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- Speeches, conference papers, or translations of significant works not appearing in English.

- Detailed bibliographies on comparative issues in labor law, employment policy, or social security.

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DISPATCHES

A **dispatch** is a brief essay, ordinarily not to exceed five printed pages, describing a significant development in national labor law: legislative, judicial, administrative. The importance of the development in domestic context should be explained; the reasons for transnational interest might be suggested.

Proposed dispatches should be submitted to the Journal's editorial office at law-cllpj@illinois.edu and, if approved, will be posted on the *Comparative Labor Law & Policy Journal*'s website. The titles and authors of Dispatches appearing from one number to the next will be published in the *Journal*.

Dispatches are available on the *Comparative Labor Law & Policy Journal* website: https://cllpj.law.illinois.edu/dispatches.

THE SACHEM PASSES

In 1997, Matt Finkin took a phone call from Clyde Summers. That was no surprise. Clyde had been Matt's teacher and, later, his collaborator, sharp-penned critic of his works-in-progress (which Clyde insisted on being sent), and good friend. But this was a business, not a social call.

For over a decade, Clyde and Janice Bellace had edited the *Comparative Labor Law Journal*. They had taken the *Journal* over from Ben Aaron at UCLA where he had edited it for several years. At Penn, the *Journal* had become one of the school's portfolio of student journals, to academics abroad a strange, even bizarre American institution. The *Journal* was largely a venue for student work, usually stimulated by Clyde, but as well for articles written by scholars often in response to calls for papers from regional and global meetings of the International Society for Labor and Social Security Law, and, occasional collections curated by the foreign correspondents of the National Academy of Arbitrators. Whence the reason for Clyde's call: to see if Matt might be interested in assuming the editorship. (Only much later did Matt ask Clyde how many had been on Clyde's list. Clyde said there were four. Matt was third.)

What ensued was a conversation on several fronts. With the Dean of the University of Illinois' College of Law, Tom Mengler, on whether the College would be willing to host the *Journal*. Tom said it was. Happily, his successors unreservedly adhered to that commitment, which we would like to acknowledge with genuine thanks.

The conversation continued with Clyde. Would he be amenable were the scope to be expanded, to *Comparative Labor Law and Policy*, with an expanded editorial advisory board, an expanded general editorial role outside of law, and editorial selections relying on blind peer review. Even as Clyde stated that once the *Journal* was in other hands he'd have nothing to say about the conduct of its mission, he allowed that what was proposed was most genial.

The conversation was next pursued with Sanford Jacoby. Matt had made Sandy's acquaintance while seeking permission to excerpt part of Sandy's *Employing Bureaucracy: Managers, Unions, and the Transformation of Work in American Industry, 1900-1945* (1985), for use in a "cases and materials" coursebook in employment law. Their exchanges became more frequent as Sandy's ensuing work appeared – *Masters to Managers* (1991) and

The Workers of Nation (1995). Given Sandy's disciplinary interconnectedness, in economics, history, and public policy, he was the only candidate on Matt's list of potential co-editors. Fortunately, *that* list needed no further extension.

All the pieces came together: the *Comparative Labor Law & Policy Journal* was launched as volume 19 in continuance of its predecessor. Production of the *Journal* could not have gone forward and certainly not as successful as it did without the efforts of a series of managing editors – most of whom discovered their taste and talent for it "on the job" – Stacey Ballmes, Gita DeLeon, Erica Melko, Naomi Young, and Vanessa Kamman – and the many student assistants who checked every citation. To all of them we give our heartfelt thanks.

Now with volume 44, a mere quarter of a century on, the two of us have come to the belief – or to our senses – that it is time for editorial rejuvenation, that we have done what we could, and if we have not, there'd be no reason to believe with more time we'd do any better. But what had we done? The goal was set by Clyde when the *Journal* was handed over. He was, he said, a missionary striving to break down the wall of American parochialism, to open the minds of American lawyers, judges, legislators and bureaucrats to the arresting fact that other countries face identical or analogous economic, social, and legal issues embedded in the world of work; that America could profit from a wider and deeper exposure which recourse ought to become a matter of course. We also thought that readers should be exposed to scholarship in other countries – we later put together a collection on "National Styles" if labor law scholarship – to make the *Journal* a medium for international exchange.

It is fitting that our final number is devoted to a collection on the future of comparative labor law. In connection with it, we took a sidelong, unscientific glance at where the *Journal* stood not only in the world of scholarship but in the world of legislation and adjudication. On the former we were fortunate indeed that the indefatigable Anne Trebilcock had undertaken the arduous task of editing a collection for Elgar, *Comparative Labour Law* (2018), reprinting what she judged to be the most significant English language periodical contributions to the field, canvassing venues from the *Melbourne University Law Review* to the *Modern Law Review* to the *American Journal of Comparative Law*. Of the thirty-two articles she selected, covering four major areas of study, ten had appeared in the *Comparative Labor Law and Policy Journal*. We were as gratified by her selections as impressed by the fineness of judgement and the enormous effort expended in making them.

For the latter, the real world reception, we cast about our Editorial Board for bibliographic assistance. In some, perhaps most jurisdictions – Italy,

Japan, Portugal, Belgium, for example – by law (in Italy) or practice (in others) the legal periodical literature in general or the foreign language legal literaeture in particular is not referenced by the courts. Even so, a couple of our respondents pointed out that Advocates General of the European Court of Justice had relied on work appearing in the *Journal*. And not surprisingly, given Canada's well-earned reputation for open-mindedness, the Osgoode Hall library informed us of eleven decisions of various Canadian bodies referencing one or more pieces we had published, though most on Canadian law. What did come as a surprise is what the library staff at the University of Illinois College of Law turned up: between 2003 and 2021, ten different articles had been referenced in eight federal courts in the United States – three courts of appeals, five district courts – and by the National Labor Relations Board, and the Supreme Court of Wisconsin. Some of these references dealt with U.S. law, but several dealt with law abroad especially Italian and German law. The density of references may not be impressive; the fact of reference is.

Such was the *Journal's* situation as we sought to secure new editorship. Due to the extraordinary efforts of Jeffrey Sack in Toronto, we have more individual Canadian than U.S. subscribers: we are now more a North American journal than one moored to the United States alone. Thus it was our good fortune, and our readership's, that Valerio De Stefano, whose comparative depth needs no introduction, had relocated to Osgoode Hall and was eager to take the task on, that Sara Slinn, whose empirical work comports with and fleshes out the "policy" part of the *Journal's* mission, was happy to join him, and that the administration of York University was agreeable to add the *Journal* to its growing international portfolio.

Apropos of our North American grounding, the tract of territory in the continent's Northeast straddling the U.S. and Canada is the ancestral home of what the French called the Iroquois, but which the indigenous people call the Haudenosaunee Confederacy. The Haudenosaunee are famous for the fabrication of exquisite, intricately patterned beaded belts, called Wampum. Every Chief of the Confederacy, called the Sachem, and every Clan Mother has a specific belt of Wampum that serves as his and her certificate of office. When a new Sachem or Clan Mother takes office the belt passes on to him or her. And so, figuratively, the Sachem now passes to Valerio and Sara, with a sigh of wistfulness on our part, but with great expectations for what will follow. To Valerio and Sara, *bon succès*.

Matt Finkin
Sandy Jacoby

COMPARATIVE LABOR LAW IN THE UNITED STATES AND CANADA TODAY: INTERPRETING DIFFERENT BUT STABLE EQUILIBRIA

KEVIN BANKS[†]

STEVEN WILLBORN[††]

In 2003, the editors of this Journal celebrated its Silver Anniversary with an issue asking scholars to address the future of the Journal, and of comparative labor law, in the following quarter century.[1] Now, almost but not quite 25 years later, the editors ask scholars to address the current state of comparative labor law. The editors must be getting soft because the former task was much more difficult and challenging than the latter one. Describing the present is no easy task, but predictions are particularly difficult, especially about the future.[2] Indeed, there may be special risks to scholars making predictions – if the predictions are specific, then they are falsifiable, and, if they are falsified, then the scholar's reputation may be at risk.[3] This article mostly sticks to the main assignment, describing the current state of comparative labor law in North America.[4]

Comparative labor law has always been a fraught enterprise. In the 1750s, Montesquieu claimed that cross-national legal comparisons were very unlikely to be useful: "Les lois politiques et civiles de chaque nation … doivent être tellement propres au people pour lequel ells sont faites, que c'est un

† Faculty of Law, Queen's University, Canada. We wish to thank David Earl, Riley Hayes, Mikaela Norkus, and Dana Surtees for excellent research assistance. All errors remain ours.

†† Spencer Professor of Law, University of Nebraska College of Law.

1. Matthew W. Finkin, *Introduction: On the Journal's Mission in the Next Quarter Century*, 25 COMP. LAB. L. & POL'Y J. 1 (2003).

2. Clever aphorisms, as with any success, have many fathers. Baseball fans in the United States attribute this aphorism to the quote-master, Yogi Berra, but he may well have been a late-comer to the phrase. *It's Difficult to Make Predictions, Especially About the Future: Niels Bohr? Samuel Goldwyn? K.K. Steincke? Robert Storm Petersen? Yogi Berra? Mark Twain? Nostradamus? Anonymous?,* quote investigator.com/2013/10/20/no-predict (last viewed Jan. 2024).

3. Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces*, 76 IND. L.J. 29, 30 (2001).

4. It is worth noting that the assignment in 2003 was to predict the future of comparative labor law *scholarship*, while the current assignment is to assess comparative labor law more generally, for example, in the courts and legislatures, as well as in the literature. So maybe the editors are not getting so soft after all.

grand hazard si celles d'une nation peuvent convener à une autre."[5] Law was so closely related to the local geographic, economic, social, cultural, and political environment that it would only be the merest chance – "un grand hazard" – if the laws of one nation would be suitable for another. In the modern classic on comparative labor law, Sir Otto Kahn-Freund was more optimistic than Montesquieu about the value of comparativism. The world had become much smaller, much less diverse on all the Montesquieu factors, in the three centuries between Montesquieu and Kahn-Freund.[6] But even Kahn-Freund was very skeptical about its usefulness for comparative *labor* (or as he said, labour) relations.[7]

But outside of theory, in the real world, the impact of labor comparativism has ebbed and flowed. In the United States, the rapid state-based development of workers' compensation during the first quarter of the 20th century leaned heavily on prior developments in Europe, especially Germany and Great Britain.[8] Trans-Atlantic comparisons informed a similar wave of legislation in Canada.[9] In the years during and immediately following the Second World War, Canadian legislatures passed labor relations statutes modelled on the United States' Wagner Act.[10] Later, the United States was the first mover in the waves of legislation and case law prohibiting employment discrimination, and Canada and Europe looked to the developments in the United States as a first draft.[11] But at other times, including now as we will see, the impact of comparativism on labor law was waned. This implies that the utility of comparativism depends considerably on the social and

5. "The political and civil laws of each nation … must be so fitted to the people for which they are enacted that it would be the merest chance if those of one nation would be suitable for another." Esprit des Lois, Book I, Chap. 3, *cited in*, Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 6 (1974).

6. Kahn-Freund, *supra* note 5, at 8-9.

7. *Id*. at 20-27.

8. *See* JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (2006); DANIEL T. RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE 209-266 (1998).

9. *See, e.g.*, The Hon. Sir William Ralph Meredith, *Final Report on Laws relating to the liability of employers to make compensation to their employees for injuries received in the course of their employment which are in force in other countries, and as to how far such laws are found to work satisfactorily,* Report for the Ontario Government (October 1913).

10. Taylor Hollander, *Making Reform Happen: The Passage of Canada's Collective-Bargaining Policy, 1943-1944*, 13 J. POL'Y. HIST. 299 (2001); Laurel S.MacDowell, *The Formation of the Canadian Industrial Relations System during World War Two*, 3 LAB./LE TRAVAIL, 175 (1978). Donald M. Wells, *Origins of Canada's Wagner Model of Industrial Relations: The United Auto Workers in Canada and the Suppression of "Rank and File" Unionism, 1936-1953,* 20 CAN. J. SOCIO. 193 (1995).

11. *See* Kevin Banks *et al., The Lasting Influence of Legal Origins: Workplace Discrimination, Social Inclusion and the Law in Canada, the United States and the European Union, in* HANDBOOK OF COMPARATIVE LABOUR AND EMPLOYMENT LAW (Matthew W. Finkin & Guy Mundlak, eds., 2015); Steven L. Willborn, *Proof of Discrimination in the United States and the United Kingdom*, 5 CIV. JUST. Q. 3212 (1986).

economic pressure for change at the time; when millions of workers are being maimed and killed by the new industrialism (exposing the need for workers' compensation laws); when labor relations instability threatened wartime production in Canada and reflected widespread popular support for collective bargaining rights; or when social disparities become salient and impossible to ignore (exposing the need for employment discrimination laws), nations begin to look for models to address these problems wherever they can be found.

This article addresses the current state of labor law comparativism in Canada and the United States. As noted, this is not a period of great dependence on comparative labor law. The article will begin in Section I by describing the status quo. Then Section II will venture again into the explanation and prediction business by discussing the factors that might (or might not) explain the current status of comparative labor law and lead to increased reliance in future.

I. THE CURRENT STATE OF COMPARATIVE LABOR LAW IN CANADA AND THE UNITED STATES

Sadly for readers of this Journal, the current state of comparative labor law in the United States is relatively weak and ineffective. Across a number of dimensions – scholarship, legal education, and case law – comparative labor law makes only occasional and, even then, mostly passing appearances. In Canada, an infrequent but robust international comparative practice continues to inform appellate court judgments and law reform discourse, but its influence on directions of legal change has been relatively modest.

Scholarship. In 2003, comparative labor law scholarship in the United States had shown steady growth over the prior 20 years. In five-year periods prior to then, the number of articles had grown from 73 in the 1985-1989 period, to 362 in 1995-1999, and to an estimated 425 for the 2000-2004 period. (See Table 1.) At that time, one would have been justified in predicting that the growth would continue (in fact, one of us predicted that). But since then, there has been stasis, at best. For the 2015-2019 period, there were 382 articles; for 2020-2024, the estimate is that there will be 390 articles.

Table 1. Number of Comparative Labor Law Articles in the United States, Five-Year Periods, Since 1985

Time Period Beginning	Number of Articles
1985	573
1990	213
1995	362
2000	372 (estimated 425 in 2003)
2005	423
2010	482
2015	382
2020	390 (estimated in 2023)

The one bright spot in this picture is the role played by this Journal. The 2003 Silver Anniversary issue of this Journal noted the central role played by this Journal in fostering the comparative labor law enterprise. That journal noted that in the five-year period from 1999-2004, 120 articles from this Journal were cited in 99 other legal periodicals; 23 of the articles were cited in more than one other journal; and the publications citing this Journal included major legal publications, such as the *Columbia Law Review*, *Yale Law Journal*, and the *Duke Law Journal*.[12] By comparison, in a recent five-year period (2018-2022), 248 articles from this Journal were cited in 219 other legal periodicals; 107 of the articles were cited in more than one other journal; and the publications citing this Journal continued to include major legal publications, including those mentioned specifically in the 2003 article.[13] As a result, even though the overall impact of comparative labor law tends to be stable or even declining generally, the impact of this Journal continues to be robust.[14]

The prominent place in comparative labor law scholarship occupied by this journal and by the International Journal of Comparative Labour Law and Industrial Relations likely explains the much more modest output of comparative labor law scholarship, even on a per capita basis, in Canada that is evident in Table 2 below. In contrast with the United States, Canada saw an increase in comparative labor law scholarship directed at Canadian audiences in the early 2000s. This was mainly a result of comparative perspectives on

12. Finkin, *supra* note 1, at 2-3.

13. A caveat: Five more journals were included in the 2018-2022 analysis than in the 1999-2004 analysis.

14. Another bright spot internationally is the Labor Law Research Network, which holds well-attended biannual international conferences devoted mostly to comparative labor law. *See* Labour Law Research Network at labourlawresearch.net. While American scholars have been active participants in these conferences, as noted above, the organization does not seem to have resulted in increased domestic scholarship in the area.

developments during that time of freedom of association jurisprudence under Canada's Charter of Rights and Freedoms.

Table 2. Number of Comparative Labor Law Articles in Canada, Five-Year Periods, Since 1985

Time Period Beginning	Number of Articles
1985	2
1990	5
1995	3
2000	9
2005	16
2010	11
2015	16
2020-2023	4

Education

Only one of the ten leading textbooks used in American law schools to teach individual employment law has a chapter devoted to comparative labor law, and that chapter is mostly focused on international (vs. comparative) labor law and it is in a book whose most recent edition was published in 2005.[15] One other book has a section of a chapter devoted to comparative labor law; the section is less than a fourth of the chapter at the very end of the third edition of a book which is now in its fifth edition.[16] (The fifth edition does not include the section.[17]) The other employment law textbooks have very little to no consideration of comparative labor law, including those co-authored by major proponents of comparative labor law, such as Matt Finkin[18] and Steve Willborn.[19] The textbooks in the other subjects within the broad labor-and-employment umbrella – labor law, employee benefits law, employment discrimination law – are similar in their inattention to comparative labor law. Law students have only limited exposure to the methods and insights of comparative labor law.

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15. KENNETH M. CASEBEER & GARY MINDA, WORK LAW IN AMERICAN SOCIETY 1129-1202 (2005).
16. ROBERT J. RABIN *et al.*, LABOR AND EMPLOYMENT LAW: PROBLEMS, CASES AND MATERIALS IN THE LAW OF WORK 845-880 (3d ed. 2002).
17. KENNETH G. DAU-SCHMIDT, LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE (5th ed. 2016).
18. *Id*.
19. STEVEN L. WILLBORN *et al.,* EMPLOYMENT LAW: CASES AND MATERIALS (7th ed. 2022).

In Canada, by contrast, comparative analysis likely plays a modest but somewhat more important role in the education of labor and employment lawyers. The leading English-language labor and employment law casebook includes excerpts from research and case law from foreign jurisdictions, mainly the United States and the United Kingdom.[20] This is largely for three purposes. The first is to provide insights into important context such as the relationship between labor laws and labor markets, the roles of unions, and labor market and labor and employment relations trends across industrialized economies. The second is to provide information on the historical origins of legal structures and doctrines imported from foreign jurisdictions, again largely the United States and the United Kingdom. The third is to consider alternative approaches to Canadian labor and employment law doctrines and models. This includes reflecting on the cautionary tale of the decline of labor law in the United States and its relationship to small but impactful differences between Canada's version of the Wagner Act model and its original counterpart south of the border.

Case Law

Comparative labor law analysis is rare to non-existent in American case law. Based on Westlaw searches for cases from 2017 to 2022, we were unable to find any cases in the federal courts at any level (Supreme Court, Court of Appeals, District Courts) that engaged in true comparative analysis.[21] Outside that time frame, perhaps the most interesting reference to comparative labor law occurs in an early *Boys Markets* case[22] which contains no comparative analysis itself, but which cites a Sir Kahn-Freund article which finds it "to be regretted that labour lawyers do not often show an interest in comparative law…".[23]

Interestingly, until recently, comparative labor law could have had a significant effect in the United States through an aspect of international law. There, the Alien Tort Statute permits actions for violations of customary

20. THE LABOUR LAW CASEBOOK GROUP, LABOUR AND EMPLOYMENT LAW: CASES, MATERIALS, AND COMMENTARY (9th ed. 2018).

21. The search was (comparative or "comparative labor") w/5 (labor or employment). While there was no true comparative analysis, a few cases made tangential references to comparative law. *See S*chultz v. Royal Caribbean Cruises, Ltd., 465 F. Supp.3d 1232, 1260 (S.D. Fla. 2020) (noting that Malta's anti-discrimination law protects against disability discrimination and, thus, the ADA is consistent with Maltese law); Wang v. General Motors, LLC, 371 F. Supp.3d 407, 413 (E.D. Mich. 2019) (referencing an email to the plaintiff noting that the retirement age in China is 60 years old).

22. *Boys Markets* is an important Supreme Court case permitting federal courts to issue pre-arbitration injunctions in labor disputes under certain conditions. Boys Markets v. Retail Clerks Union Local 770, 398 U.S. 235 (1970).

