexibility is achieved by means of contracts is incidental. In the U.S., the contractual aspect is central, coupled with a desire on the part of the buyer of labor to free itself from both the substantive obligations of statutes and the procedural obligations that might accompany claims to secure these substantive standards.

Outside Western Europe and the U.S., the situation is different. Statutory standards by and large are such that lower levels are not acceptable. Japan might conceivably be in a position that is similar to the European inasmuch as workers have achieved a standard of living that is comparable to European levels. A tightly knit web of statutory rules combined with the same need for flexibilisation, as in Europe, provides ground for derogation. But collective agreement regulation is not much of an option in Japan because of the bargaining structure. Virtually all collective agreements are enterprise agreements. By and large, regional and, in particular, industry-wide agreements are nonexistent and unobtainable in most branches of the economy. The Japanese solution is twofold: Complete deregulation where possible or even more detailed legislation where that is not considered possible.

C. *Do New "Holy Cows" and Shibboleths See The Light Of The Day?*

Most conspicuously, the very term "flexibilisation" is in the process of becoming a new shibboleth. Though not new as a phenomenon, the word "flexibilisation" is new as a catchword and it seems to be *the* labor market shibboleth of the 1990s. The 1960s and 1970s revelled in "employment protection" and "co-determination." Today every country stresses the need for flexibility. "Flexibility" has become a "holy cow." Using "flexibilisation" as a battle cry, legislative changes that might otherwise have been very difficult to achieve can be justified. The 1996 Dutch "Flexibility and Security" agreement illustrates the point.

Another shibboleth that is part and parcel of the flexibilisation movement is the term "atypical." Terminologically workers are virtually everywhere divided into at least two categories, typical and atypical, the core workforce versus the contingent workforce. The typical workers, the core workers, are those predominantly male workers who are employed indefinitely and work full time. Atypical workers are all others, employees or not, such as part-time employees, employees on fixed-term employment contracts, temporary workers, self-employed workers, contract workers or freelance people. The term "atypical" is already an anachronism. "Atypical" workers are not "atypical" at all since they represent an important and increasing proportion of the workforce, anywhere from 15-20 to some 35-40% of the entire working population. But the term has become a standard catchword. Whether it will remain so is far from certain. First, it is anachronistic. Second, and more important, it is a universal phenomenon that the borderlines between different kinds of workers are becoming increasingly blurred. Work everywhere is becoming more fluid, more portable, less fixed to a specific location, partly as a result of the emergence of different kinds of distance work and telework arrangements and partly as a result of the increased willingness of workers to try different kinds of work formats, employment work, temporary work or self-employment work. The phrase "just-in-time-work" is sometimes used. So far it is done hesitantly and perhaps even with a hint of some embarrassment. "Just-in-time-production" is an accepted phrase, used everywhere. Will the phrase "just-in-time-work"—and the concomitant reality—become equally ubiquitous? Only time will tell, but so far the phrase has not yet gained anything like common acceptance. Perhaps it never will. Human work, after all, *is not* a commodity.

On the other hand, "dualisation of the workforce" has become a standard phrase. It covers a reality since atypical work has become ubiquitous. The phrase probably suffers from a derogatory stigma but it has become a catchword nevertheless. "Derogation in pejus" collective agreements would be yet another candidate to enter the world of legal shibboleths.

D. *Employment as Status or Contract*

Writing about developments in private law in the Western world Sir Henry Maine some 150 years ago coined the famous phrase that the employment relationship was in the process of changing "from Status to Contract."[9] This phrase developed into a cherished shibboleth in many quarters. Under the previous master and servant regulation, the employment relationship in many ways resembled a family relationship, even after the abolition of the right of masters physically to punish their servants. This regulatory structure collapsed under the combined pressure of industrialism and liberalism, as reflected in the schematics set out in Tables 2-4 below.

The transition from status to contract went hand in hand with the introduction of the "at-will" employment relationship. It was greeted as liberation for workers. They became free agents, as it were. No longer bound by the master and servant regulation and its strict rules, *e.g.* the submissive position of the employee, the fixed-term employment regime and the virtually all-comprehensive ban on premature termination of the employment agreement, sellers of labor were at liberty to sell their labor to anyone, at any time, for any amount of money.

Starting some decades ago, developments in employment law in many Western countries, in particular in Europe, strongly indicated a movement "from status to contract and back." Though no Western country introduced rules anywhere as strict and all-comprehensive as those of the master and servant regulation, there certainly was much justification for asking if a reversion was in fact in progress. Has the time now come to remove the dust from Sir Henry's phrase and proclaim a new era of contractual hegemony over status? Is the present trend to introduce flexibility in labor arrangements a move in that direction?