23. U.S. Steel Corp. v. United Mine Workers of America, 519 F.2d 1236, 1249 n. 25 (5th Cir. 1975).

international law and, of course, what is "customary" can be determined only by examining and comparing the law of nation states. For a time, the Alien Tort Statute was used to address the use of child labor by American corporations in foreign countries. (The leading case involved a claim that an American corporation was facilitating the use of child slave labor on cocoa farms in the Ivory Coast.)[24] But even that fairly limited use for comparative labor law was cut off in 2013 when the Supreme Court held that the Alien Tort Statute did not apply to violations of customary international law occurring within other sovereign nations.[25] Perhaps ironically, not long afterwards the Supreme Court of Canada concluded that customary international law, including *jus cogens* prohibitions against slavery and forced labor, form part of the Canadian common law, and that novel tort claims of workers for breaches of customary international law should be allowed to proceed because it was not plain and obvious that they would fail.[26]

Canadian courts and tribunals appear to use of comparative analysis in the labor and employment law contexts more frequently than their US counterparts. The Supreme Court of Canada makes the most comparisons, including in labor and employment law cases, and to the widest variety of jurisdictions. Provincial Courts of Appeal make comparisons less frequently, and in labor and employment law mostly to US jurisprudence, with the exception of the Quebec Court of Appeal, which primarily compares to France. (This is not surprising given the origins of Quebec civil law system in that of France.) Canada's busiest labor relations tribunal, the Ontario Labour Relations Board, makes relatively frequent comparisons, mainly to US law.

Several studies have examined the Supreme Court of Canada's use of comparative law.[27] The most recent and most comprehensive of these describes Canada as "a leader in the importation and exportation of constitutional ideas".[28] It finds that the Supreme Court is most likely to make comparisons to foreign law when, among other things: (a) the issue is one of constitutional law, especially human rights cases, (b) there is a novel legal issue, and (c) the legislation involved has foreign origins.[29] Each of these

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24. John Doe I v. Nestle USA, 766 F.3d 1013 (9th Cir. 2014).

25. Kiobel v. Royal Dutch Petroleum, 569 U.S. 108 (2013).

26. Nevsun Resources Ltd. v. Araya, 2020 SCC 5.

27. *See e.g.*, Peter McCormick, *Waiting for Globalization: An Empirical Study of the McLachlin Court's Foreign Judicial Citations* 41 OTTAWA L. REV. 209 (2010); Eszter Bodnár, *A "Comparative Constitutional Powerhouse" in Action: An Empirical Study of the Supreme Court of Canada's Use of Comparative Law Based on Interviews and Case Citations* 54 U. BRIT. COLUM. L. REV. 353 (2021).

28. Bodnár, *supra* note 27, at 353-54.

29. For more information on which judges use comparisons, see Figure 3, located in *Id.* at 371. See also *Id.* at 393 for a discussion on the relevance of bilingualism (the bilingual judges interviewed always

situations can arise in Canadian labor and employment law. In recent years, about 40% of foreign citations by the Supreme Court have come from the UK, 37% from the United States, and 8% from Australia.[30] These tendencies reflect the origins of Canada's constitution in the United Kingdom and the fact that Canadian constitutional law is a "product of different legal and political traditions",[31] in that the drafting of the Canadian *Charter of Rights and Freedoms* was influenced by international human rights instruments and the US Constitution.

On the other hand, the uses that the Supreme Court makes of foreign comparisons tend to be relatively modest and cautious. The Court has in fact recently commented that foreign decisions should be used with caution in constitutional interpretation, and that the role of comparative law is limited to confirming or supporting an interpretation arrived at through a purposive approach to that task.[32]

A search of Supreme Court of Canada and provincial Court of Appeal labor and employment law decisions between 1985 and 2022 undertaken for this paper shows that while Canadian courts rely relatively infrequently on comparative analysis, it does from time to time play an important role in supporting judicial reasoning, and that in practice a similar approach to that taken in constitutional interpretation applies to statutory and common law interpretation. [33] This approach leaves room for comparative analysis where it is relevant and persuasive in arriving at an interpretation that is consistent with the wording and purposes of Canadian law. Of course, where a Canadian provision was itself modelled on international or foreign laws, its purposes

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relied on English translations from other jurisdictions, but they would use other languages while contacting fellow foreign judges).

30. *Id.* at 368.

31. *Id.* at 372.

32. Quebec (Attorney General) v. 9147-0732 Québec Inc, 2020 SCC 32; R c. Bissonnette, 2022 SCC 23, paras. 98-108. In his study of *Charter* decisions from the Supreme Court between 1998 and 2003, Bijon Roy says:

[T]he quantitative and qualitative findings of this study generate a picture of the Supreme Court of Canada as an institution that is in fact quite hesitant, even reluctant, to adopt the jurisprudence of foreign jurisdictions or rules set out by international instruments. In fact, the Court very rarely adopts this foreign reasoning as its own and draws support from it only with caution and to bolster rather than underpin domestic jurisprudence.

See Bijon Roy, *An Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation* 62 U. TORONTO FAC. L. REV. 99, 138-139 (2004). For the view of the Court's then sitting Chief Justice on the value of international comparison in a later period, *see* Beverly McLachlin, *Keynote Address: The Use of Foreign Law – A Comparative View of Canada and the United States*, 104 AM. SOC'Y INT'L L. PROC. 491 (2010).

33. Some have argued that Canadian courts should make more robust use of international comparison in statutory interpretation. *See* Lorne Neudorf, *Taking Comparative Law Seriously: Rethinking the Supreme Court of Canada's Modern Approach to Statutory Interpretation,* 39 STATUTE L. REV. 184 (2018).

can in principle be construed in light of those of foreign or international counterparts.

Our search identified 25 Supreme Court of Canada decisions relying to some extent on comparative analysis, either in a majority or in a dissenting opinion.[34] Of these, the vast majority contained an analysis of foreign law in sufficient depth to indicate either that it supported the Court's reasons or that the Court thought it necessary to distinguish its approach to Canadian law from that of comparable foreign laws.[35] The jurisdictions most frequently referred to in the labor and employment law context are the United Kingdom and the United States. The next most referred to sources are the European Court of Human Rights, and international instruments. While in principle it is arguable that the Supreme Court has moved towards a monistic approach to international law under Canada's Charter of Rights and Freedoms, in practice it appears that the Court treats international law as simply relevant and persuasive in Charter interpretation, an approach more akin to that which it takes to international comparison.[36] The Court made some, but far fewer references to laws in Australia, New Zealand, Germany, Israel, France, Italy, Portugal, Spain and South Africa.

The most common subject of international comparison at the Supreme Court, appearing in 6 decisions, has been that of freedom of association. This is not surprising. Over the period in question, the Supreme Court first adopted a narrow interpretation of freedom of association that did not protect

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34. Fraser v. Canada (Att'y Gen.), 2020 SCC 28; Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4, paras. 35-37, 42, 67-74; Mounted Police Association of Ontario v. Canada (Attorney General), 2015 SCC 1, para. 53; McCormick v. Fasken Martineau DuMoulin LLP, 2014 SCC 39, paras. 34-37; Waterman v. IBM Canada Ltd., 2013 SCC 70, paras. 36, 54, and 60; Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27, paras. 71-79; Canada (House of Commons) v. Vaid, 2005 SCC 30, paras. 38-39, 42, 44-46, 61-70; Toronto (City) v. CUPE, Local 79, 2003 SCC 63, paras. 23-29; RWDSU, Local 558 v. Pepsi-Cola Canada Beverages (West Ltd.), 2002 SCC 8, para. 99; Janzen v. Platy Enterprises Ltd, [1989] 1 S.C.R. 1252, paras. 50, 53-54, 66-67; Berry v. Pulley, 2002 SCC 40, paras. 35-36; R c. Advance Cutting & Coring Ltd, 2001 SCC 70; Des Champs v. Prescott-Russell (Conseil des écoles séparées catholiques de langue française), [1999] 3 S.C.R. 281, paras. 22 & 28, 68 & 99; ACTRA v. Canadian Broadcasting Corp, [1995] 1 S.C.R. 157, paras. 125-26; Bazley v. Curry, [1999] 2 S.C.R. 534, paras. 23-24; K Mart Canada Ltd v. UFCW, Local 1518, [1999] 2 S.C.R. 1083, paras. 51-55; Dayco (Can.) Ltd. v. CAW. [1993] 2 S.C.R. 230; Lavigne v. OPSEU., [1991] 2 SCR 211, paras. 83-86, 121-127, 266-268, 317-318; Canada (Att'y Gen.l) v. PSAC., [1991] 1 SCR 614, paras. 53-66; Gendron v. Supply & Services Union of PSAC, Local 50057, [1990] 1 S.C.R. 1298; CAIMAW, Local 14 v. Canadian Kenworth Co., paras. 23, 26, 45; Hills v. Canada (Att'y Gen.), [1988] 1 S.C.R. 513, paras. 5, 57-68; British Columbia Telephone Co. v. TWU. of BC,.[1988] 2 S.C.R. 564, paras. 44-46; Reference re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313, paras. 52-76; Ontario (Human Rights Commission) v. Simpsons-Sears Ltd, [1985] 2 S.C.R. 536, paras. 16, 20.

35. In our view 19 of 25 opinions contain such analysis.

36. Benjamin Oliphant, *Interpreting the Charter with International Law: Pitfalls and Principles*, 19 APPEAL: REV. CURRENT L. & L. REF. 105 (2014).

collective bargaining rights, and then reversed that interpretation so as to protect the rights to organize, bargain collectively and strike.[37] In addition, it recognized the freedom not to associate, and upheld certain limits on that freedom.[38] Other subjects of repeated international comparison included labor relations legislation, and anti-discrimination law. This is consistent with the short list of major topics of legal importation into Canada identified above. There was no discernable pattern in the frequency of international comparisons over time, suggesting a steady state in the frequency if not the depth of international comparison.

Our search identified 21 provincial Court of Appeal decisions between 1985 and 2023 making international comparisons.[39] Of these, the vast majority involved in-depth consideration rather than passing reference. Interestingly, the most frequently recurring topic of international comparison in Courts of Appeal was workers' compensation legislation, again a subject of international influence at its origins in Canada. Judges in provincial Courts of Appeal drew comparisons to US law more often than to English law. Their comparisons seldom reached beyond those two jurisdictions. Again, there was no discernable pattern in the frequency of international comparisons over time.

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37. *See* Reference (Alberta), 1 S.C.R 313; Health Services and Support 2007 SCC 27; Mounted Police Association of Ontario, 2015 SCC 1; Saskatchewan Federation of Labour, 2015 SCC 4, *supra* note 34.

38. *See* Lavigne, [1991] 2 S.C.R. 211; Advance Cutting & Coring 2001 SCC 70, *supra* note 34.

39. Lavigne v. Ontario Public Service Employees Union., [1989] O.J. No 95 (Ont.)(QL); Dayco (Can.) Ltd. v. CAW., [1990] O.J. No. 1650 (Ont.)(QL); Huras v. Primerica Financial Services Ltd., 2000 CarswellOnt 3751, paras. 14-17 (Ont.)(WL); Cadillac Fairview Corp. v. RWDSU, 1989 CarswellOnt 936, paras. 36-37 (Ont.)(WL); Trinity Western University v. Law Society of Upper Canada, 2016 ONCA 518; Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd, 1991 CarswellOnt 489, paras. 186-191 (Ont.)(WL); Minott v O'Shanter Development Co, 1999 CarswellOnt 1, para. 26 (Ont.)(WL); Delisle c. Canada (Sous-procureur general), 1997 CarswellQue 4702, para. 6 (Que.)(WL); Maroc (Royaume) c. El Ansari, 2010 QCCA 2256, paras. 72-76; Société Radio-Canada v. Union des Artistes, 1983 CarswellQue 367 (Que.)(WL); Chaput c. Société de transport de la communauté urbaine de Montréal, 1992 CarswellQue 223 (Que.)(WL); Janzen v. Platy Enterprises Ltd, [1986] M.J. No. 560, paras. 35, 49-62 (Man.)(QL); Dinney v. Great-West Life Assurance Co, 2005 MBCA 36, paras. 32-34, 43-49, 53-56, 59, 62, 69; RWDSU, Locals 544, 496, 635, 955 v. Saskatchewan, 1985 CarswellSask 193,paras. 12, 67-68, 90 (Sask.)(WL); Zurich Life Insurance Co v. Branco, 2015 SKCA 71, paras. 153-156, 177; Osborn v. Alberta (Workers' Compensation Board Appeals Commission), 2011 ABCA 44, paras. 27-28; Nabors Canada LP v. Alberta (Workers Compensation Board Appeals Commission), 2006 ABCA 371, para. 27; Weldon v. Teck Metals Ltd, 2013 BCCA 358, paras. 13, 27-28; British Columbia Ferry Corp v. Invicta Security Service Corp, 1998 CarswellBC 2541, paras. 30, 32, 43, 62 (B.C.)(WL); Bhindi v. British Columbia Projectionists, Local 348, International Alliance of Picture Machine Operators of United States & Canada, 1985 CarswellBC 166, paras. 51-59, 76-85 (B.C.)(WL); M (FW) v. Mombourquette, 1996 NSCA 125, paras. 41-47; Mehta v. MacKinnon, 1985 CarswellNS 277, para. 20 (N.S.)(WL); Butt v. USWA., 2002 NFCA 62, paras. 18-19, 21, 102-112; Joey's Delivery Service v. New Brunswick (Workplace Health, Safety & Compensation Commission), 2001 NBCA 17, para. 51; Coffin v. Martin et al., 2018 NBCA 46, paras. 46-47.

Between 1985 and 2023 the approach of the Ontario Labour Relations Board to international comparison appears to have changed. Older cases cite foreign law more frequently than more recent ones.[40] Though the Board still makes international comparisons frequently relative to the practice of Courts of Appeal, in recent years these have tended to be relatively brief, without contextualized analysis, and not to have a significant role in its legal reasoning.[41] The jurisdiction compared to most, by far, is the United States, and the next most common foreign source is Australia. One conjecture that these trends might support is that with the decline of U.S. labor's law's effectiveness has come a decline in its influence in Canada.

Publicly Commissioned Law Reform Reports.

In Canada, publicly commissioned expert reviews of workplace laws continue to be informed by national and international comparisons. There have been three such reviews in recent years. The first, led by Professor Harry Arthurs, produced a report on modernizing federal labor standards, published in 2006.[42] Research prepared for that report compared in detail then current federal labor standards to those in other Canadian and industrialized country jurisdictions.[43] The Report made regular use of comparisons between Canadian jurisdictions in justifying its recommendations. While acknowledging limitations of comparisons across international borders,[44] the

40. *See e.g.*, York University v. YUFA., 1977 CarswellOnt 934 (WL), [1977] O.L.R.B. Rep 611; Globe & Mail (The) v. Southern Ontario Newspaper Guild, Local 87, 1982 CarswellOnt 989 (WL), [1982] O.L.R.B. Rep. 189; UFCW v. Sunnlea Foods Ltd, 1981 CarswellOnt 1058 (WL), [1981] O.L.R.B. Rep. 1640; ILGW. v. 490266 Ontario Ltd., 1982 CarswellOnt 1072 (WL), [1982] O.L.R.B. Rep. 828; OPSEU v. Mini-Skool Ltd., 1982 CarswellOnt 1121 (WL), [1983] O.L.R.B. Rep. 1514; CLC, Local 1689 v. Algonquin Tavern, 1981 CarswellOnt 975 (WL), [1981] O.L.R.B. Rep. 1057; Cadillac Fairview Corp v. RWDSU, 1985 CarswellOnt 1251 (WL), [1985] O.L.R.B. Rep. 941.

41. *See e.g.*, B.A.C. v. Kvaerner Jaddco, 1999 CarswellOnt 5392, para. 46 (WL), [1999] O.L.R.B. Rep. 1023. Sometimes the comparison is part of a citation of another case, instead of the body of the decision itself. *See e.g.,* Care Partners v. SEIU, Local 1, 2016 CarswellOnt 11206, paras. 22-23 (WL), [2016] O.L.R.B. Rep. 387; IWA-Canada, Local 700 v. Supply Chain Express Inc., 2001 CarswellOnt 5471, para. 6 (WL), [2001] OLRB Rep 1288; Ontario v OSSTF, 2012 CarswellOnt 15934, para. 58 (WL), [2012] O.L.R.B. Rep. 1007; USW, Local 1-2693 v. Neenah Paper Co. of Canada, 2006 CarswellOnt 4292, para. 51 (WL), [2006] O.L.R.B. Rep. 224.

42. Harry W. Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century*, Report for the Government of Canada (2006).

43. *Id.* at 42-46.

44. *Id.* at 43. Arthurs states, "Comparisons among jurisdictions, especially across international borders, are notoriously difficult because different jurisdictions use different strategies to ensure decent conditions in the workplace. Some use labour standards, some social welfare or economic policies; some regulate the employment bargain, some provide incentives to employers or subsidies to workers; some integrate employment standards with other forms of labour market regulation such as collective bargaining, some allow these systems to operate in relative isolation. Accordingly, a narrow focus on particular labour standards may obscure the fact that in different jurisdictions the same issues are dealt with in

Report noted that such they "force us to think 'outside the box'", "remind us that people confronting similar challenges to our own have come up with very different responses" and that "even if we decide not to imitate their response, we are at least driven to examine our own critically, and with an awareness that alternatives do exist."[45] The Report indicated that its analysis of the legal status contract workers, the equal treatment of part-time and temporary workers, and education and training leaves was informed by such comparisons,[46] though they seem to have served as background information and are not mentioned as justifications for specific recommendations.

In 2017 the Ontario government published a review by prominent arbitrators Michael Mitchell and John Murray of whether the Ontario *Employment Standards Act, 2000* (ESA) and the *Labour Relations Act* (LRA) required legislative changes to create better workplaces in Ontario.[47] Like the earlier Federal Labour Standard Review Commission, their report made regular comparisons to other Canadian jurisdictions.[48] While discussing the possibility of introducing provisions regulating scheduling of work by employers, the authors looked at laws in the US and Australia.[49] The report also compared laws in in Europe and elsewhere in North America in examining rights to request modified schedules.[50] Its most extensive comparative analysis focused on the regulation of temporary help agencies in the US, European Union, and Australia.[51]

Finally, the 2019 Report of the Expert Panel on Modern Federal Labour Standards followed up on the 2006 Report of the Arthurs Commission. The Expert Panel's report focused on whether new laws, policies and programs should be implemented to protect workers in the face of income inequality, wage stagnation and declining unionization rates.[52] The Report made frequent comparisons to the US context and weaved them into its analysis. It assessed: minimum wage law and policy the United Kingdom and the United States;[53] approaches to disconnecting from work-related communications in

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different but equally effective — or ineffective — ways." Arthurs also discusses technical problems with comparisons, such as the fact that data may be collected on different bases in different jurisdictions.

45. *Id.* at 43-44.

46. *Id.,* at 45-6.

47. Michael Mitchell & John C. Murray, *The Changing Workplaces Review: An Agenda for Workplace Rights,* Report for the Government of Ontario (May 2017).

48. *See e.g. Id.* at 189.

49. *Id.*at 189-192.

50. *Id.*at 193-196.

51. *Id.* at 202-204.

52. Employment and Social Development Canada, *Report of the Expert Panel on Modern Federal Labour Standards*, (June 2019).

53. *Id.*at 31-33.

Belgium, Italy, France, Germany, and the United States;[54] approaches to pension and benefits portability in the United States, the United Kingdom, France and the European Union; joint workplace committees in Europe; and approaches to enforcement in the United Kingdom, Australia, and in good practices identified by the International Labour Organization.[55]

II. Reasons for Limited Reliance on Comparative Labor Law

In 2003, the task set by this Journal's editors was to *predict* the future use of comparative labor law in 25 years. Today, the editors ask us to *explain* comparative labor law's current use. Yesterday's failed predictions may help us with today's task.

In 2003, the predictions were starkly different. On the one hand, one of the authors of this article predicted a rosy future for the enterprise for a number of reasons: the world was becoming increasingly homogenized with the growth of global markets, access to the laws and scholarship of foreign countries was more available than ever; and comparisons were facilitated by the increasing influence of other disciplines, such as economics, on legal analysis.[56]

On the other hand, one of the editors of this Journal saw the arc of comparative labor law moving from robust receptivity during the Progressive Era, to insularity, to the then-current xenophobia.[57] A Resolution had recently been introduced in the U.S. House of Representatives specifically warning U.S. courts not to rely on foreign law. Seeing this progression, he doubted optimistic predictions. Now, nearing the end of the 25-year period, neither prediction seems especially prescient. The rosy predictions certainly did not come true. As the prior section shows, instead of increasing and robust use of comparative labor law, in the United States the discipline has flat-lined at a relatively modest level. On the other hand, the worst predictions have not borne out either. Flatlining is not decline. In Canada the output of comparative labor law scholarship has fluctuated in response to emerging issues, while a relatively robust practice of international comparison continued to make modest supporting contributions to jurisprudence and to law reform discourse, particularly in constitutional human rights cases, where legislation has foreign origins, and in the face of novel legal and policy issues. It is probably fair to say that, in each country, over the last quarter century

54. *Id.* at 96-97.

55. *Id*., at 119-120, 145-146, and 165-166.

56. Steven L. Willborn, *Onward and Upward: The Next Twenty-Five Years of Comparative Labor Law Scholarship*, 25 COMP. LAB. L. & POL'Y J. 183, 185-95 (2003).

57. Finkin*, supra* note 1, at 3-4.

international comparative labor law has remained in very distinct states of national equilibrium.