Perhaps a two-tier answer is called for: Yes, very much so and no, very much the opposite! Flexibility may well work in two directions

9. Henry Maine, ANCIENT LAW (Oxford University Press, 1959) (*reprinted* from 1861 edition).

depending on whether a typical employment relationship is envisaged or if the work arrangement is of an atypical character. For typical employment, trends definitely point in the direction of a status type relationship. In the atypical area, in particular in case of non-employment, the contractual aspect might gain in stature. The hypotheses might be something like the following: Flexibility and indefinite, full-time employment contracts—the very characteristic of "typical" work—do not fit well together. Flexibility calls for ever-changing work requirements. The employee will face a reality that calls for constant modification and alteration in all relevant respects, *e.g.* work tasks, total daily or weekly working time, daily or weekly working time schedules, location of work *et cetera*. Detailed contracts are less suited for such a relationship since they cannot foresee all situations. Evidently, the contract can stipulate that it applies to an ever-changing and unpredictable relationship where one party, the buyer/employer, gives orders, and the other party, the seller/employee, obeys. But a contract of that kind gives raise to a relationship that is much more akin to a status than to a contractual relationship. Customarily, after all, contracts tend to be fairly transparent, predictable and precise in terms of spelling out the rights and obligations of the contracting parties, requiring mutual consent to any modification. A flexible employment contract would be wanting in all these respects.

True, the ancient master-servant regulation was a contractual one at bottom. A contract of hire existed and was in fact required. Nevertheless, the relationship was open-ended in the sense that the servant was at the disposal of the master in a very broad and vaguely defined way. The focal part of the agreement was that the servant agreed to obey orders by the master and—by statutory fiat—the master was entitled to obedience from the servant for a specified period of time. Bluntly speaking, that is the nucleus of a flexible employment agreement of today as well. True, the master and servant agreement was entered into for a specific length of time prescribed by statute, usually twelve months. The indefinite employment contract does not share this characteristic. But this difference does not radically alter the basic similarity between the master-servant agreement and an indefinite employment contract based on a bargain that the seller is at the discretionary disposal of the buyer.

On the other hand, the atypical work contract would, one might hypothesize, continue to move in the direction of a strictly business bargain. The atypical worker—be it part-time or fixed-time employment, a temporary worker, a self-employed person, an independent contractor or a free lancer—has chosen to operate in that way pre-

cisely because he or she wants to be free of the restraints of the typical employment relationship. Subordination would be the very last that he or she would accept as part of a bargain.

Are these hypotheses now submitted born out by experience in various countries? At the present stage only a tentative answer can be given. Indications do in fact strongly point in the direction a dualisation of this kind.

Another aspect of the status-contract dichotomy is concerned with the relationship between the individual employment contract and other rule-making instruments, primarily collective agreements and statutes. In other words, what is the actual scope for individual contracts in employment matters? Which role does the individual contract of hire play in employment regulation? These are not the questions Sir Henry Maine had in mind, but they are no less relevant for that.[10]

Virtually all European countries would agree that the individual contract of hire plays only a marginal role in comparison to collective bargaining. Non-European countries have experienced a development that is similar to the European mainstream. Strangely enough, the actual scope of individual bargaining might not be that wide in the U.S. either despite the fact that almost unrestricted freedom of contract prevails. Unlike most other countries, where statutes and/or collective agreements impose severe limitations, the U.S. vista is characterized by the virtual absence of substantive employment regulation. However, the U.S. has experienced a standardization of the employment relationship. Work rules, employment policies and company employment handbooks governing the employment relationship are ubiquitous. Obviously, employers will hire only applicants that agree to the rules unilaterally established by them.

Whenever the employment relationship is governed by rules other than those negotiated for by the individual buyer and seller, an element of status is present in the employment relationship. There is nothing new in this situation. The master-servant system was based on an individual contract of hire, but there was only scant room for individual bargaining. Statutory regulation covered most aspects of the relationship, either by instruments of long duration concerning, *e.g.* hiring procedures, principal obligations of the parties and working time rules, or instruments of a more transient nature, *e.g.* rules on pay. When the regulatory regime broke down as a result of industrializa-

10. For a recent comprehensive discussion, *see* THE EMPLOYMENT CONTRACT IN TRANSFORMING LABOUR RELATIONS (Lammy Betten, ed., Kluwer, 1995).

tion and liberalism in England early in the 19th century, freedom of contract filled the vacuum. In the ensuing negotiations the buyer side gained the upper hand and sellers of labor saw their lot go from bad to worse, from hard to hardship. The collective agreement became the contractual device for sellers of labor to better their lot. Since their standard of living was more important to them than an often fictitious freedom of contract, they accepted, indeed strove for, the reintroduction of uniform rules of the kind previously existing in the master-servant regulation. The ensuing limitation of their freedom of contract was partly a response to the *de facto* failure, from a social welfare point of view, of the principle of freedom of contract. Unions and collective agreements came into existence to correct the imbalance that the market had produced. The result was that the march from status towards contract was reversed in Europe almost as soon as it had begun!

Has flexibilisation affected this aspect of the status-contract dichotomy? Indeed it has. Atypical employment represents an increase in individual contract regulation since it entails at least one individual element. That element depends on what kind of atypical work is considered. For example, part-time work agreements must spell out the number of hours and fixed-time employment the time agreed upon.