So what explains the stasis? And (back to predictions) will it continue? The answers to the former help us think about the latter.

One answer, overlooked in the prior volume, lies in what we mean when we say "comparative" labor law. For this Journal and most academics, we mean international comparisons. As noted, in the United States, that type of comparative labor law is present but marginal. In Canada is it done more frequently, but cautiously and in ways unlikely to disrupt. But a different type of comparativism is extremely common and impactful in both the United States and Canada: comparisons between different states and provinces.

This type of comparativism is very salient in the United States and it tends to crowd out the traditional form of comparative labor law. Cross-state comparativism is so common and important in the United States for three major reasons. First, in the United States, most employment law is state-based, and the law varies significantly permitting useful comparisons. The most basic issues affecting employment law, such as the definition of employee and the rules for employment contracts and employment-related torts, are primarily or entirely state-based and, again, the states vary significantly on these topics. Other, more regulatory topics in labor law, such as workers' and unemployment compensation are primarily based on state law and, again, state laws differ. In other important areas, such as wage-and-hour regulation and antidiscrimination law, significant federal laws apply, but they explicitly permit more protective state law, and most states have broader protections in both areas. Finally, even in an area where there is a broadly preemptive federal law, the National Labor Relations Act regulating private sector labor relations, state law plays a significant role; state law governs state and local public-sector unionization, and close to half of all unionized workers are public-sector workers governed by state law.[58] The issue of the federalization of American labor law is a complex topic – and a constantly moving target – but the general point here is that state law governs important swaths of it and, as a result, provides grist for comparative evaluation.

Further, more than any other country in the world, federalization in the United States provides more opportunities for comparison. The United States has 51 sub-national jurisdictions (counting the District of Columbia and excluding territories). Of the other countries in the world with federal systems,

58. Bureau of Labor Statistics, Union Members – 2023, Table 3 (Jan. 23, 2024)(reporting that there were 7.4 million private-sector union members and 8.4 million private-sector employees represented by unions vs. 7.0 million state and local employee union members and 7.8 million state and local employees represented by unions).

only Russia has more sub-national units (85), and perhaps it should not be included. On average, excluding Russia, federal systems tend to have about 15 subnational units, with a range of two (Bosnia-Herzegovina) to 37 (Nigeria).[59]

In Canada, labor and employment law and policy is based not only on shared legislative models,[60] but also on a shared policy ideas and institutional structures that serve to diffuse them, while allowing ample room for local variation.[61] The decentralization of the Canadian federation has permitted and encouraged Canadian provinces and the federal government[62] to engage in institutional experimentation.[63] Despite Canada's being a small open economy by industrialized country standards, economic globalization has not prevented or penalized legislative and policy change by governments seeking to enhance labor rights protections.[64] At the same time, important institutions have enabled the diffusion of legislative models, policy consensus and innovative ideas. For example, the Canadian Association of Administrators of Labour Legislation has long served as an influential forum for regular discussion among senior federal and provincial officials of labor policy issues, ideas, and challenges.[65] In addition, because the Supreme Court of Canada is a court of final appeal from provincial Courts of Appeal, it has provided authoritative resolution of interpretive issues that are often common to all Canadian jurisdictions.[66]

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59. These are approximations, as counting subnational units is complicated. These numbers come from data provided by the Forum of Federations, http://forumfed.org/federal-countries (last visited Jan. 29, 2024).

60. While Quebec has a distinct civil law tradition governing important aspects of employment law, Canadian provinces all adopted the Wagner model of labor relations law in the post-World War II period, share similar approaches to their employment standards, occupational safety and health and workers' compensation systems, and define equal opportunity and prohibited grounds of discrimination similarly in anti-discrimination law. See LABOUR LAW CASEBOOK GROUP, *supra* note 20, at 2- 22.

61. Murray and Trudeau argue that this has produced what they call a "Canadian Common Model" of ideas and policies that characterize labor regulation. See Gregor Murray & Gilles Trudeau, Federalism as Institutional Experimentation: The Case of the Canadian Common Model, 25 Can. Lab. & Emp. L.J. 231 (2024)

62. The federal government has jurisdiction over labor and employment law in certain industries as an incident of its exclusive constitutional authority to legislate in relation to those industries. These represent about 6 per cent of the Canadian workforce, but are key aspects of Canadian economic infrastructure including banking, telecommunications, and inter-provincial and international transportation. See Employment and Social Development Canada, *supra* note 52, at p.7-9.

63. Murray & Trudeau, *supra* note 61.

64. *Id.*; Kevin Banks, *Must Canada Change its Labour and Employment Law to Compete with the United States,* 39 QUEEN'S L. J. 419 (2013).

65. Murray & Trudeau, *supra* note 61 at p.7; H. D. WOODS ET AL., LABOUR POLICY IN CANADA (2nd ed. 1973), at 29.

66. *See e.g.*, Ontario (Human Rights Commission), [1985] 2 S.C.R. 536, Janzen [1989] 1 S.C.R. 1252; Health Services and Support, 2007 SCC 27; Mounted Police Association of Ontario, 2015 SCC 1; Saskatchewan Federation of Labour, 2015 SCC 4, all *supra* note 34; Kevin Banks, *Progress and Paradox:*

Of course, the availability of sub-national comparativism minimizes the serious perennial problem with comparative labor law highlighted by Montesquieu and Kahn-Freund: the problem of incommensurability because of geographical, economic, sociological, and cultural differences. Transplantation of legal ideas is still fraught. American states are not, and have never been, fungible;[67] the labor rules for San Francisco's high-tech workforce are unlikely to be the best ones for the rural south. But the differences between American States are much less than the differences between American States and foreign governments. The major divergences identified by Kahn-Frend are smoothed away when considering American States; all are non-communist democracies, in non-parliamentary systems, with similar organized groups playing roughly equivalent institutional roles.[68] The same, except that they are all parliamentary democracies, can be said about Canadian provinces.[69]

These factors facilitate a robust intra-national comparativism. States and provinces pay attention to one another, sometimes copying one another and sometimes creating distinctions, but in either case providing raw materials for comparison. And the comparisons occur regularly both because federalism encourages states and provinces to act as laboratories for experimentation.[70] This is particularly so in the US, because states are very aware of the impact of their labor laws on interjurisdictional competition.[71] Because it is closer to home and more salient, this type of comparativism tends to crowd out the traditional form of comparative labor law, and may partially explain the latter's limited impact.

The Remarkable Yet Limited Advance of Employer Good Faith Duties in Canadian Common Law, 32 COMPAR. LAB. POL'Y J. 547 (2011).

67. For example, the federal Fair Labor Standards Act of 1938 which contained minimum-wage and overtime-pay requirements ignited serious disagreements between Northern and Southern States. Representatives from former Confederate States provided 40 percent of the votes against the Act, but only 16 percent of the votes for the bill. The bill passed overwhelmingly with votes from the North. In general, the North supported the Act to protect its industries from "unfair" low-wage competition, while the South opposed it because of fears that jobs would be lost (and, in particular, lost to the North). STEVEN L. WILLBORN *et al.,* EMPLOYMENT LAW: CASES AND MATERIALS 461 (1th ed. 1993). For a good history of the enactment of the Fair Labor Standards Act of 1938, see Jonathan Grossman*, Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LABOR REV. 22 (1978).

68. Kahn-Freund, *supra* note 5, at 11-13.

69. For a discussion of organized groups and their institutional roles in Canada, see Murray & Trudeau, *supra* note 61.

70. Justice Brandeis made the most famous statement of the States as laboratories for experimentation in dissent in New State Ice Co. v. Liebman, 285 U.S. 262, 310-11 (1932).

71. *See, e.g.,* Timothy P. Glynn, *Interjurisdictional Competition in Enforcing Noncompetition Agreements: Regulatory Risk Management and the Race to the Bottom*, 65 WASH. & LEE L. REV. 1381 (2008); Richard A. Bales, *Explaining the Spread of At-Will Employment as an Inter-Jurisdictional Race-to-the-Bottom of Employment Standards*, 75 TENN. L. REV. 453 (2008). *But see* Steven L. Willborn, *Labor Law and the Race to the Bottom*, 65 MERCER L. REV. 369 (2014).

Another factor explaining the limited use of comparative labor law in the United States is the country's oft-touted (and oft-criticized)[72] "exceptionalism." Regardless of its utility for other purposes, the United States really is "exceptional" in its labor relations, mostly not in a good way. Among other things, the United States has very low levels of unionization, limited job-tenure protections, few guarantees for workplace rights such as leave time, and a compensation scheme that includes significant elements (health insurance and pensions) that are largely covered by social programs elsewhere. Each element of this exceptionalism makes it difficult to make comparisons with other countries with significantly different labor systems.

Having said all this to explain the stasis (maybe), it is worth noting that, for both the United States and Canada, comparative labor law has had its greatest impact when it was needed to address large and pressing problems. During the Progressive Era, when because of rapid industrialization, and especially the railroads, workers were suffering unprecedented numbers of workplace deaths and injuries, the States in the United States and provinces in Canada looked to Europe for solutions, and relied heavily on those models to develop its own laws.[73] Canada imported the Wagner Model to broker a social compromise in a period of social unrest that threatened to disrupt wartime production. Then again, in the Civil Rights Era, when attention became focused on huge disparities in treatment based on race and other factors, the United States acted first and provided a model for other countries including Canada, which then adapted the American models for their own laws and cultures.[74] It is possible, but not certain, that we are entering another era when major labor disruptions call for innovative thinking, which may again call for international comparisons. Several areas pose the possibility, such as changes in the nature of the work relationship,[75] the growth of labor market inequality,[76] the digitization of work,[77] and the use of artificial intelligence in the

72. Stephen M. Walt, *The Myth of American Exceptionalism*, FOREIGN POLICY, no. 188 (Nov.-Dec. 2011).

73. *See supra* note 8.

74. *See supra* note 9.

75. There is an enormous literature on the distinction between worker status as employee or independent contractor. *See, e.g.,* Eric A. Posner, *The Economic Basis of the Independent Contractor/Employee Distinction*, 100 TEXAS L. REV. 353 (2021); Richard R. Carlson*, Employment by Design: Employees, Independent Contractors and the Theory of the Firm*, 71 ARK. L. REV. 127 (2018); Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661 (2013); Miriam A. Cherry & Antonio Aloisi, *Dependent Contractors in the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635 (2017).

76. See for example Florian Hoffmann et al., *Growing Income Inequality in the United States and Other Advanced Economies*, 34 J. ECON. PERSPS. 52 (2020).

77. *See, e.g.*, Ron Brown, *Robots, New Technology, and Industry 4.0 in Changing Workplaces, Impacts on Labor and Employment Laws,* 7 AM. U. BUS. L. REV. 349 (2018); Matteo Avogaro, *New Perspectives for Workers' Organizations in a Changing Technological & Societal Environment*, 40 COMP.

workplace.[78] It remains to be seen whether these workplace challenges will overcome the relative stasis in comparative labor law.

LAB. L. & POL'Y J. 325 (2018); Valerio DeStefano, *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy,"* 37 COMP. LAB. L. & POL'Y J 471 (2016).

78. *See, e.g.,* Jeffrey M. Hirsch, *Future Work*, 2020 U. ILL. L. REV. 889 (2020); Pauline T. Kim, *Big Data and Artificial Intelligence: New Challenges for Workplace Equality*, 57 U. LOUISVILLE L. REV. 313 (2019); Valerio DeStefano, *"Negotiating the Algorithm": Automation, Artificial Intelligence & Labor Law*, 41 COMP. LAB. L. & POL'Y J. 15 (2019).

MOVING BEYOND ENTERPRISE-BASED COLLECTIVE BARGAINING: COMPARING NEW ZEALAND'S FAIR PAY AGREEMENTS LEGISLATION AND AUSTRALIA'S MULTI-EMPLOYER BARGAINING REFORMS

Anthony Forsyth†

ABSTRACT

This article undertakes a comparative evaluation of the Fair Pay Agreements Act 2022 (NZ) and the multi-employer bargaining provisions of the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth), exploring the significance of these laws in seeking to shift the orientation of collective bargaining away from the enterprise level. After considering the aims and objectives of the NZ and Australian laws, the assessment encompasses the following aspects: the coverage of collective agreements; initiation of bargaining including employee support, public interest and other statutory tests; the bargaining process and good faith obligations; subjects of bargaining; resolving bargaining disputes and avenues to arbitration; and completion of bargaining. The evaluation includes examination of early evidence as to how the new Australian provisions are operating, and how the FPA Act was being utilized prior to its repeal in late 2023. In the concluding section, several comparative observations are made about these reforms of collective bargaining regulation, highlighting their strengths and deficiencies as measures intended to realize the goal of extending bargaining beyond the confines of the enterprise – and therefore increase collective agreement coverage.

Keywords: *collective bargaining, fair pay agreements, sectoral bargaining, multi-employer bargaining*

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I INTRODUCTION

2022 saw the enactment of new labor laws on both sides of the Tasman Sea, through which centre-left governments sought to reverse the dominant trend towards labor market deregulation over the last 35 years. The Ardern-Hipkins Labour Government in New Zealand (NZ) secured passage of the *Fair Pay Agreements Act 2022* (NZ) (FPA Act) after several years of policy development. In Australia, the new Albanese Labor Government obtained enactment of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (SJBP Act) within seven months of coming to office. These laws aim to extend collective bargaining between employees, unions and employers beyond the enterprise level, overcoming the effects of "fissured" workplace arrangements and lifting workers' real wages. Collective bargaining in Australia and NZ has been mostly confined to the individual enterprise, since these countries moved away from their traditional conciliation and arbitration systems from the mid-to-late-1980s.[1] The Australian and NZ search for alternative approaches to regulate collective bargaining responds to the continuing decline in bargaining coverage in each country, despite the existence of laws which ostensibly facilitate the negotiation of collective agreements: Part 5 of the *Employment Relations Act 2000* (NZ) (ER Act) and Part 2-4 of the *Fair Work Act 2009* (Cth) (FW Act). In NZ, the proportion of the workforce covered by collective agreements dropped from 60.8% in 1990 to 30.2% in 2000, and further still to 19.8% in 2015.[2] In Australia, overall bargaining coverage went from 43.4% in 2010 to 35.1% in 2021,[3] with a significant decline in private sector agreement-making over that period.[4]

Falling rates of collective agreement coverage in other countries with enterprise bargaining systems, including the United Kingdom, Canada and

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[1] *See* DENNIS R. NOLAN, THE AUSTRALASIAN LABOUR LAW REFORMS: AUSTRALIA AND NEW ZEALAND AT THE END OF THE TWENTIETH CENTURY (1998).

[2] Stephen Blumenfeld & Noelle Donnelly, *Collective Bargaining Across Four Decades: Lessons from CLEW's Collective Agreement Database*, *in* TRANSFORMING WORKPLACE RELATIONS IN NEW ZEALAND 1976-2016 107, 114 (Gordon J. Anderson ed., 2017).

[3] Department of Employment and Workplace Relations, *Trends in Federal Enterprise Bargaining Coverage: December Quarter 2022*, 14 (2022) (Austl.).

[4] Jim Stanford et al., *Collective Bargaining and Wage Growth in Australia*, Ctr. for Future Work at the Austl. Inst. 12–13 (2022); Alison Pennington, *The Fair Work Act and the Decline of Enterprise Bargaining in Australia's Private Sector*, 33 Austl. J. Lab. L. 68 (2020).

the USA, have led policy-makers and academics in those nations to explore the merits of allowing bargaining at sectoral, multi-employer or national levels.[5] This reflects evidence demonstrating that countries which allow bargaining at these various levels have considerably higher rates of collective agreement coverage, than jurisdictions which limit bargaining to the single employer or enterprise level.[6] A recent ILO report covering 93 countries indicated that:

> The institutional setting – that is, whether bargaining is carried out in a single- or multi-employer setting and the predominant level of collective bargaining – is an important predictor of collective bargaining coverage … . Multi-employer bargaining, typically carried out between employers' organizations and trade unions at the interprofessional and sectoral levels, results in the highest rates of coverage by collective agreements, making this the most encompassing form of bargaining (with a mean of 71.7 per cent).[7]

In comparison, "mixed" systems with "multi-employer bargaining at the sectoral level in some sectors and single-employer at enterprise level in other sectors" had a mean collective bargaining coverage of 32.1%, while the mean was 15.8% in countries with single-employer bargaining at the enterprise level.[8]

The FPA Act implemented sectoral bargaining in NZ, while the SJBP Act introduced two new streams of multi-employer bargaining (MEB) in Australia. These additional avenues were intended to complement existing enterprise bargaining schemes under the ER Act and FW Act respectively. Yet following a change of government in NZ in October 2023, the Fair Pay Agreement (FPA) experiment is already over: the FPA Act was removed from the statute books by the *Fair Pay Agreements Act Repeal Act 2023*

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[5] *See* Keith D. Ewing eds., *Rolling Out the Manifesto for Labour Law*, Inst. of Emp. Rts. (2018); WILLIAM E. SCHEUERMAN, A NEW AMERICAN LABOR MOVEMENT: THE DECLINE OF COLLECTIVE BARGAINING AND THE RISE OF DIRECT ACTION 173–201 (2021); Sara J. Slinn, *Workers' Boards: Sectoral Bargaining and Standard-Setting Mechanisms for the New Gilded Age*, 26 Emp. Rts. & Emp. Pol'y J. 191 (2023).

[6] Claus Schnabel, *Union Membership and Collective Bargaining: Trends and Determinants*, IZA Institute of Labor Economics Discussion Paper Series No. 13465, 23, 38–39 (2020).

[7] Int'l Labour Org., *Social Dialogue Report 2022: Collective Bargaining for an Inclusive, Sustainable and Resilient Recovery* 66 (2022).

[8] *Id.* at 67.

(NZ), swiftly implementing a central policy commitment of National, the major Coalition partner in the new government.[9]

This article undertakes a comparative evaluation of the FPA Act and the MEB provisions of the SJBP Act, exploring in particular the significance of these laws in seeking to shift the orientation of collective bargaining in NZ and Australia away from the enterprise level. This assessment encompasses the following aspects of the NZ and Australian laws: the coverage of collective agreements; initiation of bargaining (including requirements for union involvement, testing employee support, public interest grounds, and the roles of government institutions); the bargaining process and good faith obligations applicable to parties and their representatives; subjects of bargaining; resolving bargaining disputes and avenues to arbitration; and completion of bargaining.

These elements of collective bargaining regulation were chosen because each of them is considered (although not always using the same precise terminology) in three important contributions to international debate on this subject, in particular the consideration of options for adopting some form of broader-based bargaining in countries which have traditionally devolved bargaining to the enterprise level. Those contributions are the UK Institute of Employment Rights' 2018 policy report, *Rolling Out the Manifesto for Labour Law*, intended to provide a labor law reform program for an incoming Labour Government;[10] the 2020 report of the "Clean Slate for Worker Power" Project, a Harvard University initiative aimed at fundamentally redesigning US labor law to significantly enhance the collective power of workers;[11] and a 2023 paper by Canadian writers Sara Slinn and Mark Rowlinson, which provided an in-depth proposal for a Canadian FPA model based on the NZ FPA legislation.[12] The Institute of Employment Rights report and the Slinn and Rowlinson paper also considered the enforcement of collective agreements, while the Clean Slate report examined labor law enforcement generally. Enforcement has been excluded from the present analysis, along with

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[9] National, *100 Day Action Plan*, https://www.national.org.nz/policies/100-day-plan (last visited Jan. 10, 2024).

[10] *See* Ewing eds., *supra* note 5, especially at 18–27.

[11] *See* Sharon Block & Benjamin Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy*, Labor and Worklife Program, Harvard Law School, especially 37–45 (2020).

[12] Sara Slinn & Mark Rowlinson, *Bargaining Sectoral Standards: Towards Canadian Fair Pay Agreement Legislation*, 39 Windsor Y.B. Access Just. 78 (2023).

other issues considered by Slinn and Rowlinson (e.g., access to collective bargaining for dependent contractors), to enable a manageable comparison.

The comparative evaluation in this article includes examination of early evidence as to how the new Australian provisions are operating, and how the FPA Act was being utilized prior to its repeal. In the concluding section, several comparative observations are made about these reforms of collective bargaining regulation, highlighting their strengths and deficiencies as measures intended to realize the goal of extending bargaining beyond the confines of the enterprise. Before turning to the comparative assessment of the identified features of the new laws, some background to their introduction and their purposes are outlined in the next section.