To conclude, the actual scope for individual bargaining is small for most job applicants. The ordering of the employment relationship is primarily in the hands of others than the individual parties to the employment contract. In that sense, status reigns over contract. Flexibilisation has enlarged the scope to some extent but so far not very much. Will this trend continue? It probably will, thus strengthening the contractual aspect of atypical work agreements. This, and the concomitant change in the role of the social partners, will be discussed below.

E. *Towards a New Actor's Model?*

For decades after World War II, companies have been looked upon as an arena of contention between a number of competing actors, primarily shareholders/owners, employees (but not others working for the company), suppliers, customers, credit institutions and the government. Management is looked upon as a basically neutral actor whose task it is to strike a balance between these various actors and their interests. The actors all have a relationship with the company, but their contracts differ radically. The shareholders have a "soft" contract whereas the other actors have a "firm" contract in the sense

that they are legally entitled to specific performance by the company of their claims whereas shareholders face the risk of non-performance.

A reorientation looms at the horizon. The rather cavalier treatment of atypical workers both in conceptual and in substantive respects will perhaps be replaced by a comprehensive treatment of all members. Atypical workers must be integrated into the mainstream of labor law regulation, in particular non-employed members. Non-employed members typically have contracts with companies that are either for fixed periods or easily terminable (or both). But experience demonstrates that non-employed members often remain in contact with companies for prolonged periods of time. Often enough they are also highly qualified, not just day-to-day laborers hired for simple, menial tasks. The difference between them and typical members is often formal rather than functional.

At stake in the present context is also the distribution of influence between employed and non-employed members (whatever their capacity may be, *e.g.* freelancers, consultants, self-employed, contract people, temporary workers). So far non-employed members have no standing at all in co-determination and the like at the place where they actually work. This does not seem fair. Perhaps some kind of "company member assemblies" will come into existence. These—or a committee elected by the "company member assembly"—might become a forum for inter-member communication and consultation as well as a body for contacts with management and shareholders.

III. Flexibilisation and the Established Order

A. *Dualisation of the Workforce?*

It has become rather common in labor market parlance to distinguish between a "core" versus a "peripheral" (or "atypical," alternatively "contingent") workforce. The march towards a dualisation of the workforce of this kind is often said to be still in its infancy. The need for flexibility is often cited as a, perhaps *the*, main reason for dualisation. (Since a dualism of this kind has existed for a long time in Japan one could perhaps talk about a "Japanisation" of the workforce in highly industrialized countries.) The core workforce is composed of well-educated employees that companies intend to employ indefinitely. They work full time and they are continuously trained and retrained at company expense. They represent an important investment in human capital. The "core" workers are functionally flexible. The peripheral workforce is made up of atypical workers. Women account

for a disproportionate percentage of this workforce. Atypical workers are quantitatively flexible.

A threefold division is also noticeable. The innermost circle is composed of workers employed on a permanent basis. The middle circle contains workers employed on a temporary (or fixed-term) basis. The third and uttermost circle refers to personnel with a much looser relationship with the employer, and includes minimum-term workers, workers from temporary employment agencies, seconded personnel and the like.

Two questions present themselves:

> Are there tendencies to create a dualistic system consisting of an 'inner' and an 'outer' circle or workers, *i.e.* a system whereunder some workers enjoy full protection in stable positions and some do not?
>
> If so, have these tendencies been translated into legal rules or are they so far mostly social arrangements not yet crystallized into formal, legal rules?

It certainly is true that there is a dualisation in the sense that a contingent workforce exists in most countries. The Netherlands might lead the league in actual size of an atypical workforce, if part-time employment is considered atypical. The percentage of part-timers in the Netherlands is about a third of the economically active. Other atypical workers raise the total percentage of the atypical workforce further. However, the numbers can easily give a false impression since the vast majority of employees are employed for an indefinite period of time, approximately 85% of the economically active population. In France, the dualisation is perhaps not primarily a matter of typical versus atypical workers but of the young versus everybody else. Though there is a marked dualisation, young people are the ones that shoulder the burden. One expression of this is that virtually all new employment contracts are for fixed-time employment. The percentage in 1994 was a staggering 95%. An initial period of fixed-time employment has become *the* route to permanent employment.

The former communist countries in Eastern and Central Europe do not seem to have been visited quite as much by the dualisation trend. For example, in Hungary the number of part-timers is less than 2% of the working population. The number of fixed-term employees and temporary work is also very low.[11]

Differences between the various countries with regard to actual size and precise definition of the atypical workforce will not be dis-

11. The OECD Employment Outlook, July, 1997, Table E puts the figure at 4.8% for Hungary. The figure is 18.9% for the Czech Republic and 10.6% for Poland.

cussed here.[12] Suffice to say that a figure around 25% of the total workforce seems to be what many countries experience. For the present purpose, it is sufficient to establish that it is ubiquitous to distinguish between groups of workers along the "typical-atypical" divide and that legal responses have been forthcoming in many countries. The U.S. represents one extreme. Hiring is at-will and so is firing. No rules limit buyers from contracting for part-time or fixed-time work. Temporary work is regulated but that is the exception to the rule; and, restrictions are few and of minor significance. In an environment where virtually unrestricted freedom of contract prevails, few distinctions are made or needed between workers of different categories. From a legal point of view this means that the issue of a dualisation of the workforce does not have all that much meaning.

The characteristic feature does not seem to be that the workforce is becoming divided into two or more groups in the U.S. but something far more fundamental and perhaps threatening. There seems to be a growing notion that work itself is in the process of becoming something radically new and different, something elusive and fluid. Even full-time work is less and less considered something stable. Companies can, and do, resort to big scale restructuring affecting large numbers of "core" employees as well. No legislation has been passed or even seriously considered to subject buyers of labor to limitations as to what kind of employment contracts they are legally entitled to enter into or at what wages. Freedom of contract continues to prevail so the dualisation that de facto is taking place is a matter of actual labor market practices and not affected by any changes in the law, restrictive or otherwise.

The U.K. experience resembles that of the U.S. In many other countries, on the other hand, the distinction between the typical and the atypical workforce is keenly felt and fraught with painful distinctions and delicate balancing of competing interests. The dilemmas confronting legislators are primarily due to the fact that employment contracts are not terminable at will. Employment protection has been introduced in most countries. If employment contracts are terminable only for just cause, then the borderline between those who enjoy such protection and those who do not becomes crucial.

12. Statistical data compiled by the OECD for fairly reliable comparison is available for part-time work; *see, e.g.*, OECD, Employment Outlook, July, 1997, Table E covering the period 1983-1996. For other types of atypical work transnational statistical data is much less reliable.

The definition of what constitutes atypical work is not necessarily the same in different countries. For example, female work might be considered atypical.

Accordingly, the definition of employee status becomes vital. So does fixed-time employment as the very idea of fixed-term employment is that it ends for no other reason other than the expiration of the time agreed and often without notice. If buyers of labor were at liberty to contract for fixed-time employment at will, employment protection legislation can be undermined, indeed totally circumvented. Furthermore, if work-related benefits—including employee status and employment protection—are related to a specific number of working hours per week (or some other period of time), then part-time employment becomes a crucial issue as well. Legislative focus is necessarily directed towards a whole set of issues related to that borderline, *e.g.* employer hiring practices, the lawfulness of entering into employment contracts with working hours below the crucial number, preferential rights of employees to increase their working hours to reach the critical level *et cetera*.[13]

In the wake of employment protection legislation most countries have enacted statutory rules on atypical work. The primary response was part of the original employment protection legislation proper since statutes defined their field of application and what workers were covered. The 1990s have seen subsequent changes of the original employment protection structure as a response to the call for flexibility. Legislation has been responsive, not triggering. In that sense, there is a division between "core" employees and these other workers, the atypical workers, be they employees or not. But that does not mean that any country has deliberately created a dualism of the workforce along the "typical-atypical" divide. No country has accepted dualisation in the sense that statutory rules accept, much less prescribe, less favorable terms and conditions of employment for atypical workers. The opposite is true and developments in employment law are directed towards diminishing the differences between typical and atypical work. Nor does it mean that there is dualisation in the sense that statutes accept and confirm anything like a division *per se* of work arrangements. Consequently, no country has enacted comprehensive legislation specifically and exclusively covering atypical work. In this sense, no country has accepted the idea of a dualisation of the workforce.

13. In this respect, *see, e.g.*, the agreement on part-time work reached at EU level between the European-level social partners (ETUC for labor unions, UNICE for private sector employers, and CEEP for public sector employers) in June, 1997. Clause 5:3 directs employers "to give consideration to: . . . (b) requests by workers to transfer from part-time work to full-time work or to increase their working time should the opportunity arise." *See also* 1994 ILO Convention (No 175) concerning part-time work, article 10, and Recommendation (No 182) concerning part-time work, article 18.

As the discussion demonstrates the answer to the first question initially asked is that a dualisation of the workforce is already a fact. The extent to which this is something radically new cannot be answered here. A reasonable hypothesis is that the advent of employment protection regulation is at the very root of the dualisation. If that were true, dualisation would be a recent phenomenon since employment protection regulation is rather new in most countries. However, the fact that the U.S. has approximately the same proportion of atypical workers, despite the fact that it has no comprehensive employment protection regulation, puts the hypothesis in doubt. So does the corresponding Danish experience. One is left with uncertainty; perhaps altered consumer demand patterns are at the root.

The second question is more down to earth. Work dualisation is at the fore of legislative interest. Virtually all legal systems have addressed it in *some* fashion. No legal system has greeted dualisation as something desirable *per se*. On the contrary, rules tend to aim at bridging the divide between typical and atypical work. Actually bridging the gap is an act of delicate balancing between, on the one hand, employment security, and, on the other hand, flexibility. Other interests are also involved, *e.g.* social fairness, social responsibility of employers, and the fight against unemployment.

B. *The Role of the Social Partners and the Flexibilisation Process*

Several aspects present themselves. Union density rates is the first. Power balance between employers and unions is a second. Bargaining balance between individual buyers and sellers of labor is a third. The relationship between buyers and sellers of labor is a forth.