II BACKGROUND AND OBJECTIVES OF THE NZ AND AUSTRALIAN REFORMS

NZ and Australia are small island nations in terms of population and economic power, with similar cultural outlooks, close bilateral political and trade relationships, and significant levels of "people-to-people" exchange for purposes including work and tourism (although many more New Zealanders migrate to Australia than vice versa). In many respects, these two countries also share a common history in their approaches to labour regulation, with traditionally strong trade union movements and an historical acceptance (including by employers) of legal intervention in industrial relations. This began with the introduction of systems of conciliation and arbitration in the late nineteenth and early twentieth centuries,[13] providing for settlement of industrial disputes by the making of awards setting minimum wages and other working conditions, a central role for unions, and the prohibition of strikes. These conciliation and arbitration systems essentially remained in operation until the late 1980s/early 1990s, when pressures emanating from globalization and economic deregulation led to the introduction of reforms to bring greater flexibility into workplace regulation.[14] Mostly these were modest reform measures, including opening up the option for employers and unions to negotiate enterprise agreements within the existing framework of awards in

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[13] *Industrial Conciliation and Arbitration Act 1894* (N.Z.), followed by the *Conciliation and Arbitration Act 1904* (Cth) (Austl.).

[14] On the intellectual foundations for this shift *see* HR NICHOLLS SOCIETY, ARBITRATION IN CONTEMPT: THE PROCEEDINGS OF THE INAUGURAL SEMINAR OF THE H. R. NICHOLLS SOCIETY HELD IN MELBOURNE 28 FEBRUARY-2 MARCH, 1986 (1986); PENELOPE J. BROOK, FREEDOM AT WORK: THE CASE FOR REFORMING LABOUR LAW IN NEW ZEALAND (1990).

each country.[15] However, more radical legislative changes followed: in NZ, through the *Employment Contracts Act 1991* (NZ), which abolished the conciliation and arbitration system and awards in favor of facilitating direct employer-employee relationships regulated by contract; and in Australia, through two reform statutes enacted in 1996[16] and 2005[17] which progressively reduced the powers of the federal industrial tribunal and the reach of awards, while providing statutory support for individual employment contracts. These changes introduced by conservative governments were followed by minimal attempts at reversal by center-left governments in each country,[18] with the pendulum swinging mildly back towards deregulation under re-elected conservative administrations.[19] This generally parallel trajectory in the development and reshaping of labour regulation[20] has been continued with the more recent shift towards broader-based collective bargaining, which is the primary focus of this article.

Put simply, the recent NZ and Australian reforms retained each country's pre-existing systems of enterprise-based collective bargaining, but added new avenues for broader-based bargaining with the principal goal of increasing bargaining coverage: in NZ, by enabling industry-level agreements to be made (FPAs), and in Australia, by allowing two different types of multi-employer agreement to be negotiated. The introduction of the FPA system was in the Labour Party's 2017 election manifesto, followed by the Labour-Green-NZ First Government's establishment in June 2018 of the Fair Pay Agreement Working Group including representatives of the NZ Council

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[15] *Labour Relations Act 1997* (N.Z.); *Industrial Relations Legislation Amendment Act 1992* (Cth); *Industrial Relations Reform Act 1993* (Cth).

[16] *Workplace Relations and Other Legislation (Amendment) Act 1996* (Cth).

[17] *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

[18] *Employment Relations Act 2000* (N.Z.); *Fair Work Act 2009* (Cth).

[19] *See e.g.*, *Employment Relations Amendment Act 2014* (N.Z.). In Australia, while tinkering with some aspects of the FW Act to address employer concerns, the Coalition Government's legislative focus was mainly on subjecting trade unions to greater levels of accountability in response to several instances of corruption. *See e.g.*, *Fair Work (Registered Organisations) Amendment Act 2016* (Cth).

[20] Anthony Forsyth & John Howe, *Reaching Across the Ditch? Similarities and Differences in the Trajectory of Australian and New Zealand Regulation of Collective Labour Relations 1988–2018*, 50 Victoria U. Wellington L. Rev. 215 (2019).

of Trade Unions (NZCTU) and Business NZ.[21] The stated policy rationale for FPAs was to counter a "low wage, low productivity 'race to the bottom' cycle."[22] This was reflected in the *Fair Pay Agreements Bill* introduced into Parliament in March 2022, which aimed to "improve labour market outcomes in [NZ] by enabling employers and employees to collectively bargain industry-wide or occupation-wide minimum employment terms" and address the "significant prevalence of jobs with inadequate working conditions, low wages, and low labor productivity" (especially for Māori, Pacific peoples, young people and workers with disabilities).[23] Bargaining for FPAs would overcome a major limitation of NZ labor law, which: "only allow[ed] for collective bargaining at an enterprise level … There [was] no mechanism for parties to co-ordinate collective bargaining across entire occupations and industries."[24] The Minister for Workplace Relations and Safety, Hon Michael Wood, explained that the Bill would restore the floor of minimum employment standards which had been removed for many NZ workers by the *Employment Contracts Act 1991* (NZ):[25]

> The Fair Pay Agreements Bill … is about making sure that workers like cleaners and many others once again have a voice, that we stop the race to the bottom that for over 30 years has brought down pay, conditions, and security for many workers doing this critical work in our society. It's our cleaners, our bus drivers, our security guards, our retail workers, our orderlies, our aged-care workers, our early childhood education teachers. Our society relies

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[21] Alan Bevin & Susan Hornsby-Geluk, *Fair Pay Agreements–A Massive Reform of How Minimum Terms and Conditions Are Set*, Paper Presented at the NZLS CLE Conference on Employment Law 177–178 (2022).

[22] Avalon Kent, *New Zealand's Fair Pay Agreements: A New Direction in Sectoral and Occupational Bargaining*, 31 Lab. & Indus. 235, 238 (2021).

[23] Explanatory Note, *Fair Pay Agreements Bill 2022* (NZ) 1.

[24] *Id*. MEB is possible under the ER Act, although its utility is limited by s 33(3) which provides that opposition to concluding a multi-employer collective agreement is a genuine reason not to conclude an agreement (for purposes of s 33(1)) if that opposition is based on reasonable grounds. Bargaining for multi-employer agreements in NZ also requires the consent of employers. Despite these constraints, such agreements are common in the health care sector. Dennis Maga, *Fair Pay Agreements May Be Dead, but the Fight for Fairer Pay Goes On*, THE SPINOFF (Dec. 15, 2023), https://thespinoff.co.nz/politics/15-12-2023/fair-pay-agreements-may-be-dead-but-the-fight-for-fairer-pay-goes-on.

[25] *See* RAYMOND HARBRIDGE ED., EMPLOYMENT CONTRACTS: NEW ZEALAND EXPERIENCES (1993); GORDON J. ANDERSON, RECONSTRUCTING NEW ZEALAND'S LABOUR LAW: CONSENSUS OR DIVERGENCE? 151–52 (2011).

on the work of so many of these workers, but the race to the bottom that they have experienced has meant that their work has not been valued as it should, and, at its core, that is what fair pay agreements (FPAs) are about. They are about valuing work.

… [F]air pay agreements are about recognizing that a basic minimum floor… is good for workers in terms of protecting their pay and conditions, but it is also good for good businesses … . … Fair pay agreements, by putting that minimum floor in place, ensure a level playing field for the worker and also for the good employer.[26]

Schofield[27] observes that the "FPA regime is similar to, but not identical to, the awards system that operated in [NZ] prior to the enactment of the Employment Contracts Act 1991, which deregulated the labor market. There are also similarities with the 'modern award' system that operates in Australia."[28] Unlike the decimation of awards in NZ under the 1991 legislation,[29] the award system in Australia survived the peak period of deregulation under the Howard Coalition Government from 1996 to 2007.[30] Modern awards under the FW Act provide a framework of minimum employment standards applying across most industries and occupations,[31] of the kind that was envisaged for FPAs in NZ.

The purpose of the new MEB options is to enable more Australian workers to obtain wage rises after a decade of wage stagnation by extending access to collective bargaining.[32] MEB also aims to overcome the inability of enterprise-based bargaining to keep pace with changes in business structures through "fissuring."[33] US scholar David Weil has used this term to explain

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[26] New Zealand, Parl. Deb., H.R., Oct. 18, 2022, (Michael Wood).

[27] SIMON SCHOFIELD, NEW ZEALAND EMPLOYMENT LAW GUIDE 331 (2023 ed.).

[28] *See also* Kent, *supra* note 22, at 247–50.

[29] Margaret Wilson, *A Struggle between Competing Ideologies*, *in* EMPLOYMENT RELATIONSHIPS: WORKERS, UNIONS AND EMPLOYERS IN NEW ZEALAND 9, 16–17 (Erling Rasmussen ed., 2d ed. 2010); ANDERSON, *supra* note 25, at 73–74.

[30] Although the process of making awards, their functions and content were transformed during this period. Andrew Stewart & Mark Bray, *Modern Awards Under the Fair Work Act*, 33 Austl. J. Labour L. 52 (2020).

[31] David Peetz, *Awards and Collective Bargaining in Australia: What Do They Do, and Are They Relevant to New Zealand?*, 44 N.Z. J. Emp. Rel. 58 (2020).

[32] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 October 2022 (Tony Burke).

[33] Tim Kennedy et. al., *Rebuilding Worker Power in Australia through Multi-Employer Bargaining*, 31 Lab. & Indus. 225 (2021); Senate Educ. & Emp. Legis.

how major corporations have divested non-core business functions to smaller firms, which engage in fierce competition to obtain services contracts by driving down labor costs.[34] Fissuring also distances employers from responsibility for minimum employment standards and having to bargain with trade unions.[35] Despite the increasing adoption of fissuring strategies by Australian firms, prior to the SJBP Act amendments, unions could generally only negotiate an agreement under the FW Act with the direct employer of a group of employees. They could not bargain with the lead firms ultimately controlling the cost of labor through outsourcing, labor hire, supply chains and similar strategies.[36] The policy option chosen to address this was explained by the Minister for Employment and Workplace Relations, Hon Tony Burke as follows: "For employees and employers that have not been able to access the benefits of enterprise level bargaining, [the SJBP Act] will provide flexible options for reaching agreements at the multi-employer level."[37] These options are provided through two new streams of MEB known as Supported Bargaining and Single Interest Employer Bargaining. Although both streams have the goal of stimulating MEB, Supported Bargaining is likely to have primary application in government-funded sectors of the economy, while Single Interest Employer Bargaining will largely be utilized in private sector workplaces. However, each of the streams is subject to stringent statutory tests which must be satisfied before the federal workplace tribunal will permit employees and unions to initiate MEB.

The justification for the Australian reform was further stated in terms similar to the arguments for FPAs in NZ, Minister Burke asserting that: "We want to see businesses competing on quality, on innovation, on product and service offerings—not on who can pay the lowest wage. If we are going to

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Comm., Progress Report on the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, Parl. of Austl. 29–31 (2022).

[34] DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014).

[35] *Id*.; Timothy J. Bartkiw, *Charting a New Course in a Fissured Economy? Employer Concepts and Collective Bargaining in the US and Canada*, 37 Int'l J. Comp. Lab. L. & Indus. Rel. 385 (2021).

[36] RICHARD JOHNSTONE ET. AL., BEYOND EMPLOYMENT: THE LEGAL REGULATION OF WORK RELATIONSHIPS (2012); Anthony Forsyth et. al., *Collective Bargaining in Fissured Work Contexts: An Analysis of Core Challenges and Novel Experiments*, 51 Fed. L. Rev. 509 (2023).

[37] Parliamentary Debates, *supra* note 32.

get wages moving, we need to stop the race to the bottom."[38] Equally, as in Australia, the need to counter the effects of fissuring was articulated in support of the FPA Act, President of the NZCTU Richard Wagstaff pointing to:

> … hypercompetitive markets where some competitors position themselves as almost loss leaders on the quality of employment. … Take, as an example, supermarkets. One major chain has a union collective [agreement] applied across the country. But others are franchise chains, some notoriously anti-union, competing aggressively on the lowest possible minimums for staff. This directly impacts wages and conditions right across the sector. This is one of the reasons unions are clear that supermarkets should be a top contender for FPAs.[39]

Throughout the four-year process of developing the FPA legislation, Business NZ remained strongly opposed to the reform[40, 41] as did the then Opposition National Party, whose spokesperson told Parliament in October 2022:

> The National Party will not be supporting … the misnamed Fair Pay Agreements Bill. Indeed, if we are lucky enough to win the next election this time next year we will repeal it forthwith, because this is not about fair pay; it's about imposing mandatory union deals on New Zealand workforces and making them less agile, less flexible, at a time when they need to be both of those.[42]

Despite this opposition, the FPA Act was passed by the NZ Parliament and commenced operation on 1 December 2022. However, the legislation was only to remain in place for just over a year. In government, National moved to repeal the FPA Act with effect from 20 December 2023. The Minister for Workplace Relations and Safety, Hon Brooke van Velden, clarified that the intention of the repeal was: "for the [FPA] system to stop … and for all bargaining processes to cease. … I am committed to acting quickly to

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[38] *Id.*

[39] Richard Wagstaff, *Fair Pay Agreements*, Emp. Law Bull. 41, 42 (2021).

[40] Bevin & Hornsby-Geluk, *supra* note 21, at 178.

[41] BusinessNZ made an unsuccessful complaint about the FPA Act to the International Labour Organization's Conference Committee on the Application of Standards. Rebecca Macfie, *Fair Pay Complaint to ILO Crashes and Burns*, NEWSROOM (Jun 11, 2022), https://www.newsroom.co.nz/fair-pay-complaint-to-ilo-crashes-and-burns.

[42] New Zealand, Parl. Deb., H.R., Oct. 18, 2022, (Paul Goldsmith).

remove this legislation before any [FPAs] are finalized and the transition arrangements become more expensive and more complex."[43]

Business groups and the Coalition Opposition advocated heavily against the expansion of MEB under Australian law, raising the prospect of a return to the era of industry-level wage negotiations and especially industry-wide strikes.[44] The Labor Government was to some extent receptive to these concerns, agreeing to significant amendments to the SJBP legislation to obtain its passage by the Senate in early December 2022, the MEB provisions taking effect on 6 June 2023.[45]

III COVERAGE OF AGREEMENTS

A New Zealand

The FPA Act defined a "fair pay agreement" as "an agreement that the chief executive has validated in accordance with section 168 by issuing a fair pay agreement notice," including a varied or renewed FPA and an FPA that replaces an earlier one.[46] The coverage of FPAs could be either industry-based or occupation-based. The proposed coverage had to be expressed in the initiating union's application for approval to commence FPA bargaining, "with sufficient clarity so that all employees and employers are able to determine whether they are within the coverage of the proposed FPA."[47] For an occupation-based FPA, coverage had to be described according to "the occupation, including the work or the type of work, that the proposed FPA would

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[43] New Zealand, Parl. Deb., H.R., Dec. 12, 2023, (Brooke van Velden).

[44] James Massola & Angus Thompson, *New IR Laws Drive Wedge Between Government and Business over Strike Fears*, THE SYDNEY MORNING HERALD (Oct. 27, 2022), https://www.smh.com.au/politics/federal/new-ir-laws-drive-wedge-between-government-and-business-over-strike-fears-20221027-p5bte8.html.

[45] The SJBP Act also included provisions dealing with matters including gender pay equity, prohibitions upon pay secrecy and limits on fixed-term contracts. *See* Andrew Stewart et al., *Will Pay be Better and Jobs More Secure? Analysing the Albanese Government's First Round of Fair Work Reforms*, 36 Austl. J. Labour L. 104 (2023).

[46] *Fair Pay Agreements Act 2022* (N.Z.) s 5(1) ('FPA Act').

[47] *Id*. at s 32(4)(a).

cover."[48] The coverage of an industry-based FPA was to be described according to "the industry and the occupations, including the work or the type of work within that industry, that the proposed FPA would cover."[49] The FPA Act allowed bargaining for an FPA to occur in workplaces already covered by a collective agreement made under the ER Act, or where bargaining for such an agreement had commenced.[50] In this way, the NZ system did not prioritize enterprise-level bargaining over the scheme for sectoral bargaining.

B Australia

In contrast, the Labor Government made it clear when introducing the two new streams of MEB that enterprise bargaining remains the preferred form of collective agreement-making under the FW Act.[51] A Supported Bargaining Agreement is a multi-enterprise agreement in relation to which a supported bargaining authorization has been made.[52] However, such an authorization cannot be made if a single-enterprise agreement that has not passed its nominal expiry date covers the work of the relevant employees.[53] A similar restriction applies to the making of a single interest employer authorization,[54] which is the gateway to negotiations for a Single Interest Employer

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[48] *Id*. at s 32(1)(a); *see also Fair Pay Agreements Regulations 2022* (NZ) reg 10(1)(a), (2) ('FPA Regulations'), repealed by the *Fair Pay Agreements Act Repeal Act 2023* (NZ).

[49] FPA Act, *supra* note 46, at (n 19) s 32(1)(b). *see also* FPA Regulations, *id*. at (n 21) reg 10(1)(b), (2).

[50] FPA Act, *id.* at (n 19) s 176(1). Under s 175, employees were entitled to the more favourable term, where an FPA provision may have been different to a relevant term in an existing collective agreement applying to their employment.

[51] Parliamentary Debates, *supra* note 32. The *Fair Work Act 2009* (Cth) ('FW Act') provides for the making of single-enterprise agreements (which can also be made for greenfields sites), Supported Bargaining Agreements, Single Interest Em-ployer Agreements and Cooperative Workplaces Agreements; greenfields and cooperative agreements are not considered in this article.

[52] FW Act, *id.* at (n 24) s 12.

[53] *Id.* at s 243A(1). On the other hand, if a supported bargaining authorisation is made, an employer can only make a Supported Bargaining Agreement and the employer must not initiate or agree to bargaining for any other kind of agreement: s 172(7).

[54] *Id.* at s 249(1D)(a). *See also* s 249(1D)(b) which precludes an authorisation if bargaining is already occurring for a single-enterprise agreement.

Agreement.[55] A further anchor to enterprise-based bargaining is found in the exclusion, from the making of a single interest employer authorization, of employers and employees who are bargaining in good faith for a new single-enterprise agreement and "have a history of effectively bargaining" at that level.[56] Both types of multi-employer agreement under the FW Act will apply to two or more employers and their employees whose work will be covered by the agreement.[57] As they are unlikely to apply to all of an industry or occupation, their coverage does not need to be specified in the same way as was the case with NZ FPAs. The coverage of Australian enterprise and multi-enterprise agreements is not prescribed by the FW Act,[58] and is typically expressed by reference to the employer parties to the agreement, the relevant modern award(s) applying in the industry, types of work performed, work locations, etc.[59]

IV COMMENCEMENT OF BARGAINING

A New Zealand

Bargaining for an FPA could only be initiated by an eligible union,[60] defined in FPA Act s 5(1) as a union with at least one member who was a "covered employee" (this included an employee performing work within the coverage of the proposed agreement) or a union with constitutional rights to represent the collective interests of covered employees (whether union members or not). The FPA agreement, once made, would apply to all covered employees regardless of union membership.[61] In these and other ways,[62] union involvement was built into the FPA system. However, the legislation also

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[55] Defined in FW Act (n 24) s 12 as a multi-enterprise agreement for which a single interest employer authorisation has been made.

[56] FW Act, *supra* note 51, at (n 24) s 250(3).

[57] *Id.* at s 172(3)(a).

[58] Apart from several provisions requiring the group of employees covered by an agreement to be 'fairly chosen' (*e.g.*, FW Act, *id.* at (n 24) s 186(3)-(3A)).

[59] *See e.g.*, the proposed agreement coverage in the first authorisation made under the supported bargaining provisions for employers in the early childhood education and care sector in *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176, [1].

[60] FPA Act, *supra* note 46, at (n 19) ss 25(2), 26, 27(1)(a).

[61] *Id.* at s 172(2)(a).

[62] *See* the discussion of union access to workplaces in Part V below.

made it clear that employees could not be required to become or remain – or not become or stop being – a union member for the purposes of FPA bargaining.[63] A union commenced the FPA process by applying to the chief executive of the Ministry of Business, Innovation and Employment (MBIE) for approval to initiate bargaining, providing evidence as to how the union met either of the initiation tests: the representation test or the public interest test.[64]

The representation test was satisfied if at least 1000 employees or at least 10% of all employees within the coverage of the proposed FPA supported this form of bargaining (union membership was not of itself sufficient evidence of such support).[65] The evidence required to demonstrate that a union met the representation test included the names and occupations of employees in support of FPA bargaining, the date on which they indicated such support, the employers of those employees, and if the 10% threshold was relied upon the total number of employees covered by the proposed FPA.[66] It was suggested that the representation test threshold was "concerningly low, as 1000 employees may easily make up less than 1% of a particular workforce, for example in hospitality and retail."[67] However, a representative of the former NZ Government explained that while the FPA threshold "may be lower than in other countries' systems, this reflects our relatively low levels

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[63] FPA Act, *supra* note 46, at (n 19) s 10(1). *See also* s 10(2) imposing the same prohibitions in respect of employer associations; the prohibitions of 'preference' provisions in FPAs in ss 13-15; and s 16 prohibiting undue influence regarding membership/non-membership of unions and employer associations. The FW Act (n 24) prohibits compulsory union membership while also protecting union members from discriminatory treatment, *see* pt 3-1. Enterprise agreement terms offending these provisions are unlawful under s 12 (definition of 'objectionable term') and s 194(b).

[64] FPA Act, *id*. at (n 19) s 27(1)(b).

[65] *Id.* at s 28(1), (3).

[66] *Id.* at ss 28(2), 31(1)(a), (2)-(3). The applicant union was also required to provide, for each employee in a sample of employees who the union claimed were in support of FPA bargaining, the email addresses and phone numbers of the employees (if the union had that information): FPA Regulations, *supra* note 48, at (n 21) reg 11(3).

[67] Bevin & Hornsby-Geluk, *supra* note 21, at 185. *See also* Nadia Dabee & Alan Toy, *Fixing the Fair Pay Agreements Act 2022*, 27 N.Z. Bus. L.Q. 78, 82–84 (2023).

of union density and collectivization. Setting higher representation thresholds would effectively mean this pathway could not be used."[68 · 69]

The public interest test was satisfied where a prescribed portion of employees within coverage of the proposed FPA "receive low pay for their work"[70] and satisfied one or more of the following criteria:

"they have little bargaining power in their employment"[71] (approximately 20% or less of the employees are union members or are employed under a collective agreement[72]);

"they have a lack of pay progression in their employment (for example, pay rates only increase to comply with minimum wage requirements)"[73] (around 60% or more of those employed in a role for a relatively long period are paid wage rates, on average, no higher than 20% above the wages of other employees appointed to the same role, despite having completed relevant training or increased their skills[74]);

"they are not adequately paid, taking into account factors such as - (A) working long or unsocial hours, for example, working weekends, night shifts, or split shifts, and (B) contractual uncertainty, including performing short-term seasonal work or working on an intermittent or irregular basis"[75] (at least 60% of the employees are not adequately paid taking into account whether they: regularly work over 40 hours per week, mostly in night shifts, split shifts or on weekends; regularly receive total wages that are not the same each week or fortnight; or are employed under casual or fixed-term agreements[76]).

The chief executive had to approve an application to initiate FBA bargaining if several requirements were satisfied,[77] including that: the coverage

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[68] Committee on the Application of Standards, 110th Session, 17th Meeting, International Labor Organization, 4 (June 8, 2022).

[69] *See* further Part IX below.

[70] FPA Act, *supra* note 46, at (n 19) s 29(1)(a), satisfied where approximately 60% or more of the employees are paid at or close to statutory minimum adult wage rates and around 30% or less of the employees are paid close to, equal to or higher than median wages: FPA Regulations, *supra* note 48, at (n 21) reg 6.

[71] FPA Act, *id*. at (n 19) s 29(1)(b)(i).

[72] FPA Regulations, *supra* note 48, at (n 21) reg 7.

[73] FPA Act, *supra* note 46, at (n 19) s 29(1)(b)(ii).

[74] FPA Regulations, *supra* note 48, at (n 21) reg 8(1); *see also* reg 8(2).

[75] FPA Act, *supra* note 46, at (n 19) s 29(1)(b)(iii).

[76] FPA Regulations, *supra* note 48, at (n 21) reg 9.

[77] FPA Act, *supra* note 46, at (n 19) s 33. *See also* ss 34-37.

of the proposed FPA was clearly defined;[78] one of the initiation tests was met;[79] and any of the work covered by the proposed FPA was not already covered by another FPA or bargaining for another FPA.[80] As at 28 November 2023, 10 applications had been made to initiate FPA bargaining, with 6 approved, 3 withdrawn and 1 under assessment (MBIE, 2023a)[81] as shown below:

Table: Applications to initiate FPA bargaining[82]

Application / date	**Initiating union**	**Initiation test relied on & evidence**	**Status**	**Approved additional employee bargaining parties**	**Approved employer bargaining parties**
Waterside Workers (FPA02-010-2023) - 16 June 2023	Maritime Union of New Zealand Inc	Representation test (1000 employees)	Under assessment		
Hospitality Industry (FPA01-001-2022) - 1 December 2022	Unite Union Inc	Representation test (1000 employees) - union claimed support from	Approval to initiate bargaining - 29 May 2023	Raise the Bar Hospitality Union Inc; E tū Union Inc	Restaurant Association of NZ; NZ Security Association Inc; Hospitality NZ Inc; Clubs NZ Inc; Employers' &

[78] *Id.* at s 33(3)(b)(i).
[79] *Id.* at s 33(3)(b)(ii).
[80] *Id.* at s 33(3)(b)(iii). *See also* s 27(2)
[81] Ministry of Business, Innovation & Employment (N.Z.), *Coversheet to Fair Pay Agreements Regulatory Impact Statement*, Nov. 28, 2023, https://www.mbie.govt.nz/business-and-employment/employment-and-skills/fair-pay-agreements/.
[82] All information in the table was drawn from the "Fair Pay Agreements Dashboard," Ministry of Business, Innovation & Employment (N.Z.), https://www.mbie.govt.nz/business-and-employment/employment-and-skills/fair-pay-agreements/fpa-dashboard/ (this web page was removed following the repeal of the FPA Act).

		1562 employees[83]			Manufacturers' Association (Northern) Inc; Holiday Accommodation Parks Association of NZ Inc; NZ Motion Pictures Exhibitors' Association Inc; Retail NZ Inc; Tourism Industry Aotearoa Inc
Interurban, Rural and Urban Bus Transport (FPA01-003-2022) - 21 December 2022	First Union Inc	Representation test (1000 employees) - union claimed support from 1132 employees	Approval to initiate bargaining - 27 March 2023	NZ Tramways & Public Passenger Transport Employees Union Inc; Amalgamated Workers Union NZ Inc	Bus & Coach Association NZ Inc
Grocery Supermarket Industry (FPA01-004-2022) - 23 December 2022	First Union Inc	Representation test (1000 employees) - union claimed support from 1383 employees	Approval to initiate bargaining - 11 July 2023		Retail NZ Inc; NZ Security Association Inc; Employers' & Manufacturers' Association (Northern) Inc; Upper North Island Regional Supermarket Association Inc; Lower North Island Regional Supermarket Association Inc; Far North Island Supermarket Association Inc; Upper North Island Metro Supermarket

[83] MBIE used the information provided by the union in its application to select a random sample of these employees, and on the basis of that sample verification of the information the chief executive was satisfied that the representation test in FPA Act (n 19) s 28(1)(a) had been met. Ministry of Business, Innovation & Employment (N.Z.), *Public Notice of Approval of Application to Initiate Bargaining for a Proposed Fair Pay Agreement: Hospitality Industry* (May 29, 2023). The same method was used in respect of the five other approved applications shown in the table.

					Association Inc; Lower North Island Metro Supermarket Association Inc; WWFC Inc
Security Officers and Guards (FPA02-006-2023) - 29 March 2023	E tū Union Inc	Representation test (1000 employees) - union claimed support from 1164 employees	Approval to initiate bargaining - 29 May 2023	NZ Public Service Association Te Pukenga Here Tikanga Mahi Inc	NZ Security Association Inc; Employers' & Manufacturers' Association (Northern) Inc; Lyttleton Port Inc; Ports Industry Association of NZ Inc
Commercial Cleaners (FPA02-007-2023) - 11 April 2023	E tū Union Incorporated	Representation test (1000 employees) - union claimed support from 1307 employees	Approval to initiate bargaining - 19 June 2023	Unite Union Inc	Building Service Contractors of NZ Inc; Hospitality NZ Inc; (and 2 specified state public sector employers under FPA s 64: Te Whatu Ora Health NZ & Secretary for Education)
Early Childhood Education Industry (FPA01-008-2023) - 1 May 2023	New Zealand Educational Institute (Te Riu Roa)	Representation test (1000 employees) - union claimed support from 2925 employees	Approval to initiate bargaining - 19 June 2023		Montessori Aotearoa NZ Inc; Te Rito Maioha Early Childhood NZ Inc; Employers' & Manufacturers' Association (Northern) Inc
Interurban, Rural and Urban Bus Transport – Bus & coach drivers (FPA01-002-2022) - 15 December 2022	Amalgamated Workers Union New Zealand Incorporated	Representation test (10%)	Withdrawn		
Interurban and Rural Bus Transport – Bus drivers, coach drivers and cleaners/refuellers (FPA01-005-	Amalgamated Workers Union New Zealand Incorporated	Representation test (10%)	Withdrawn		

2023) - 30 January 2023					
Stevedoring Services - General (FPA01-009-2023) - 3 May 2023	Maritime Union of New Zealand Incorporated	Representation test (1000 employees)	Withdrawn		

B Australia

MEB for a Supported Bargaining Agreement can be initiated by any employee or employer bargaining representative, or any union that represents the industrial interests of employees whose work will be covered by the proposed agreement, applying to the Fair Work Commission (FWC) for a supported bargaining authorization.[84] Union involvement in supported bargaining is secured by the requirement that at least some employees who will be covered by a proposed agreement are union-represented.[85] There is no required threshold of employee support that must be met for a union applicant to obtain a supported bargaining authorization. The union's application must specify the employers and employees that would be covered by the agreement.[86] The FWC then applies the tests for making an authorization set out in FW Act s 243, requiring satisfaction that it is appropriate for some or all of the relevant employees and employers to bargain for one agreement, considering several factors. Most importantly, these include: current pay and conditions in the industry or sector and whether low pay rates prevail; and whether the employers have clearly identifiable common interests such as their geographic location, the nature of the employing enterprises and employment conditions within them, and their reliance on federal, state or territory government funding.[87] An alternative avenue to the making of a supported bargaining authorization by the FWC is available, where the relevant employees are specified in an industry, occupation or sector declared by the Minister for Employment and Workplace Relations.[88] Such a declaration can be made where the Minister is satisfied that this is consistent with the

[84] FW Act, *supra* note 51, at (n 24) s 241(1).
[85] *Id*. at s 243(1)(c).
[86] *Id*. at s 241(2).
[87] *Id*. at s 243(1)(b)(i)-(ii), (2).
[88] *Id*. at s 243(2A).

objectives of supported bargaining[89] (ie, to assist and encourage parties who need support to bargain, and address constraints on their ability to do so including lack of skills, resources, bargaining strength or previous bargaining experience[90]). Employers can be added to, or removed from, supported bargaining authorizations (or single interest employer authorizations, discussed below) after they are made, on application to the FWC.[91]

The first application for a supported bargaining authorization was brought by three unions for a multi-employer agreement, including a 25% pay rise, to cover 64 employers in the early childhood education and care (ECEC) sector employing around 12,000 employees (i.e., childcare workers, educators and teachers in long day care centers).[92] In making the authorization, which all of the employers supported, the FWC Full Bench noted that the supported bargaining stream had been introduced by the SJBP Act amendments with the aim of improving access to collective bargaining for workers formerly covered by the low-paid bargaining stream.[93] It determined that, for purposes of the relevant statutory tests:

'low rates of pay' prevail in an industry or sector 'if employees are predominantly paid at or close to the award rates of pay for their classification, since this is the lowest rate legally available to pay'[94] – and the pay rates for ECEC workers 'are the same as, or close to, the minimum' pay rates in the two applicable awards, such that 57.8% of employees in the sector are on award rates and another 20.9% are paid only 0.01%-10% above award rates;[95]

the concept of 'common interests' is to be construed broadly and 'extends to any joint, shared, related or like characteristics, qualities, undertakings or concerns as between the relevant employers'[96] – here the employers 'clearly have one overriding common interest, namely, they all operate long day care

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[89] *Id*. at s 243(2B).

[90] *Id*. at s 241.

[91] *Id*. at ss 244, 251.

[92] Workplace Express, *Childcare Early Starter for New Support-ed Deal Regime*, Workplace Express (June 6, 2023).

[93] *Application by United Workers' Union, supra* note 59, at 176, [20], [20]-[23]. On the failure of low-paid bargaining to stimulate collective agreements, *see* Sara Charlesworth & Fiona Macdonald, *Collective Bargaining and Low-Paid Women Workers: The Promise of Supported Bargaining*, 65 J. Indus. Rel. 403 (2023).

[94] *Application by United Workers' Union, Id.* at [32].

[95] *Id*. at [47].

[96] *Id*. at [34].

businesses in the ECEC sector' and are all covered by the same two awards, operate under the same regulatory framework, and 'are subject to common arrangements for the funding of long day care services by the Commonwealth' (the Child Care Subsidy);[97]

other relevant factors to be taken into account[98] included that: all of the affected employers supported the authorization and no employees opposed it;[99] "over 90% of the workforce in the ECEC sector is female" and 'granting the authorization … would open the prospect of improving rates of pay of a female-dominated workforce' (and therefore advance the new gender equality objective of the legislation introduced by the SJBP Act);[100] and the take-up of enterprise bargaining in ECEC has been low, as many long day care operations are small, lack the resources to bargain, and are subject to funding and pricing constraints.[101]

The second application to utilize the Supported Bargaining stream was brought by the Health and Community Services Union and the Australian Education Union (AEU), for an agreement covering 19 Victorian-based disability services providers. This application is contested by the employers[102] and had not been decided at the time of writing. A third application was also awaiting determination, by the Independent Education Union of Australia (IEU) for bargaining to cover over 100 community-based pre-schools in NSW, although the employers are not opposing the authorization in that case.[103]

To initiate bargaining for a Single Interest Employer Agreement, two or more employers that will be covered by the proposed agreement – or any employee bargaining representative (including a union) – may apply for a single interest employer authorization from the FWC.[104] In contrast to supported bargaining authorizations, there are many more requirements that

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[97] *Id*. at [51].

[98] FW Act, *supra* note 51, at (n 24) s 243(1)(b)(iv).

[99] *Application by United Workers' Union, supra* note 59, at [54].

[100] *Id*. at [55].

[101] *Id*. at [66]. One employer, G8, was anomalous in this regard (with over 10,000 employees) but was otherwise considered to share the common interests of the other employers and was included in the authorisation: *see* [57], [59].

[102] David Marin-Guzman, *Unions Use Multi-Employer Bargaining to Lift NDIS Workers' Pay*, Austl. Fin. Rev., Jan. 24, 2024.

[103] Workplace Express, *IEU Seeking 25% Rise for Pre-School Teachers in Supported Bargaining*, Workplace Express (July 5, 2024).

[104] FW Act, *supra* note 51, at (n 24) s 248(1).

must be satisfied for the FWC to make a single interest employer authorization.[105] The more significant of these include that: at least some employees covered by the proposed agreement are represented by a union;[106] the employers are carrying on similar business activities in the same franchise[107] *or* are employers with clearly identifiable common interests and it is not contrary to the public interest to make the authorization in respect of them;[108] the operations and business activities of the employers are 'reasonably comparable';[109] and (where employers do not consent to the authorization) a majority of the employees at each employer want to bargain for the agreement.[110]

The IEU brought the first application for a single interest employer authorization, seeking a multi-employer agreement covering general and support staff in 163 Catholic schools in Western Australia.[111] The FWC Full Bench made the authorization to instigate bargaining between the IEU and 10 Catholic education employers who run the schools, observing that this 'pathway [was] relatively straightforward' given the consent of the relevant employers and that each of them had 50 employees or more.[112] The Full Bench indicated that it would have been positively satisfied of the common interests of the employers anyway, given that they all operate under the same legislation in WA, provide primary and secondary Catholic education, receive federal and state funding for that purpose, and employ education support staff who are not teachers under the same modern award.[113] There was

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[105] *See* generally *Id*. at s 249.

[106] *Id*. at s 249(1)(b)(i).

[107] *Id*. at s 249(2).

[108] *Id*. at s 249(3). Common interests for these purposes include location, regulatory regime and nature of the enterprises and their employment conditions (s 249(3A)); this requirement is presumed to be satisfied for any employers with 50 employees or more unless the contrary is proved (s 249(3AB)). Small businesses with less than 20 employees are excluded from being the subject of single interest employer authorisations (s 249(1B)(a)).

[109] *Id*. at s 249(1)(b)(vi). It is assumed that this requirement is met in respect of employers with at least 50 employees: s 249(1AA).

[110] *Id*. at s 249(1B)(d). *See* further Part IX below.

[111] Workplace Express, *Education Union First to Pursue Multi-Deal in FWC*, Workplace Express (June 21, 2023).

[112] *Independent Education Union v Catholic Education Western Australia Ltd* [2023] FWCFB 177, [23], [29].

[113] *Id.* at [30]; *see also* [31]-[32].

also nothing to indicate it would be contrary to the public interest to make the authorization.[114] The AEU brought the second application, to commence single interest employer bargaining in 12 Technical and Further Education (TAFE) Institutes in Victoria.[115] Again, all of the employers had at least 50 employees and consented, leading the FWC to grant the authorisation[116] with the observation that (despite the presumption of 'common interests' being sound) the employers shared the requisite common interests in respect of: their geographic location in the same state; being subject to the 'substantially common substratum of TAFE regulation, organization and funding'; and having 'common existing terms and conditions of employment' under the same current enterprise agreement.[117] The third application was brought by the Australian Manufacturing Workers Union (AMWU) for an agreement covering NSW-based employers in the heating, ventilation and air conditioning industry.[118] The FWC accepted that these 9 employers have recognizable related characteristics, including geographical location, operating in the same sector and being members of the same industry association, and employing workers from the same labor pool under similar terms and conditions.[119] The tribunal also found that the public interest element was satisfied, as an authorization would advance the statutory objects of enabling collective bargaining,[120] 'ensuring a commonality of wages and conditions … thus avoiding a race to the bottom on wages and competition as between employers', encouraging productivity, reducing industrial disputes and ensuring industrial harmony across multiple enterprises.[121] Finally, Professionals Australia initiated the fourth application, seeking authorization to bargain for an agreement for the underground coal operations of five mining companies in NSW,

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[114] *Id.* at [32]

[115] Workplace Express, *Union Seeks Multi-Bargain Approval for TAFE Colleges*, Workplace Express (Oct. 19, 2023).

[116] *Australian Education Union* [2023] FWC 3034.

[117] *Id.* at [26]

[118] For background *see* David Marin-Guzman, *Air-Con Chiefs, Unions Embrace New Laws to Stop Being Undercut on Pay*, Austl. Fin. Rev., Nov. 28, 2022.

[119] *Application by AMWU* [2024] FWC 395 [34]; the employers share other common interests including that they perform work "contract to contract," resulting in high employee turnover and itinerant employment, *see* [35].

[120] *See* FW Act, *supra* note 51, at (n 24) ss 3 and 171.

[121] *Application by AMWU* [2024] FWC 395, *supra* note 119, at [38].

which strongly resist the application.[122] This application was before the FWC at the time of writing, and will be an important test case on the Single Interest Employer Bargaining provisions.

V THE BARGAINING PROCESS AND GOOD FAITH OBLIGATIONS

A New Zealand

After approval of the initiation of FPA bargaining, the initiating union had to, within 15 working days, use its best endeavors to notify other unions likely to have members covered by the proposed FPA of the approval, and notify any employers likely to be covered.[123] Employers so notified were then required, within 15 days, to identify and inform any union with members who were covered employees of the FPA approval.[124] Covered employers also had to, within 30 days of being informed of the FPA approval, provide all covered employees with information relating to the FPA process including details of the initiating union and how an FPA could affect the employees and their work.[125] Bargaining[126] for an FPA was required to be conducted between an employee bargaining side and an employer bargaining side.[127] An employee bargaining side was formed three months after the approval to initiate bargaining had been given to the initiating union,[128] which was 'thus the first employee bargaining party on the employee bargaining side.'[129] Additional unions on the employee bargaining side and an employer association on the employer bargaining side could be added upon approval by the chief

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[122] David Marin-Guzman, *Miners Targeted in Historic Bid for Multi-Employer Deal*, Austl. Fin. Rev (Jan. 24, 2024); Workplace Express, *Mining Titans Seek to Stymie Proposed Multi-Employer Deal*, Workplace Express (Feb. 29, 2024).

[123] FPA Act, *supra* note 46, at (n 19) s 39(1).

[124] *Id*. at s 40(1).

[125] *Id*. at ss 39(2)(c), (4) and 40(2)-(3).

[126] The term "bargaining" was defined in FPA Act (n 19) s 5(1) to include negotiations for a proposed FPA, communications or correspondence between or on behalf of the bargaining parties, and the ratification process (*see* Part VIII below).

[127] FPA Act, *supra* note 46, at (n 19) s 25(1).

[128] *Id*. at s 38.