Before discussing these issues, some comments on the ongoing transition from an "industrialized society" to an "information society" might be appropriate. Flexibilisation is not *per se* an originator of this society, but walks hand in hand with it and probably is a factor of crucial importance for achieving the full potential of an information society. It would seem reasonable to assume that a fundamental shift in the balance of power between buyers and sellers of labor is under way as a result of the transition from the industrialized to the information society.

Table 2 focuses on the individual relationship between buyers and sellers of labor. In the information society, personal contacts, interdependence, and closeness are based on what the parties agree upon at any given time. Typically there is a close professional relationship; although this relationship is mutual, the seller frequently has the upper hand. Work at common work sites depends less on personal inter-

TABLE 2. RELATIONSHIP BETWEEN BUYERS AND SELLERS OF WORK

	Agrarian Society	*Industrialized Society*	*Information Society*
Where?	Parties live and work together. Work and private life intertwined.	Parties live apart but work together. Work and private life separate.	Parties live and work apart. Work and private life partly intertwined.
How?	Status relationship: Work: family-duty. Strongly hierarchical	Contractual relationship: Work: commodity. Strongly impersonal	Core members: status Atypical: contract Work: transfer of knowledge. Strongly mutual

action and increasingly on cooperation based on data and information technology. Distance work is becoming increasingly prevalent, in particular telework. Core workers have a status-type relationship with the employer. Atypical members will base their relationship on a contractual basis, even though many have a long-term relationship with the buyer of work.

TABLE 3. FACTORS REPRESENTING WEALTH AND VALUE-ADDING FACTORS

	Agrarian Society	*Industrialized Society*	*Information Society*
Wealth Factor	Land (real estate)	Capital (money)	People
Value Adding Factor	Manual work: Muscle power	Combination of means of production: Machine handling power	Knowledge and creativity: Brain power

Table 3 illustrates factors that represent and create wealth in economic life. In the information society, monetary capital (*i.e.* money proper and equipment) becomes less important and the importance of raw material is drastically reduced. Knowledge and creativity are primarily what count. These are primarily individual.

TABLE 4. CAPITAL

	Agrarian Society	*Industrialized Society*	*Information Society*
Owners	Family	Buyers of work	Sellers of work
Shape	Land	Monetary capital	Human capital
Purpose	Maximizing survival of family	Maximizing monetary capital	Maximizing quality of life

Table 4 highlights various aspects of the role, form, and purpose of capital. By and large, capital is not marketable in agrarian societies. The transition to industrialism means that capital is liberated in the sense that it becomes marketable and offered at a free market. The information society sees a further liberalization of capital and its dissemination to an increasingly wide proportion of the population. "Everyone" becomes a capitalist. The aggregated power of moneyed capitalists over capital diminishes since the relative role of capital in the shape of such entities that can be traded by individuals, primarily money proper and equipment, becomes increasingly less significant relatively speaking. Possession and control of capital is increasingly atomized as knowledge and creativity increasingly become the relevant capital.

The evolution from "muscle power" via "machine operation power" towards "brain power" represents a crucial change in another way as well. To a great extent, this shift also entails a shift in relative power and in the balance of power in society. Whenever the "capital" of sellers of labor is easily substitutable and consequently only scantily individualized, buyers of labor enjoy a considerable advantage. The information society changes that because the relevant "capital" increasingly is personal, vested in individual knowledge and creativity. These are far less substitutable. As a consequence, companies will become increasingly dependent on their workers, their knowledge, creativity, and enthusiasm. This will be so regardless of the legal divide between typical and atypical workers. In this particular respect the divide is of little or no significance. The spectacular shift in focus of temporary work firms is highlighting. Whereas these traditionally were predominantly providing low and medium skill clerical workers, they are now increasingly supplying high level professionals, often on long-term contracts.[14] The traditional connection between atypical work and less qualified workers is rapidly breaking up.

14. *See, e.g.*, articles *quoted in supra* note 7.

Furthermore, the advent of the information society means that the emphasis in the economy shifts from products to services. Services, in turn, are less standardized than products. In addition, demand for products also becomes less standardized. To an increasing extent, buyers ask for products that meet their specific needs. Long past is the time when—as Henry Ford wanted it—everyone could get his car in the color of his liking provided it was black. The evolution towards an increasingly individualized demand structure for goods and services goes hand in hand with a concomitant individualization of labor supply. It is no wonder that sellers of labor become more discerning and specific as consumers when their demand for work becomes so. It is probable that the truly decisive factor for increased flexibility in working life is change in consumer demand patterns.

Returning now to the four aspects initially mentioned, union density rates will be approached first. Because it is outside the scope of this essay to discuss even superficially the causes of union decline, only some comments *en passant* will be offered. It seems likely that unions will be profoundly affected by the move from an industrialized society to an information society. Characteristic of the information society is the increasing importance of knowledge and creativity. These qualities are individual and have only a scant relationship to standardization and collectivization. Sellers of labor may increasingly hold the upper hand vis-à-vis buyers of labor. This would translate into declining union density rates in the OECD countries. By and large this is also the case, but the picture is far from unequivocal. Furthermore, union density rates should be fairly low in OECD countries. That, however, is far from always being the case; these countries differ considerably. Some countries have extremely low unionization rates (*e.g.*, France and the U.S.) and some others very high (*e.g.*, the Nordic countries, with unionization rates in Sweden well above the 80% mark). Still, since the core idea of unions does not seem overly compatible with labor supply patterns in an information society, it seems reasonable to believe that unions will face increasing difficulties to assert themselves even in countries where the legislator grants them extreme privileges, as in Sweden.

The rise in atypical work is often quoted as one of the main reasons for declining unionization rates.[15] The decline in unionization rates and the increase of the atypical workforce have happened simultaneously. The standard thesis is that the peripheral workforce is less inclined to join unions. It is a fact that unionization rates among atyp-

15. *See, e.g.*, Olney, op. cit. *supra* note 1, p. 20 *et seq.*, ILO, World Labour Report 1997-98, ch. 1, and Walter Galenson, TRADE UNION GROWTH AND DECLINE (Praeger 1994), chs. 2, 3.

ical workers (and among women) are lower in most countries than in traditional (male) full-time employment. Unions in many countries have shown little or no interest in organizing atypical workers (including women), most notably in Japan. However, as the Swedish experience demonstrates, unionization rates are not necessarily lower among atypical workers (and women) in the first place. In the second place, unions do not have to take less interest in atypical workers. Sweden, again, might serve as an example. In the third place, peripheral workers should be particularly prone to join unions because they are highly vulnerable and more often than not face working conditions that are far less favorable than core members. Indeed atypical workers rather than core employees might represent the true potential for unions!

Concerning the power balance between employers and unions it is obvious the decline in union density rates has a dramatic effect. Nowhere has this process gone further than in the United States. On the other side of the Pacific Ocean, Japan has experienced a similar development.[16] At the other end of the spectrum the Swedish experience is radically different. Union density rates are extremely high—well above 80% and increasing rather than declining.[17] Far from daunted by the march into the information society, the concomitant potential for union decline and the challenges of a dualised workforce, unions are at the forefront in creating rules for atypical work as well. This even goes for temporary work, probably the most difficult arena for collective ordering. The structure of the bulk of temporary work in Sweden is under collective ordering in a collective agreement between industry-wide organizations on both sides. One aspect of this is that the end of collective ordering as the main avenue for organizing work seems very distant indeed. "The reports of my death are greatly exaggerated," as it were.[18]

The picture in other European countries is divergent. In Belgium, for example, the role of trade unions has changed fundamentally due to high unemployment. As a consequence, employers now increasingly shape labor law. At the same time, union density rates have been remarkably stable in the last ten years.[19] Conversely,

16. *Cf.* ILO op. cit. note previous note, Tables 1.2 and 1.3. However, the Japanese vista is somewhat ambiguous since the decline of Western type unionism is accompanied by an increase in company based employee associations; *cf.* Reinhold Fahlbeck, *Unionism in Japan: Declining or Not? in* LIBER AMICORUM FOR ROGER BLANPAIN (Kluwer 1998).

17. *Cf.* ILO op. cit. note 15, Tables 1.2 and 1.3.

18. Mark Twain in a cable from Europe to the American news agency Associated Press, upon learning that he had been reported dead by the agency.

19. *Cf.* ILO op. cit. note 15, Tables 1.2 and 1.3.

Dutch unions still are in a position to negotiate epochal agreements, *i.e.* the 1996 Flexibility and Security Agreement. Density rates around 25% are unchanged from 1985, but much lower than some 25 years. How come? Two reasons present themselves. The "culture of consensus" remains intact. Second, the representative authority of the labor marker organizations is rarely, if ever, challenged.

The third and fourth aspects initially raised have been touched upon in the previous sketch of current developments and the effect of the transition from an industrialized society to an information society. Succinctly stated, this transformation already has and increasingly will change the bargaining power balance profoundly between sellers and buyers of labor and tip it in favor of sellers. In the process the entire relationship between them will be transformed.

Yet another facet of the on-going process of transformation is the increasingly blurred distinction between employees proper and the self-employed. It seems to be a universal phenomenon that buyers of labor increasingly prefer to contract with self-employed workers or independent contractors than employees. An obvious reason is that freedom of contract is more or less unrestricted in dealings with the self-employed whereas that is not the case with employed workers. Restrictions vary from far-reaching in some countries (*e.g.* Sweden), to small but still not completely negligible in some other (*e.g.* the U.S.). Buyers have an incentive to form contracts that give them the advantages of the employment contract—*e.g.* worker submission and obligation to perform work on an ever changing basis—without its disadvantage, *e.g.* obligation to provide employment protection and equal opportunity or to pay full social security contributions.