[129] CCH, *New Zealand Employment Law Commentary*, para. 27-080 (Wolters Kluwer, undated).

executive.[130] Multiple employer associations could be on the employer bargaining side,[131] as long as each association had at least one member that would be an employer covered by the FPA and had coverage rights over the collective interests of covered employers.[132] Provision was also made for 'default bargaining parties' to engage in FPA negotiations where either bargaining side was not formed.[133] The former Government intended the main NZ union and employer representative bodies to play this role,[134] however Business NZ refused to participate[135] until it was clear that the FPA legislation would come into operation.[136] This shift was partly motivated by the inclusion in the FPA Act of a 'backstop' mechanism, whereby if no default representative emerged, the terms of an FPA could be fixed by the Employment Relations Authority.[137]

Three months after approval to initiate FPA bargaining was given, the chief executive had to provide each bargaining party with the names of the other bargaining parties for the proposed FPA.[138] Duties to deal with each other in good faith, and not to mislead or deceive each other, applied to a wide range of relationships of parties involved in FPA bargaining including parties on the employer and employee bargaining sides.[139] Additional good faith obligations of parties on opposing bargaining sides included agreeing on a process for effective and efficient bargaining, meeting with each other

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[130] FPA Act, *supra* note 46, at (n 19) s 25(3). A union needed to be an eligible union (*see* Part IV above) to join the employee bargaining side: *see* the approval requirements in ss 47-50. On approval of an employer association to be an employer bargaining party on the employer bargaining side, *see* ss 43-45. The bargaining parties which ultimately made up the employee and employer bargaining sides were set out in ss 52 and 53 respectively.

[131] *Id.* at ss 65-75.

[132] *Id.* at s 43(2). *See also* the definition of "eligible employer": s 5(1).

[133] *Id.* at ss 65-75.

[134] FPA Regulations, *supra* note 48, at (n 21) reg 24 (designating the NZCTU as the employee default bargaining party and BusinessNZ as that of employers).

[135] SCHOFIELD, *supra* note 27, at 332.

[136] Business NZ, *BusinessNZ Network to Assist Members with Fair Pay Agreements*, Scoop Business (Nov. 17, 2022), https://www.scoop.co.nz/stories/BU2211/S00278/businessnz-network-to-assist-members-with-fair-pay-agreements.htm.

[137] FPA Act, *supra* note 46, at (n 19) s 78; *see* further Part VII below.

[138] *Id*. at s 51.

[139] *Id*. at s 17.

from time to time, considering and responding to each other's proposals, continuing to bargain on other matters even if a deadlock was reached on a particular matter, providing information reasonably necessary to support bargaining claims if requested by the other bargaining side, recognizing and not undermining the role and authority of another representative or bargaining party, and using their best endeavors to agree the terms of the FPA agreement in an orderly, timely and efficient manner.[140] Penalties applied to breaches of some of the good faith obligations imposed by the FPA Act, although not those in 19 relating to negotiations between opposing bargaining sides.[141]

Once both bargaining sides had been formed and the employee bargaining side agreed to proceed, an employee bargaining party could arrange an FPA meeting by giving at least 14 days' notice to each employer with eligible employees.[142] Covered employees could attend two meetings of up to 2 hours' each relating to FPA negotiations (on ordinary pay), as long as the employer's business was maintained and there were sufficient employees to continue the employer's operations during FPA meetings.[143] A representative of an employee bargaining party (eg, a union official) could enter a workplace without the employer's consent to hold discussions with covered employees about FPA bargaining (or an FPA once made), including communicating with employees about progress in bargaining and seeking their feedback.[144] During bargaining, the employee bargaining side was required to use its best endeavors to represent the collective interests of all covered employees (whether they were union members or not), by providing them with regular updates, obtaining and considering their feedback, recognizing all relevant interest groups and advising the employees of a ratification vote on an

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[140] *Id*. at s 19. *See* also ss 93-95. These good faith bargaining requirements are similar to those of longer standing applying to collective bargaining generally under ER Act, ss 32-34. On the limited effectiveness of those provisions in curtailing employer strategies of avoiding collective agreement negotiations with trade unions, *see* ALEX BUKARICA & ANDREW RICHARD DALLAS, GOOD FAITH BARGAINING UNDER THE FAIR WORK ACT 2009: LESSONS FROM THE COLLECTIVE BARGAINING EXPERIENCE IN CANADA AND NEW ZEALAND, chs. 3–4 (2012); Gordon J. Anderson, *Competing Visions and the Transformation of New Zealand Labour Law*, *in* TRANSFORMING WORKPLACE RELATIONS IN NEW ZEALAND 1976-2016, *supra* note 2, at 191, 204–06.

[141] FPA Act, *supra* note 46, at (n 19) s 21.

[142] *Id*. at s 83(1), (3)(a).

[143] *Id*. at ss 84-85 and 83(3)(b).

[144] *Id*. at s 88(1)-(2); *see also* ss 88(4)-(5), 89-91 on the further conditions of and restrictions on access to workplaces.

FPA.[145] Similar representation obligations were imposed on the employer bargaining side in respect of covered employers.[146]

There is very little information available on the public record about the progress of FPA negotiations for any of the six sectors or occupations for which approval had been given, prior to the repeal of the FPA Act. The new National Minister indicated that all of these were 'in the very early stages of bargaining'.[147] It appears that various steps in the bargaining process outlined in this Part of the article had been taken in these negotiations, including the approval of additional employee bargaining parties and approval of employer bargaining parties[148] and unions holding paid meetings with members to inform them about FPA discussions. As noted earlier, the legislation's repeal brought an immediate end to all FPA negotiations from 20 December 2023. This ended the prospect of sectoral collective agreements being concluded for between 200,000 and 300,000 NZ workers.[149]

B Australia

In comparison to the NZ FPA scheme, the bargaining process for the new multi-employer agreements under the FW Act is not as tightly regulated. As in single-enterprise bargaining, employers and employees can be represented by 'bargaining representatives': for employers, these can include an employer itself or another person appointed by the employer in writing[150] (eg, an employer association); for employees, a union is the default bargaining representative of any of its members unless they appoint someone else to perform that role,[151] and an employee can act as their own bargaining representative or appoint another person to represent them [152] (e.g., a co-worker).[153] Bargaining for a Supported Bargaining Agreement or a Single

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[145] *Id*. at s 96(1)-(2); *see also* the specific obligation to ensure effective representation of Māori employees in s 97.

[146] *Id*. at ss 99-100.

[147] New Zealand, Parl. Deb., H.R., Dec. 12, 2023, (Brooke van Velden).

[148] *See* the table in Part IV above.

[149] New Zealand, Parl. Deb., H.R., Dec. 12, 2023, (Camilla Belich).

[150] FW Act, *supra* note 51, at (n 24) s 176(1)(a), (d).

[151] *Id*. at s 176(1)(b), (2).

[152] *Id*. at s 176(1)(c), (4).

[153] *See* Rosalind Read, T*he Role of Trade Unions and Individual Bargaining Representatives: Who Pays for the Work of Bargaining?*, *in* COLLECTIVE BARGAINING UNDER THE FAIR WORK ACT 69 (Shae McCrystal et al. eds., 2018).

Interest Employer Agreement commences once the relevant authorization is made by the FWC.[154] Both a supported bargaining authorization and a single interest employer authorization trigger the application of the good faith bargaining obligations.[155] These require all bargaining representatives to attend and participate in meetings at reasonable times, disclose relevant information (although not if it is confidential or commercially sensitive), respond and give genuine consideration to each other's proposals, refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining, and recognize and bargain with all other bargaining representatives.[156] However, good faith does not require bargaining representatives to make concessions or agree on terms for an agreement.[157] Over their more than 15 years of operation, the FW Act good faith bargaining rules have proven effective in requiring employers to engage in negotiations[158] and in countering some employer strategies to bypass union bargaining representatives.[159] But they have been largely ineffective in addressing employer avoidance tactics like 'surface bargaining' (negotiating without any real intent to conclude an agreement).[160] Penalties do not apply to primary breaches of the good faith requirements. However, such breaches could give rise to the making of a bargaining order by the FWC which, if contravened, may result in civil penalties.[161]

Unlike the arrangements in the FPA Act, employees would only be able to attend negotiations for a Supported Bargaining Agreement or a Single Interest Employer Agreement if they were a bargaining representative,[162] or

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[154] *See* Part IV above.

[155] Bargaining orders to enforce the good faith bargaining obligations in the context of multi-employer agreements can only be sought from the FWC if one of these authorisations is in place: FW Act, *supra* note 51, at (n 24) ss 229(2), 230(2)(d)-(e).

[156] *Id*. at s 228(1).

[157] *Id*. at s 228(2).

[158] *See, e.g.*, *APESMA v Peabody Energy Australia Coal Pty Ltd* (2015) 248 IR 360; *Re United Workers' Union (Davies Bakery Pty Ltd)* [2020] FWC 3246.

[159] *See, e.g.*, *Australian Manufacturing Workers Union v Galintel Rolling Mills Pty Ltd* [2011] FWA 6326; *APESMA v Mt Arthur Coal Pty Ltd* [2021] FWC 356.

[160] *See, e.g.*, *Endeavour Coal Pty Ltd v APESMA* (2012) 206 FCR 576.

[161] FW Act, *supra* note 51, at (n 24) ss 229-233; no such penalty has ever been imposed.

[162] Issues may then arise as to whether the employee/bargaining representative is entitled to time off and payment to attend bargaining meetings: *see*, *e.g.*, *Bowers v*

potentially if they were a shop steward or union delegate at one of the workplaces to be covered by the relevant agreement.[163] There are no specific union rights of access to workplaces for purposes of multi-employer agreement negotiations. Rather, the general right of entry scheme in Part 3-4 of the FW Act applies, enabling union officials who are permit-holders to enter premises to hold discussions with employees working on the premises who wish to participate in those discussions.[164] These statutory rights, combined with provisions in existing enterprise agreements, could allow entry for union officials to hold discussions with employees relating to multi-employer agreement negotiations.[165]

Since the first supported bargaining authorization was made for the ECEC sector,[166] negotiations for a Supported Bargaining Agreement have been taking place between the three unions, G8 and employers represented by the Australian Childcare Alliance, Community Child Care Association and Community Early Learning Australia.[167] The FWC has been involved in these negotiations, including by issuing an order under FW Act s 246(3) that a representative of the federal Department of Education attend proceedings

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Victoria Police [2011] FWA 2862 (finding an employer was not required to provide paid time off to an individual bargaining representative); Read, *supra* note 153, at 80–84.

[163] *See*, *e.g.*, *Australian Manufacturing Workers Union v WW Wedderburn Pty Ltd T/A Wedderburn* [2016] FWC 2260 (dismissal of shop steward who was part of union bargaining team restrained as it breached good faith bargaining requirements); *Construction, Forestry, Maritime, Mining and Energy Union v DP World (Fremantle) Limited T/A DP World* [2019] FWC 4603 (company could not resist involvement in enterprise agreement negotiations of union delegate certified medically unfit for work but able to attend meetings).

[164] FW Act, *supra* note 51, at (n 24) s 484. Many other requirements apply to the exercise of entry rights for these purposes: *see* ss 486-492A.

[165] In *Communications, Electrical, Electronic, Energy, Information, Postal and Allied Services Union of Australia v Austal Ships Pty Ltd* [2022] FCA 1462, the Federal Court of Australia held that entry under the FW Act to hold discussions with employees about plans to engage in collective bargaining with their employer did not extend to organising a petition of employees in support of that objective. This decision was overturned on appeal: *Communications, Electrical, Electronic, Energy, Information, Postal and Allied Services Union of Australia v Austal Ships Pty Ltd* [2023] FCAFC 180.

[166] *Application by United Workers' Union, supra* note 59, at 176; *see* Part IV above.

[167] *Application by United Workers' Union, supra* note 59 (Order, Deputy President Easton, FWC, 3 November 2023).

in the tribunal relating to the bargaining.[168] One employer participant in the FWC-convened discussions described the ECEC negotiations as 'consensual' with all parties motivated by 'one common chief goal … to engage with the Government to improve the wages position of employees in that sector.'[169] The final resolution of the ECEC agreement is largely dependent on the amount of money the federal government will provide to fund pay increases, an issue which remained unclear as at mid-May 2024.[170] No information is publicly available about the progress of negotiations in the WA Catholic schools or Victorian TAFEs, which were the subject of the first two authorizations to bargain for Single Interest Employer Agreements.[171] The third application has, according to the AMWU, resulted in an agreement with multiple heating, ventilation and air conditioning employers that delivers 200 workers a 26% pay rise over 4 years, and a 'labor pool' clause requiring that employees be offered work with one of the other employers before their work is outsourced or casuals are hired.[172]

VI SUBJECTS OF BARGAINING

A New Zealand

The subjects of FPA bargaining included certain matters designated as mandatory content in FPAs and topics that bargaining sides were required to discuss but not necessarily include in an agreement. In the latter category were the objectives of the FPA, health and safety requirements, flexible working arrangements and redundancy.[173] The mandatory provisions[174] included coverage of the FPA, standard hours of work, wages (including

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[168] *Id. See also* FW Act, *supra* note 51, at (n 24) s 246(3), and Part VII below.

[169] Workplace Express, *Supported Bargaining More Challenging if Parties at Odds: Participant*, Workplace Express (Nov. 3, 2023).

[170] Workplace Express, *Budget Fails to Reveal Details of Aged Care, Child Care Pay Rises*, Workplace Express (May 15, 2024).

[171] *See* Part IV above.

[172] Workplace Express, *AMWU Hails "Game-Changing" Multi-Employer Deal*, Workplace Express (Mar. 27, 2024); David Marin-Guzman, *Employers to Share Workers in First Multi-Employer Deal*, Austl. Fin. Rev., Apr. 3, 2024.

[173] FPA Act, *supra* note 46, at (n 19) s 125.

[174] The mandatory content of FPAs in some respects reflected the permissible and prescribed content of modern awards in Australia: *see* FW Act, *supra* note 51, at (n 24) ss 139, 143.

minimum base wage rates, overtime and penalty rates), training, leave entitlements, governance arrangements for the bargaining sides when the FPA came into force, the process for bargaining sides to engage with each other over proposed variations to the agreement, and the agreement's commencement and expiry dates (FPAs could have a term of between three and five years).[175] Terms other than mandatory content could be included in an FPA, but had to relate to the employment of covered employees and not be contrary to any law.[176] FPA terms could not fall below, but could improve upon, the minimum entitlements provided for in the ER Act, *Holidays Act 2003* (NZ), *Minimum Wage Act 1983* (NZ) and *Wage Protection Act 1983* (NZ).[177]

B Australia

There are no specific rules applicable to the content of Single Enterprise Agreements and Single Interest Employer Agreements. The content rules are the same as those for enterprise agreements generally under the FW Act, which provides for permitted matters, mandatory terms and unlawful terms. The permitted matters in agreements are as follows: 'matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees'[178] (for example, wages, working hours and other terms and conditions of employment); matters pertaining to the employers and any union that will be covered by the agreement[179] (for example, union training leave, union involvement in consultation and dispute settlement under the agreement); deductions from wages authorized by an employee[180] (such as for salary sacrifice arrangements or superannuation); and terms relating to how the agreement will operate (such as its coverage, duration, etc).[181] Mandatory agreement terms include a nominal expiry date of not more than four years after approval of the agreement by the FWC,[182] a consultation term (requiring the employers to consult with employees about

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[175] FPA Act, *supra* note 46, at (n 19) ss 123, 124; FPA Regulations, *supra* note 48, at (n 21) reg 13-23. District (ie, regional) variations were permitted in relation to certain FPA provisions including wages, leave entitlements, redundancy: *see* s 135.

[176] FPA Act, *id*. at (n 19) s 126.

[177] *Id.* at ss 127-129.

[178] FW Act, *supra* note 51, at (n 24) s 172(1)(a).

[179] *Id.* at s 172(1)(b).

[180] *Id.* at s 172(1)(c).

[181] *Id.* at s 172(1)(d).

[182] *Id.* at s 186(5).

major workplace change or changes to rosters),[183] and a term providing for the settlement of disputes arising under the agreement by the FWC or another independent person.[184] Unlawful clauses in enterprise agreements include any term discriminating against an employee on the basis of a wide range of attributes,[185] an 'objectionable term' (for example, a requirement to be or not be a union member or to pay a bargaining services fee),[186] and terms derogating from or varying other parts of the legislation dealing with unfair dismissal, industrial action and union rights of entry.[187] Base rates of pay in an enterprise agreement cannot fall below the base rate of pay an employee would be entitled to under a modern award,[188] and an agreement cannot undermine an employee's entitlements under the National Employment Standards (NES).[189] A proposed agreement will be assessed against relevant modern awards to ensure that employees are 'better off overall' as part of the requirements of which the FWC must be satisfied to approve an agreement.[190]

VII RESOLVING BARGAINING DISPUTES AND AVENUES TO ARBITRATION

A New Zealand

Parties could obtain assistance with FPA negotiations through the mediation services and bargaining support services provided by the chief executive of MBIE.[191] Bargaining parties could also seek assistance from private mediators, and both parties needed to agree to participate in whichever form

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[183] *Id.* at s 205.

[184] *Id.* at s 186(6).

[185] *Id.* at ss 194(a), 195. For example, an agreement provision imposing age-based criteria for redundancy entitlements: *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)* (2015) 247 IR 350.

[186] FW Act, *supra* note 51, at (n 24) ss 12: definition of "objectionable term." *See also* s 194(b), pt 3-1.

[187] *Id.* at ss 194(c)-(g).

[188] *Id.* at s 206.

[189] *Id.* at ss 55-56, 186(2)(d). The NES are minimum employment conditions for all employees covered by the FW Act including in relation to annual leave, personal/carer's leave, parental leave, maximum weekly hours of work, notice of termination, redundancy pay, etc: *see* pt 2-2.

[190] *Id.* at ss 196(2)(d), 193-193A. *See* Part VIII below

[191] FPA Act, *supra* note 46, at (n 19) ss 219-226.

of mediation was chosen.[192] Parties could also apply to the Employment Relations Authority for determinations in relation to certain issues that were in dispute during FPA bargaining.[193] If the bargaining sides were unable to agree on terms to be included in an FPA, a bargaining side could apply to the Authority asking it to recommend the content of relevant terms.[194] Alternatively, a bargaining side could ask the Authority to make a determination fixing the terms of the proposed FPA.[195] The Authority could only have done so if satisfied that:

(a) the bargaining sides have exhausted all other reasonable alternatives for reaching agreement; or (b) the bargaining sides have, for a reasonable period, used their best endeavors to identify and use reasonable alternatives to agree the terms of the proposed agreement; or (c) a bargaining side has breached the duty of good faith imposed by section 17 and the breach— (i) was deliberate, serious, and sustained; or (ii) involved behavior that undermined the bargaining process; or (d) the proposed agreement has been the subject of 2 ratification processes, without having been ratified.[196]

Bevin & Hornsby-Geluk[197] note that this set a lower threshold for fixing terms in FPA bargaining than that applicable to collective bargaining under the ER Act, which requires 'a serious and sustained breach of the duty of good faith' and ensures that 'the Authority fixes terms only as a last resort'.

When recommending or fixing terms in an FPA, the Authority could consider any terms already agreed by the bargaining sides and other factors including relevant industrial or occupational practices , the likely impact and potential benefits of the terms on covered employees (especially low-paid and vulnerable employees), the likely impact on covered employers, relativities within the proposed FPA and with other relevant employment standards (eg, collective agreements or statutory minimum standards), and any likely impacts on New Zealand's economy or society.[198] Parties could be directed by the Authority into mediation services before it made a recommendation or

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[192] EMPLOYMENT NEW ZEALAND, THE FAIR PAY AGREEMENTS SYSTEM: A GUIDE FOR PARTICIPANTS 103 (2023).

[193] FPA Act, *supra* note 46, at (n 19) s 229.

[194] Id. at s 231.

[195] *Id.* at ss 229(e), 234(1).

[196] *Id.* at s 234(2), *see also* s 235 on the FPA terms that could be fixed by the Authority.

[197] Bevin & Hornsby-Geluk, *supra* note 21, at 175, 182.

[198] FPA Act, *supra* note 46, at (n 19) s 236.

determination under the above provisions, unless mediation would not contribute to resolution of the matter, would not be in the public interest, would undermine the urgent nature of the application for a recommendation or determination, or would be impractical or inappropriate.[199]

B Australia

A bargaining representative for a Supported Bargaining Agreement or a Single Interest Employer Agreement may apply to the FWC for assistance in resolving a bargaining dispute, without the agreement of other bargaining representatives.[200] The FWC can deal with the dispute by mediating, conciliating or making recommendations to the parties,[201] but cannot arbitrate unless all bargaining representatives agree.[202] In negotiations for a Supported Bargaining Agreement, once a supported bargaining authorization has been made the FWC can – on its own initiative – provide such assistance to the negotiating parties as it considers appropriate to facilitate bargaining.[203] This could include the exercise of powers as if the FWC were dealing with a dispute,[204] and directing persons other than employers specified in the authorization to attend conferences, where 'the person exercises such a degree of control over the terms and conditions' of the relevant employees 'that the participation of the person in bargaining is necessary for the agreement to be made'.[205] Given that the Supported Bargaining stream is oriented towards sectors which are reliant on government funding, this provision enables relevant government departments and agencies which control the funding to be brought into Supported Bargaining Agreement negotiations as has occurred already in the ECEC sector.[206]

Another option for resolving the inability of parties to agree in multi-employer agreement negotiations is provided by the new provisions for 'intractable bargaining declarations' (IBDs).[207] These provisions, which apply

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[199] *Id.* at s 232.