This phenomenon is noticeable at both ends of the flexibility spectrum. The U.K. has witnessed a spectacular increase in the number of self-employed. Unemployment and a favorable tax regime for the self-employed are reasons quoted for the increase. In the European context, Belgium also reports a strong increase in self-employment, in particular as a secondary job for workers. The employee status is being circumvented—or at least stretched—but societal reaction is apparently not too effective. Similar tendencies are noticeable in the former communist countries as well. In Hungary the population of self-employed and subcontractors is calculated at some 25-30% of the workforce. Here, as elsewhere, taxation is a main factor. Still further to the other end of the flexibility spectrum, Sweden struggles to overcome record high levels of unemployment by encouraging the establishment of new businesses by individuals. A statute providing for time off for employees to explore such possibilities was passed in

1997, but it has so far proved a failure. No relaxation in the strict standards defining the employee status has happened.

The significance in the present context of developments concerning the worker status is threefold. First, it illustrates the increasing heterogeneity of the worker community and the concomitant flexibilisation and dualisation of the workforce. Second, it highlights the increasing difficulties facing labor unions. More often than not, independent contractors and the self-employed are either ineligible for union membership or unwilling to join. Third, it highlights the increasing obstacles to collective ordering of labor matters.

C. *The Role of the Government and the Flexibilisation Process*

Is the role of the government changing as a result of flexibilisation? Flexibilisation can influence the three branches of government in very different ways. It can change the nature of their involvement, for example toward a less regulatory and more consultative character, or vice versa. It can influence the balance between the three branches, strengthening the one while lifting obligations form the other, etc. However, it is difficult to discern universal trends of any kind in any of these respects.

In the Japanese context, it has been suggested that flexibilisation might result in an increase in individual labor disputes. This, in turn, will increase the caseload of courts and in particular the role of mediation and conciliation. For entirely different reasons a similar move towards private conflict resolution is very prominent in the United States. There is a strong movement, propelled by the employer community, towards "privatisation" of employment law through the use of arbitrators. Thus, the entire employment law is in the process of becoming administered privately, thereby reducing the role of courts drastically. By and large, the courts honor arbitration clauses in private employment contracts.[20] Such clauses are becoming increasingly prevalent. Because arbitration awards are binding, final, and preclusive of subsequent court litigation, private arbitration may become *the* conflict resolution mechanism and provider of rules in individual employment cases.

The Japanese and the American experiences have in common that that conflict resolution becomes private. Several other results also emerge. Conflict resolution becomes less transparent because private proceedings are not public. Conflict resolution also becomes less open to public scrutiny because awards are not necessarily made

20. The leading case is Gilmer v. Interstate/Johnson Lane Corp, 500 U.S. 20 (1991).

public. The conflict resolution system becomes more atomized because arbitrators and mediators can be chosen on an *ad hoc* basis for each conflict. Conflict resolution will also become more flexible because private arbiters are not bound by procedural rules to the same extent as courts. Are tendencies similar to those in Japan, and, in particular, in the U.S. discernible elsewhere in the world? By and large, the answer is that similar tendencies seem non-existent elsewhere.

Has the role of the executive government changed? It probably is true that there is fairly universal tendency towards a more activist role for the executive and by extension for the legislature. The reason is that the partial dismantling of the protective system established earlier is a process that the social partners have difficulties achieving on their own. A variety of reasons—entrenched positions, much prestige on both sides, strongly held opinions and fears to lose face—make concessions difficult even in countries where a cooperative attitude traditionally prevails. In the Netherlands, change has been brought about by the social partners, albeit in close cooperation with the government,[21] but some other countries have not been similarly successful. A prime example of this is the Swedish experience.

In the early 1990s it became increasingly apparent that there was a need for more flexibility in Swedish labor market regulation. The social partners had not been able to arrive at solutions and their contractual relations were rather much like trench warfare. The government felt it was its obligation to set a process in motion. In 1995, it appointed a tripartite committee under semi-public chairmanship and commissioned it with the task of reaching common ground, arrive at an understanding of necessary changes and perhaps negotiate an agreement on outstanding issues. Flexibility and security coupled with equal opportunity and a positive approach to working conditions for immigrants were the lodestars for the commission. After some fourteen months of deliberations, the chairman had to report to the government that the commission had failed its task. Despite some arm-twisting by the government, the social parties persisted in their negative attitude to self-regulation. The government saw no other option than to submit a bill to Parliament.

Sweden has a long tradition of self-regulation in the labor market by the social partners. "The freedom of the labor market parties" is a cherished notion. To some extent the cooperative attitude that used to be the hallmark of Swedish industrial relations has been replaced by an attitude of "wait and see." The employer community in particu-

21. The epochal 1996 Agreement on Flexibility and Security.

lar appears to have switched to a policy of favoring legislation over negotiation. The reasons seem to be twofold. First, the national confederation of employers—The Swedish Employers Confederation (SAF)—is increasingly loath to engage in negotiations at all with the union confederations because it strongly promotes decentralized rule-making. Second, SAF seems to feel that the executive and legislative branches of government are more inclined to consider employer wishes and needs than the unions. After all, so the reasoning seems to be, the executive and legislative branches of government carry a broader responsibility to the common good than unions.

The Swedish experience is far from unique. Similar developments are reported from widely different countries, *e.g.* Poland and South Africa.

If it is true that the role of the executive government has become more activist in some countries, it is equally true that this is not a ubiquitous phenomenon. For example, the U.S. experience strongly points in the opposite direction.

D. *A New Balance?*

Has flexibilisation produced a new balance between competing interests? Flexibility seems to be regarded primarily as an employer desideratum today. It is almost always linked to economic performance and the necessity to increase economic growth. It is certainly true as well that in most countries flexibility is considered a threat to worker interests. The liberating aspects stressed primarily in the U.S. are not expressed with much or any conviction in most other countries. In a way this is rather surprising. Flexibilisation started as a device to afford more freedom of choice for workers, in particular in arranging their daily and weekly working time (*flextime*). Once underway, a change of sides seems to have occurred. Flexibility, in any case, is a two-sided phenomenon. Aggressive and defensive flexibility are two sides of the same coin.[22]

When studying a cross-section of countries it is obvious that most countries are struggling to find a new equilibrium in employment regulation. Economic rationality and flexibility, on the one hand, and protection of the workers, on the other, are the main components. The U.S. is the exception, riding at the crest of almost full employment, virtually no inflation, and a stable economic growth. But the U.S. seems to be *the* exception. Everywhere else painful accommodations are on the table. It is quite another matter that the equilibrium

22. *See, e.g.*, Olney, *supra* note 1, at 42.

in the various countries is not located at the same position on a flexibility spectrum. International comparisons demonstrate that differences in flexibility between countries are considerable. But that is a matter of degree rather than of kind.[23]

E. *Flexibilisation and Juridification*

Does flexibilisation affect juridification of labor regulation? Most countries in the Western world witnessed a forceful process of juridification of labor matters in recent decades. Previous unilateral employer rule-making or bilateral rule-making in collective agreements between the social partners was increasingly replaced as the prime regulator by statutes or public ordering of some other kind. Even the United States experienced this trend to some extent, albeit limited, as a consequence of the demise of bilateral collective private ordering. Today's trend towards flexibilisation aims at easing the rigidity of the regulatory structure that this juridification resulted in. Does that also mean that we are now witnessing a march towards dejuridification of labor matters?

By and large the flexibilisation process does not result in dejuridification. The opposite is the case. True, flexibilisation results in a certain relaxation of restrictions imposed by that regulation. However, the basic structure of previous regulation remains. In the process the system becomes even more complex because flexibility is introduced as yet another factor to take into consideration. The need for legal rules increases because even more delicate adjustments must be made to accomodate flexibility as an additional value with values already considered, *e.g.* employment protection and equal opportunity. The net result is increased juridification.

Another way of explaining why flexibilisation and dejuridification do not work hand in hand is to point at the fact that flexibilisation is not accompanied by deregulation to any greater extent. When that happens dejuridification also occurs. One example to illustrate. The model case is temporary work. As has been noted, deregulation in Sweden meant the end of a detailed regulatory structure, the very epitome of juridification. Other countries have experienced less dramatic changes concerning temporary work. The reason has primarily been that the previous regime was less restrictive so the need for relaxation—and concomitant dejuridification—was less radical.

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23. *See supra* note 6.

IV. EPILOGUE

Flexibilisation has led to changes in virtually all areas of employment law. These include the procurement and structure of the workforce (numerical, quantitative or external flexibility), employment protection, the job situation (functional, qualitative or internal flexibility), pay and working time. Each of these areas is complex and covers a multitude of situations. When discussing changes brought about by flexibilisation they must all be treated separately. Anyone who engages in such an undertaking will find a multitude of legal solutions. When confronted with the details of legal regulation in the various countries the observer is struck by several observations. Perhaps the most vivid is the staggering variety of solutions found to similar concerns. The richness in rules at the grass-root level to address the minutia of labor market exigencies is admirable.

The manifold of arrangements that the various legal systems display regarding atypical work also amply testifies to the richness of human ingenuity and imagination. Ironically it probably also testifies to the force of coincidence, if not downright vagary. Many legal solutions to precise and minute concerns and issues probably are more incidental than rational in the sense of being *the* answer to a specific problem. Just one example will serve to illustrate. Why do countries that are quite similar, like the Netherlands and Sweden, opt for very different routes to regulate fixed-term employment, one country allowing complete freedom of contract (the Netherlands), the other severely restricting it (Sweden)? There probably is no answer, at least no answer that offers a "rational" explanation. And the same probably is true with many other similarities and dissimilarities that exist between neighboring countries; which is not to deny that deep-rooted traditions sometimes also are accountable.

An observer asked to survey and describe the changes brought about by flexibilisation and the concrete rules arrived at in the various countries is faced with a nearly insurmountable difficulty. The multitude and variety is such that to present anything like a comprehensive account would require copious space, an equal measure of endurance, and near-total prescience. To present but a brief description, on the other hand, would make little sense. More or less every imaginable rule seems to exist somewhere and to work in a given system. Only by describing (and comprehending) the system as a whole could a comprehensible account be provided. Faced with this difficulty the observer might be tempted to abandon the project altogether. *Honi soit qui mal y pense!*