[200] FW Act, *supra* note 51, at (n 24) s 240(1)-(2).

[201] *Id.* at s 595(1)-(2).

[202] *Id.* at ss 240(4), 595(3)

[203] *Id.* at s 246(1), (2)(a)

[204] *Id.* at s 246(1), (2)(b); that is, conciliation and mediation powers, but not arbitration unless the parties agree: *see* s 240.

[205] *Id.* at s 246(3).

[206] *See* Part V above.

[207] FW Act, *supra* note 51, at (n 24) ss 234-235A.

to enterprise agreements generally,[208] were introduced by the SJBP Act amendments to the FW Act, addressing concerns from unions and academics that there were insufficient pathways under the original 2009 legislation to resolve protracted bargaining disputes through arbitration.[209] A bargaining representative can apply for an IBD,[210] which the FWC can make if satisfied that: the applicant has participated in FWC processes under s 240 aimed at resolving the dispute; 'there is no reasonable prospect of agreement being reached' if the declaration is not made; and 'it is reasonable in all the circumstances to make the declaration', considering the views of all bargaining representatives.[211] However, an IBD cannot be made before the end of the 'minimum bargaining period' which is the later of nine months after the expiry of an existing agreement (where applicable) and nine months since bargaining commenced.[212] In making the overall reasonableness assessment as to whether it should make an IBD, the FWC may take into account a range of matters including the history of the negotiations and the parties' conduct as well as wider economic conditions.[213] In the first decided case on these provisions, the United Firefighters' Union sought an IBD in bargaining for a single-enterprise agreement for Fire Rescue Victoria.[214] The FWC Full Bench was satisfied that bargaining had reached an impasse after three years of negotiations;[215] and that it was reasonable to make an IBD for reasons including the critical public safety function of the employer (which could be threatened if employees escalated their industrial action) and the prospect of improving

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[208] Although not greenfields agreements or Cooperative Workplaces Agreements: *Id.* s 234.

[209] *See* BUKARICA & DALLAS, *supra* note 140, at 114–17, 131–50; Shae McCrystal, *Deadlocked Bargaining Disputes: Industrial Action, Agreement Termination and Access to Arbitration*, *in* COLLECTIVE BARGAINING UNDER THE FAIR WORK ACT, *supra* note 153, at 117, 118–20, 135–37.

[210] Such an application can be made in MEB, but only where a supported bargaining authorisation or single interest employer authorisation is in operation: FW Act, *supra* note 51, at (n 24) s 234(2).

[211] *Id.* at s 235(1)-(2).

[212] *Id.* at s 235(1)(c), (5)-(6).

[213] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth) [847].

[214] IBDs have been sought by employers in other cases involving bargaining for single-enterprise agreements (including Virgin, Chevron and Ventia).

[215] *United Firefighters' Union of Australia v Fire Rescue Victoria* [2023] FWCFB 180, [41]-[42].

embittered industrial relations through a quick arbitration process.[216] An IBD was also made in a subsequent case, in which the Transport Workers' Union sought to bring bargaining to a conclusion after 17 meetings and fruitless FWC conciliation proceedings since October 2022.[217] No applications for IBDs have yet been made in the context of MEB negotiations.

If the FWC makes an IBD, it can (where 'appropriate') specify a 'post-declaration negotiating period' of any duration, during which the tribunal can assist the parties through conciliation.[218] If no post-declaration negotiating period is specified, or such a period was specified and has ended, the FWC must make an 'intractable bargaining workplace determination' as quickly as possible.[219] This determination will impose an arbitral outcome of the dispute, and must include certain core and mandatory terms, the terms which the parties had agreed upon and terms resolving the matters that remained in dispute between the parties.[220] In making a determination, the FWC must take into account factors including the interests of the employers and employees who will be covered by it, the public interest, productivity improvements in the relevant enterprises, the conduct of the bargaining representatives and whether they acted in good faith, and 'the significance, to [the] employers and employees, of any arrangements or benefits in an enterprise agreement that, immediately before the determination, applies to any of the employers in respect of any of the employees'.[221]

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[216] *Id.* at [42].

[217] *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd* [2024] FWC 91.

[218] FW Act, *supra* note 51, at (n 24) s 235A(1); the negotiating period can be extended by the FWC after considering the views of the bargaining representatives, s 235A(2).

[219] *Id.* at s 269.

[220] *Id.* at ss 270-274. Under s 270A, the final form of any disputed term must be no less favourable to employees and their union than a relevant term of the enterprise agreement that is being replaced by the intractable bargaining workplace determination.

[221] *Id.* at s 275.

VIII COMPLETION OF BARGAINING

A New Zealand

Bargaining for an FPA would have been finalized when the bargaining sides agreed that negotiations were completed and the bargaining side lead advocates for each side jointly submitted the agreement to the Employment Relations Authority for a compliance assessment.[222] Once that process was complete and the authority approved the proposed FPA,[223] it would be submitted to separate ratification votes of covered employees and covered employers.[224] If these votes were in favor of the proposed FPA, the chief executive would assess the ratification votes and if they were verified – and all other requirements of the FPA Act were met – would validate the FPA by issuing a 'fair pay agreement notice'.[225] This notice would have brought the FPA into legal effect as a form of secondary legislation.[226]

B Australia

Employers may request employees to approve a proposed enterprise agreement under the FW Act by voting for it.[227] However, in the case of a Supported Bargaining Agreement or Single Interest Employer Agreement, such a request may not be made unless each union that is a bargaining representative for the agreement has provided written agreement to the holding of a vote[228] – or the employer obtains a 'voting request order' permitting the vote.[229] Such an order can be made by the FWC where a union's refusal to allow a vote on an agreement is unreasonable in the circumstances and holding the vote would not be inconsistent with good faith bargaining.[230] Either type of multi-enterprise agreement is 'made' when a majority of employees of at least one of the employers who will be covered by it vote to approve

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[222] FPA Act, *supra* note 46, at (n 19) s 143.
[223] *Id.* at ss 144-150.
[224] *Id.* at ss 151-156.
[225] *Id.* at ss 159-171.
[226] *Id.* at ss 172-174 and 168(4).
[227] FW Act, *supra* note 51, at (n 24) s 181.
[228] *Id.* at s 180A(1), (2)(a).
[229] *Id.* at s 180A(2)(b).
[230] *Id.* at ss 240A-240B.

it.[231] The agreement will then only cover each employer whose employees approved it, and the employees of those employers.[232] Agreements must be approved by the FWC on the basis of various statutory tests,[233] including the better off overall test (measuring an agreement against the terms of an applicable modern award)[234] and ensuring that employees have 'genuinely agreed' to the agreement.[235] A Supported Bargaining Agreement or Single Interest Employer Agreement will take effect 7 days after approval by the FWC or on a later date specified in the agreement.[236]

IX ASSESSMENT AND CONCLUSION

It was observed in Parts I and II of this article that a central purpose of the recent reforms of NZ and Australian labor law was to address falling collective bargaining coverage (and in turn, overcome the effects of fissuring and raise workers' wages), by providing new options for the negotiation of agreements beyond the level of the single enterprise. This policy initiative was informed by international evidence demonstrating that nations which allow collective bargaining at other levels (e.g., sectoral, national) generally have higher levels of agreement coverage than those which limit negotiations to the enterprise. What conclusions can therefore be drawn, from the comparative analysis carried out in the article, about the extent to which the FPA Act could have meaningfully extended bargaining from the enterprise to the sectoral level in NZ, and whether the new Australian provisions will be capable of facilitating bargaining at the multi-employer level? Any such conclusions are limited by the fact that the FPA Act was in operation for only a very short period of time, with no collective agreements finalized under its provisions. The new Australian MEB streams have only been in effect since June 2023, making it difficult to assess their impacts on bargaining coverage and wages outcomes. The following observations about the NZ and Australian bargaining reforms are offered with those caveats in mind.

By providing that bargaining for FPAs could be conducted even where an existing (enterprise-based) collective agreement was in place, the FPA Act

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[231] *Id.* at s 182(2).
[232] *Id.* at s 184.
[233] *Id.* at ss 186-187.
[234] *Id.* at ss 186(2)(d), 193-193A.
[235] *Id.* at ss 186(2)(b)(i), 188; Fair Work Commission (Austl.), *Statement of Principles on Genuine Agreement* (2023).
[236] FW Act, *id.*, at s 54(1).

represented a more definitive statement of the importance of the shift from enterprise to broader-based bargaining in NZ than can be seen in the Australian reform approach. As outlined in Part III above, by precluding access to negotiations for Supported Bargaining Agreements and Single Interest Employer Agreements until after existing single-enterprise agreements have expired, the SJBP Act amendments to the FW Act arguably fall short of providing the very strong impetus needed to shift the locus of bargaining to the multi-employer level on a widespread basis. As Stanford, Macdonald and Raynes have argued: 'limitations on access to either of [the] expanded [MEB] streams remain substantial; and in essence [MEB] will continue to be seen as an exceptional practice (rather than a legitimate [and] normal practice, as is the case in most other industrial countries)'.[237]

This weakness is amplified by the differing NZ and Australian approaches to establishing the right to bargain, particularly when it comes to assessing the level of employee support for sectoral bargaining or MEB. In Part IV of the article, it was shown that the FPA Act provided for alternative pathways to the initiation of FPA bargaining: a public interest test based on factors relating to the low pay and limited bargaining power of employees, or a representation test satisfied by evidence that at least 1000 employees or 10% of them support obtaining an FPA. This lowering of the employee support threshold represented an important departure from the traditional majoritarian basis for determining collective bargaining rights, which has contributed to falling levels of agreement coverage in enterprise-focused systems. Majority employee support requirements create considerable impediments to the commencement of bargaining, because of the opportunities they offer for employer opposition during the workplace contest over whether or not collective bargaining should occur.[238] The 1000 employees or 10% representation threshold relied on an alternative concept of 'legitimacy' (demonstrated through 'a positive, or active, indication of support' from the

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[237] Stanford et al., *supra* note 4, at 30.

[238] *See* Gregor Gall, Twenty Years of the Third Statutory Union Recognition Procedure in Britain: Outcomes and Impact, 49 Indus. L.J. 657 (2020); Celine McNicholas et al., *Unlawful: U.S. Employers Are Charged with Violating Federal Law in 41.5% of All Union Election Campaigns*, Economic Policy Institute (Dec. 11, 2019).

required number of employees) as the basis for unions to establish the right to bargain for an FPA.[239]

In Australia, access to Supported Bargaining under the new FW Act provisions does not require any level of employee support to be demonstrated, although other criteria (including the commonality of employment conditions and the interests of employers) must be satisfied. However, triggering the process for Single Interest Employer Bargaining is far more onerous, with many statutory tests for a union to overcome including demonstration of majority employee approval in each workplace (where the application for an authorization is opposed by the relevant employers). This requirement was not in contest in the WA Catholic schools case, nor in the Victorian TAFEs case, because the employers in each instance consented to an authorization being made. Where such consent is absent, this test presents a significant impediment to the making of a single interest employer authorization and creates opportunities for employer opposition.[240] In stark contrast we can see the ease with which NZ unions were able to establish the right to bargain for FPAs covering entire industries or occupations, based on levels of support ranging from 1132 to 2925 employees. A NZ-style lower threshold of employee support grounded in the concept of legitimacy, with an alternative public interest avenue focused more on the common interests of the *employees* and the necessity of MEB to enable them to access bargaining, would have been far preferable in the Single Interest Employer Bargaining stream.

The early evidence examined in Parts IV and V above indicates that the FPA Act and the FW Act Supported Bargaining stream have stimulated collective bargaining activity in some of the sectors most in need of regulatory intervention, where low-paid work predominates: cleaning, security, hospitality, public transport and supermarkets in NZ, disability care in Australia, and the ECEC sector in both countries. In addition, Australian unions have started utilizing the Single Interest Employer Bargaining stream to improve

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[239] Ministry of Business, Innovation & Employment (N.Z.), *Fair Pay Agreements–The Nature of "Support" for the Representation Test*, Parliamentary Library, Parliament of New Zealand (May 3, 2021). *See also* Kent, *supra* note 22, at 244–45.

[240] This is demonstrated by a procedural ruling in the Professionals Australia application for a single interest employer authorisation covering coal mining operators in NSW, in which the tribunal ordered the union to produce documents relating to its communications with members about the proposal to bargain for a Single Interest Employer Agreement – so the companies can test whether employees gave informed consent to engaging in bargaining on that basis: *Association of Professional Engineers, Scientists and Managers, Australia v Great Southern Energy Pty Ltd T/A Delta Coal and Others* [2024] FWCFB 106.

wages and conditions for educators at primary, secondary and TAFE levels, as well as manufacturing and mining workers. However, in both countries the volume of activity under the new avenues for bargaining has been quite low. In NZ, unions only made ten applications to initiate FPA bargaining in the 12 months that the FPA Act was in operation (with no new applications made after 16 June 2023). In Australia, seven applications for MEB authorizations were made in the first eight months – mostly in government-funded sectors, but none where fissured business structures have contributed to falling bargaining coverage. The capacity of Single Interest Employer Agreements to combat fissuring in industries like aviation, the fresh food supply chain, or complex logistics and distribution networks remains untested. The limited appetite of Australian unions to test the limits of the new MEB provisions is surprising, given the long-running campaign by the union movement for enactment of these very reforms.[241] It may reflect, though, the considerable commitment of union resources needed both to run FWC cases (to obtain authorizations to access the two MEB streams) and to sustain workplace organizing and bargaining campaigns at the multi-employer level.

Certain features of the NZ and Australian laws examined in Parts V, VII and VIII above would have been conducive in the NZ case, and are likely to be conducive in the Australian context, to effective collective bargaining and enabling unions to mobilize employees for workplace campaigns to obtain sectoral or multi-employer agreements. These include good faith bargaining obligations, rights for employees and their representatives to participate in the negotiation process, union rights of access to the workplace (with significantly greater, specific rights provided in these last two areas under the now-defunct FPA system), and provision for bargaining parties to seek dispute resolution assistance from state agencies (including more flexible avenues to obtain an arbitrated outcome in intractable disputes that could assist in addressing bad faith tactics from employers like surface bargaining). The new FW Act provisions to obtain IBDs have proved useful to unions in two cases as a mechanism to force long-running enterprise agreement negotiations towards a conclusion, but have not yet been applied in bargaining for MEBs.

Finally, the NZ and Australian reforms represent important shifts away from the dominance of labor market deregulation since the mid-1980s. As noted in Part II of the article, deregulatory labor law reforms during this period prioritized individual over collective employment relationships, and the removal of interference with market forces by external bodies such as unions and industrial tribunals. In both countries, the 'big bang' experiments in labor

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[241] *See* Damien Cahill, *Change the Rules*, Arena Mag. (Jun. 2019).

market deregulation of conservative governments – the EC Act in NZ and 'Work Choices' in Australia – were only moderately wound back by later Labour/Labor governments (through the ER Act and FW Act). There is no doubting the intention of the latest reforms to move more decisively in the direction of re-regulation:[242] by repositioning the locus of bargaining away from the enterprise, towards sectoral and multi-employer agreement-making, the FPA Act and the shift to MEB under the FW Act have sought to mark out new territory for unions to advance the interests of workers after many years of hostile or indifferent state regulation. However, remnants of the deregulatory era may be seen in the protections of freedom *from* association in both the NZ and Australian reform laws, as discussed in Part IV above, and in some of the restrictions on agreement content considered in Part VI. The most recent swing back to a deregulatory ethos is revealed by the National/Coalition Government Finance Minister's comments that the FPA Act's repeal was necessary because FPAs 'would have been compulsory union-driven mandatory sector-wide employment deals which we thought would take a lot of flexibility away from individual employers and employees.'[243] The abrupt abolition of the FPA scheme is regrettable,[244] as this has deprived us of an opportunity to fully assess the extent of its practical effect in shifting bargaining in NZ beyond the enterprise level. To better understand the impacts of regulatory interventions of this kind, it is to be hoped that the Australian reform has a much longer period to develop and demonstrate its ability to facilitate MEB – and therefore extend the benefits of collective bargaining to more Australian workers.

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[242] This tendency can be seen further in the Albanese Labor Government's subsequent industrial relations reforms, the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) and the *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* (Cth), which tackle labour hire, wage theft, casual employment and the gig economy (among many other issues).

[243] RNZ, *Retailers Welcome Demise of "Unnecessary" Fair Pay Agreements Legislation*, RNZ (Dec. 12, 2023), https://www.rnz.co.nz/news/national/504516/retailers-welcome-demise-of-unnecessary-fair-pay-agreements-legislation.

[244] Ironically, NZ FPAs are considered a model for reform in other labour law systems including the USA and Canada: *see* David Madland, *Lessons from New Zealand's New Sectoral Bargaining Law*, Am. Progress (Nov. 29, 2022); Sara Slinn & Mark Rowlinson, *Bargaining Sectoral Standards: Towards Canadian Fair Pay Agreement Legislation*, Windsor Y.B. Access Just. (forthcoming 2023).

COMPARATIVISM IN LABOR LAW–A VIEW FROM ISRAEL

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INTRODUCTION

This article focuses on comparativism in the Israeli labor law system as it is reflected in judicial decisions and local Israeli scholarship. Our main interest is in exploring when Israeli labor law experts turn to comparative law. More specifically, we want to uncover the scenarios in which the Israeli labor law judge or scholar turns to comparative law, what legal system they usually choose to turn to, what their purpose is, and what they conclude from the legal comparison.

The question of how comparativism is being used by labor law actors is globally interesting. Israel has two unique features that distinguish it from other Western countries, which makes this question more complex. First, the Israeli labor law system is relatively young; it has existed and been developing for only a few decades.[1] Therefore, it is only natural to assume that it has turned quite often to other law systems to develop and to understand and even criticize itself. With this background, it is interesting to see when exactly Israeli labor law actors have done so through the years, how much they lean on comparative sources, what exactly they draw from those sources, and for what purpose.

The Israeli legal system is also unique since it is positioned somewhere between the European and the Anglo-American legal systems—*i.e.*, it combines elements from both the common law system and the continental law

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1. The Israeli state was established in 1948. Two decades later, in 1969, the Labor Courts law and regulation of the labor law system gained momentum.

system (civil law).[2] This is because, at its core, the Israeli legal system is built upon British law (and previously, Ottoman law) that was imposed on the local legal system during the Mandate period; however, the first legislators and the judges who were present at the beginning of the Israeli state mainly came from the continent and were influenced by the continental legal system.[3] Therefore, it is natural for Israeli labor law actors to turn to either system—the common law system or the continental law system—to develop, interpret, or criticize Israeli law.[4] The common law and continental legal systems are quite different in their perspectives and elaboration of labor rights.[5] Hence, it is interesting to explore which states Israeli labor law actors turn to to support their arguments and what their basic agenda is when they are following one legal system instead of the other.

To answer this set of questions, this article will focus on two labor law issues—employees' right to equality and collective rights—and look at when, how, and to what extent the Israeli labor law system relies on comparative law in these matters and to which states it has turned.

To accomplish this aim, this article will proceed as follows. Part II will introduce the Israeli labor law system. It will elaborate on its establishment and development through the years and will reveal how comparative law was always present during the building of the legal basis and justifications of the Israeli labor law system. Thereafter, in the core of this article in Part III, the question of comparativism will be explored with regard to employees' right to equality and collective rights. In this Part, we will present when, how, and for what purpose Israeli legal actors have chosen to turn to comparative law. This Part will also discuss the development of comparative methods in Israeli labor law through the years and the differences between and similarities of Israeli case law and Israeli scholarship in this regard. Against this backdrop, Part IV will describe the main themes that emerge in the comparative method throughout the evolution of employees' rights to equality and collective rights in the Israeli labor law system. Part V will conclude.

Finally, before we begin our discussion, it is important to note that this article presents comparative law as it was interpreted, understood, and

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2. Alfredo M. Rabello & Pablo Lerner, *The Role of Comparative Law in Israel*, 1 BAR-ILAN L. STUD. 89, 94 (2004) (Isr.); Nili Cohen, *Israeli Law as a Mixed System: Between Common Law and Continental Law*, 1 GLOB. JURIST TOPICS (2002).

3. Rabello & Lerner, *supra* note 2, at 101–03.

4. *Id.* at 97.

5. Juan C. Botero et al., *The Regulation of Labor*, 119 Q. J. ECON. 1339, 1345–46 (2004); WORLD BANK & INT'L FIN. CORP., DOING BUSINESS 2007: HOW TO REFORM (2006). For a more complex argument in this matter, *see* Simon Deakin et al., *The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes*, 146 INT'L LAB. REV. 133 (2007).

applied by the relevant actors, without evaluating whether they did so accurately and without examining the original comparative sources.

The Establishment of the Israeli Labor Law System and the Comparative View

The Israeli labor law system was developed as a distinct, separate branch of law in the general Israeli legal system and was based on unique legal and social criteria and considerations.[6] At first, since there were no official labor law tribunals. Some collective and individual disputes in the labor arena were decided by the Supervisor of Wage Collection, who was subordinate to the Chief Supervisor of Labor Relations on behalf of the Minister of Labor.[7] Social security issues were decided by the National Insurance Court, which dealt only with social security issues.[8] As we will show below, some of these issues eventually reached the Supreme Court for a decision.

The Israeli labor law system was officially established two decades after the founding of the Israel state, in March 1969, when the Israeli Knesset[9] enacted the Labor Court Law (1969) based on agreements between the government, the Histadrut (the leading workers' union), and employers' representatives to institute a unique jurisdiction for the areas of labor and employment.[10] The Labor Court Law defined the Israeli labor court system as a unique system with its own judges, procedural rules, and prerogatives that has absolute authority to deal with employment and social security issues.[11] This Law also determined that the Israeli labor law system would be based on five regional courts and one national court in Jerusalem that sits both as a court of appeal and as a court with the authority to decide collective disputes between workers' and employers' organizations.[12]

Since its establishment and to this day, the Israeli labor court system has relied on comparative law. Based on the British common law system, the Israeli legal system, including the labor law system, was an adversarial system in which parties present their cases before the court. The Israeli labor law system, however, was at the same time based on the inquisitorial system, in

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6. Shlomo Noyman, *The Labor Courts System – the Beginning*, *in* ESSAYS IN HONOR OF ELIKA BARAK-USSOSKIN 139, 154–55 (2012) (Isr.).

7. Then the Supervisor of Wage Collection acted under the provisions of the Wage Protection Law (1958).

8. *See generally* Noyman, *supra* note 6.

9. The Knesset is the Israeli legislature, the body equivalent to the United States Congress.

10. Noyman, *supra* note 6, at 142.

11. The Israeli Labor Court Law (1969) §§ 24–25 (authorities), 32–33 (evidence law and order to justice). This law abolished the activity of the Supervisor of Wage Collection and the National Insurance Court.

12. *Id.* §§ 1, 25–26.

which the court is actively involved in investigating the facts of the case, examines the application of a collective agreement to the specific case brought to court, etc.[13]

The comparativist aspect of the Israeli labor law system was particularly influential with respect to the initial decision to include in labor courts "public representatives"—one representing the employees' group and one representing the employers' group—alongside a professional judge to determine cases.[14] The idea to have public representatives who do not have any formal legal education yet have the authority to make judicial decisions along with a professional judge is unique in the Israeli legal system and has no counterpart in other areas of Israeli law.[15] However, it is common in the European legal system and was imported to the Israeli labor law system from Germany, where, along with a professional judge, there are two public representatives—one for employees and one for employers—whose votes each have the same weight as the vote of the professional judge.[16] The involvement of public representatives in Israeli labor courts is still considered to be an integral and meaningful part of the labor law system.[17] It also seems to imply a trend of Israeli labor courts to turn to the continental law model in future decisions when it best serves the Israeli labor law system's agenda and goals, even though at its core, the Israeli model is based on the common law.

Finally, the comparative method was present, from the establishment of the Israeli labor law system, in the decisions of the court. Comparativism is primarily identified with Judge Zvi Bar-Niv, who was the first president of the National Labor Court and is considered as to be the "founding father of Israeli labor law."[18] Bar-Niv was the head of one of the supervisory committees of the International Labor Organization ("ILO"); he was also the founder of the Israeli Society for Labour Law and Social Security (the Israeli branch

13. Noyman, *supra* note 6, at 153–55.

14. The Israeli Labor Court Law (1969) §§ 2, 10(a).

15. Stephen Adler, *Public Representatives at the Labor Court: Their Purpose, Role and Influence*, *in* THOMAS R. KNIGHT, EMP. L. Y.B. 10 (1991).

16. Guy Davidov & Reut Shemer-Begas, *Public Representatives in the Labor Courts: Their Role and Contribution in Practice*, *in* ESSAYS IN HONOR OF ELIKA BARAK-USSOSKIN 185 (2012) (Isr.).

17. *See, e.g.*, National Labor Court 5-1/L ISRAEL POSTMEN'S ORGANIZATION - STATE OF ISRAEL, MINISTRY OF POST (emphasizing the importance of public representatives to shape labor law and industrial relations in Israel).

18. Yitzhak Zamir, *In the Memory of the Late Zvi Bar Niv*, 16 MISHPATIM 261 (1986). Before his appointment to serve as the president of the National Labor Court, Bar-Niv served as the legal advisor of the Ministry of Labor and was the person to ensure that Israeli labor laws would meet the international standards established by the ILO. Later, he served as the state attorney and was one of the drafters of the Israeli labor court law. Bar-Ziv served as the president of the National Labor Court from its establishment almost to his death.

of the International Society for Labour and Social Security Law)[19] and served as the editor in chief of the International Labour Law Reports.[20] As such, Bar-Niv was an expert in comparative labor law and based many of his decisions on the comparative approach. This simple fact affected the future of the whole labor law system and made comparativism an integral and even necessary part of the labor court's judicial method. As the National Labor Court put it in 2013, "comparative law is the experienced friend of the interpreter who wishes to explore the normative potential of the Israeli labor law system."[21]

Naturally, as the Israeli labor law system has developed and become enriched over the years, the need to turn to other legal system for comparison and interpretation of local law has dramatically decreased. However, the original normative basis of the Israeli labor law system leaned heavily on comparative law, and that fact has far-reaching implications for our judicial traditions and trends even today.

Israeli labor scholarship also turns to comparative law to elaborate on and support its arguments. As will be shown throughout this article, this is sometimes done to criticize the Israeli system and find alternatives in other legal systems' norms.[22]

The Implications of Comparativism for Israeli Labor Law in Jurisprudence and Scholarship

The National Labor Court turned to comparative law on many subjects that came before it for a decision and continually used comparativism to develop and enrich the Israeli labor law corpus. Due to space limitations, in this article, we choose to examine comparativism with respect to two subjects in employment and labor law—the right to equality and collective rights—due to their important role in the Israeli labor law corpus and their distinct character. The right to equality is more focused on the individual rights of workers

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19. For further details on the Israeli branch of the International Society for Labour and Social Security Law, *see International Society for Labour and Social Security Law: Israeli Branch*, INT'L SOC'Y FOR LAB. & SOC. SEC. L.: ISRAELI BRANCH, https://www.isllss.org.il/index.php?option=com_content&view=article&id=11&Itemid=12 (last visited Jan. 21, 2024).

20. Bar-Niv published two books that contained many foreign decisions pertaining to labor law and social security law, to which many of the original decisions of the National Labor Court referred. *See generally* ZVI BAR-NIV, WORK IN THE LAW OF NATIONS (1969); ZVI BAR-NIV, NATIONAL INSURANCE LAW (1954).

21. *See* National Labor Court 12-09-25476, THE HISTADRUT–THE TRADE UNION DIVISION–PELEPHONE COMMUNICATIONS LTD., (2013) (dealing with freedom of association versus the freedom of speech of the employer in the initial stage of generating a trade union).

22. *See, e.g.*, Davidov & Shemer-Begas, *supra* note 16 (regarding procedural law in the labor system).

and is considered as part of employment rights, while collective rights are clearly part of the collective rights of employees as a group (known as "labor rights" in the United States) and related to the subject of industrial relations. Finally, as will be shown throughout this article, it is particularly interesting to look at these two sets of rights because of their distinct development in the American legal system and, accordingly, the different attitudes of the National Labor Court to U.S. law in each of them. With respect to equality, the National Labor Court relies on the U.S. legal method (along with the European one), but when it considers collective rights, it tends to reject it.

Lastly, since Israel has no constitution (only some "basic laws"), it is important to clarify immediately that the elaboration of equality and freedom of association in the labor arena was mainly done by the National Labor Court.

The Right to Equality

Employees' right to equality was established in Israel in 1988 in the Employment (Equal Opportunities) Law ("Equal Opportunities Law"), which prohibited discrimination against workers on the basis of their gender, sexual orientation, religion, age, race, etc. throughout the employment period.[23] Before this law was enacted, the main legislation that prohibited discrimination was the Women's Equal Rights Law of Israel (1951), which created a general duty to treat women equally without referring explicitly to the employment context.[24] As will be shown below, it was the National Labor Court that elaborated on and fortified the prohibition against discrimination as a profound right in the employment context, and it did so with the assistance of comparative law.

THE COMPARATIVE VIEW IN ISRAELI JURISPRUDENCE

The first ruling of the National Labor Court prohibiting discrimination in the workplace was rendered in 1973, before the Equal Opportunities Law was enacted, and it involved gender discrimination. Edna Hazin, a flight attendant, alleged gender discrimination in the promotion process in her workplace.[25] Since this decision came to court before the Equal Opportunities Law

23. Employment (Equal Opportunities) Law (1988) (Isr.).

24. Another relevant law was the Employment Service Law, which prohibited the employment service from discriminating against candidates when it offers them optional positions. Employment Service Law § 42 (1959) (Isr.).

25. National Labor Court 3/25 AIRLINE STAFF COMMITTEE - EDNA HAZIN, 4(1) PDA 365 (1973). Hazin claimed that the clauses in the collective agreement that applied to her workplace created different promotion tracks for men and women and discriminated against her based on her gender. Hazin also

was enacted, the court had only the general prohibition against women's discrimination[26] and had to use creative methods, including using comparative law, to afford the claimant justice.

The National Labor Court's president, Judge Bar-Niv, who was serving as the head of the court, clarified that even though the discrimination stemmed from an agreed procedure in the collective agreement between the parties, when it comes to discrimination, the court can interfere with the parties' autonomy and invalidate the discriminatory clause. As this basis for this decision, the court mainly relied on two comparative sources.

First, the court turned to the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) of the ILO, which banned gender discrimination throughout the employment period.[27] The decision to refer to this international source is particularly interesting because at that time, Israel had just ratified the Convention but not yet adopted it through legislation. The court justified this move by stating that it was aware that the ILO Convention was not binding until it was adopted by Israeli law, but when required to judge between right and wrong and to do *tikkun olam* (briefly, social justice), it should be guided by the Convention's instructions.[28]

The second source on which the court based its decision is even more interesting. The national court turned to the famous 1954 U.S. decision, *Brown v. Board of Education*, in which the U.S. Supreme Court abolished the "separate but equal" doctrine authorizing race discrimination in education.[29] This is quite surprising. It is not obvious that issues of race discrimination in education in the United States can serve as a normative source regarding gender discrimination in employment in Israel. However, as the national court clarified it in its judgment, when the court is required to interpret basic human rights, there is no reason that it will not turn to other courts in the enlightened world; the court is required to do *tikkun olam* and can and should do so by following the interpretation of other courts from around the world to similar constitutional matters.[30]

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referred to the clause that enabled the employer to dismiss a flight attendance due to marriage at the end of her maternity leave.

26. Women's Equal Rights Law of Israel (1951) (Isr.).

27. Discrimination (Employment and Occupation) Convention (1958) (No. 111) art. 1 (Isr.).

28. National Labor Court 3/25 AIRLINE STAFF COMMITTEE - EDNA HAZIN, 4(1) PDA 365, at §§ 18, 22 (1973).

29. The court also cited other famous U.S. decisions from fields other than employment: Plessy v. Ferguson, 163 U.S. 537 (1896); Sipuel v. Bd. of Regents, 332 U.S. 631 (1948); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

30. National Labor Court 3/25 AIRLINE STAFF COMMITTEE - EDNA HAZIN, 4(1) PDA 365, at § 23 (1973).

Based on these two comparative sources, the national court ordered that the discriminatory element in the collective agreement be invalidated and that all references to employees in the collective agreement should be read and interpreted as referring to males and females alike.

The *Hazin* decision is considered precedent that paved the way for other substantial decisions that banned other forms of discrimination in the workplace, such as discrimination on the basis of age and sexual orientation.[31] Additionally, in our context, the *Hazin* decision was precedent supporting reliance by tribunals on comparative law, even when it is not precisely consistent with local law.

This trend was also seen in the National Labor Court's future decisions. Another example can be found in a discrimination case that involved criminal sanctions. In 1988, the Equal Opportunities Law was enacted.[32] This law imposed criminal and civil sanctions for violations of it.[33] The first ruling in which the national court convicted a company for criminally violating the law, only a few months after the Equal Opportunities Law came into force, was in the *Gestetner* case. An employer, the Gestetner company (today, "Gestetnertec"), published a job advertisement seeking only men.[34] The state filed an indictment against Gestetner for violating the Equal Opportunities Law. Gestetner's main argument was that the job duties of the position included lifting something weighing five kilograms to a third-floor apartment without an elevator so men were more suited to the position. Based on this argument, the regional court dismissed the indictment. The state appealed to the national court.

As in the *Hazin* case, the National Labor Court took a comparativist approach. The court made it clear that its analysis would include comparisons to the law of other places because of the resemblance of Israeli labor law to other labor law systems' basic features and infrastructure[35] and because solutions to new legal challenges that are not covered by legislation should be based on collective labor law using the comparativist method.[36]

To be sure, as the National Labor Court clarified in its decision, when it comes to references to men or women and their implications for equality, the Hebrew language is different from many other languages (including English)

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31. *See* HCJ 721/94 EL AL ISRAEL AIRLINES LTD V. JONATHAN DANILOWITZ, 48(5) 749 (1994); National Labor Court 4191/97 EPHRAIM RAKANT V. THE NATIONAL LABOR COURT, 54(5) 330 (2000). In both these decisions, it was ruled that the illegal discrimination must be annulled.

32. *See* Employment Service Law § 42 (1959) (Isr.).

33. Equal Opportunities Law §§ 8, 10, 15 (1988) (Isr.).

34. National Labor Court 8-3/51 STATE OF ISRAEL - GESTETNER ISRAEL LTD., 24(1) 65 (1992).

35. *Id.* § 11.

36. *Id.*

because of its male/female distinctions.[37] Nevertheless, the court chose to base its decision on arguments regarding the importance of the right to equality, which had been made by other tribunals around the world.[38]

Following this clarification, the *Gestetner* court based its decision on several comparative sources, including the Discrimination (Employment and Occupation) Convention of the ILO; the law in several European states, including Italy, Belgium, Germany, the Netherlands, and Sweden;[39] on Anglo-American law[40] (including the U.K. Sex Discrimination Act (1975), the Canadian Human Rights Act (1985), and the U.S. prohibition of discrimination in the Civil Rights Act of 1964); and even on the Japanese legal system.[41]

By doing so, the court cited several decisions from all around the world in which it was determined that an employer can be exempted from application of equality requirements only when the position's discriminatory requirements are legitimate and genuinely needed to perform the job and manage the workplace. Based on this varied and comprehensive comparative review, the court explained that the exemption to the Israeli Equal Opportunities Law should be interpreted in a limited manner. The court accepted the state's appeal and convicted Gestetner of violating the Equal Opportunities Law.

The comparativist method continued to instruct the National Labor Court's rulings in decisions rendered years after the Equal Opportunities Law came into force. In 1997, approximately a decade after the 1988 law came into force, the court turned to comparative law to make it easier for a claimant to prevail and to enlarge the amount of potential compensation for such a claim. Sharon Plotkin, a saleswoman in the biotech industry, alleged gender discrimination by the defendant during recruitment.[42] Plotkin's claim was accepted in part by the regional labor court, and she appealed to the National Labor Court.

The National Labor Court accepted Plotkin's appeal primarily by expanding the instructions of the Equal Opportunities Law on the basis of

37. *Id.* at 76.
38. *Id.*
39. *Id.* at 72–73
40. *Id.* at 74–78.
41. *Id.* at 78.
42. National Labor Court 3-129/56 SHARON PLOTKIN - EISENBERG BROTHERS LTD., 481 (1997). In this case, the claimant proved in the regional court that even though she met the requirements of a position, she was offered work in an administrative position at a lower wage. The regional court accepted the claim. However, it awarded compensation in the amount of only 3000 NIS (equal to the wages for one month of work in the administrative position that the claimant was not interested in). The regional court based its decision on its understanding that the gender issue was not the sole criterion for not giving the claimant the position she applied for and on the fact that eventually another woman was recruited to that position.

comparative law. In doing so, it embraced the indirect discrimination doctrine set out by the US Supreme Court in a race discrimination case.[43] The *Plotkin* court also established the rule that in discrimination cases, the claimant does not need to prove that the employer intended to discriminate. The employee need only produce apparent evidence (a "first sight") of discrimination by the employer, after which the burden of proof will shift to the employer.[44] This precedential rule was made based on European[45] and U.K.[46] law. Finally, the court expanded the amount of compensation available to a candidate in such cases by holding that the compensation should be punitive in nature and deter future employers from discriminating against candidates. In doing so, the court relied on both European jurisprudence and American legislation.[47]

Another decade later, in 2007, the issue of gender discrimination was examined by the National Labor Court in the *Goren* case.[48] The claimant realized that she earned thirty-five percent less than her male colleague; each had negotiated separately with their employer. The court accepted the claimant's arguments and determined that free-market rules and the individual bargaining process could not serve to protect employers in cases of discrimination. Here again, the national court made this precedential ruling mainly by referring to similar rulings from the United Kingdom[49] and United States.[50] In other words, the National Labor Court again expanded the implications of the Equal Opportunities Law based on relevant comparative law.

Since the national court did so based only on the Male and Female Workers (Equal Pay) Law (1964) and not on the Equal Opportunities Law, the case eventually arrived before the Israeli High Court of Justice. The High Court of Justice declared that the employer also violated the Equal Opportunities Law. However, due to the delay of presenting the case to the High Court, this decision lacked any operative meaning in Goren's case.[51]

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43. Griggs v. Duke Power Co., 401 U.S. 424 (1971). This case dealt with indirect discrimination against African American firefighter candidates during recruitment through the use of psychotechnics.

44. National Labor Court 3-129/56 SHARON PLOTKIN - EISENBERG BROTHERS LTD., 495 (1997).

45. *Id.* at 495 (citing Enderby v. Frenchay Health Authority (1993)).

46. *Id.* (James v. Eastleigh Borough Council [1990]; Reg. v. Birmingham C.C. exp. Equal. Opp. Com. [1989]; Birmingham City Council and Equal Opportunities Commission).

47. *Id.* at 499–503 (responding to the minority opinion).

48. National Labor Court 1156/04 HOME CENTER (DIY) LTD. - ORIT GOREN, (Nov. 20, 2007). The employer argued that it conducted a free negotiation with both male and female employees and determined payment based on their requirements. It also claimed that the male employee was suitable to be a manager in the future and that he was recruited for that purpose.

49. *Id.* (citing Clay Cross Quarry Services Ltd. v. Fletcher (1978) 1 WLR 1429). The court cited the U.K. explanation that the "free negotiation" was not truly free; rather, it is based on the unequal gender power dynamic in society.

50. *Id.* (citing Brennan v. City Stores, 479 F.2d 235 (5th Cir. 1973); Hodgson v. Brookhaven, 436 F.2d 719, 726 (5th Cir. 1970)).

51. *See* HCJ 1758/11 ORIT GOREN V. HOME CENTER (DIY) LTD., 65(3) 593 (2012).

THE COMPARATIVE VIEW IN ISRAELI SCHOLARSHIP

In a manner similar to the tendency of the National Labor Court to refer to comparative law mainly to expand protection of employees' right to equality, Israeli scholarship also refers to comparative law to advocate for greater protection of the right to equality in the employment context. Naturally, however, since scholars do not have authority to change the law, they rely on comparative law primarily to criticize the current state of the law and offer alternatives. Since the National Labor Court uses comparative law to protect the right to equality and labor rights, it is not surprising that the main target of scholars is the Israeli legislature and enforcement authorities, not so much the judicial system.

To demonstrate this point, we will discuss two articles in which the authors referred to the equality challenge in Israeli law and explicitly based their criticisms on comparative law.[52] The first is Lilach Luria's article, which called for imposing the duty of equality on trade unions in addition to employers.[53] Luria argued that trade unions are not entitled to discriminate against workers who belong to protected groups in collective agreements. She cited the *Hazin* case.[54] Luria explained that in that case, the National Labor Court accepted the argument that the collective agreement led to discrimination among workers, so its discriminatory clauses could not be applied.[55] She also showed how the court invalidated those clauses based on the comparative method.[56] Later in the article, Luria demonstrated how the national court took a similar approach in cases that followed *Hazin* that dealt with discrimination in collective agreements, ordering that discriminatory provisions were not valid even when they were explicitly agreed to between the parties to the collective agreement.[57]

Luria criticized the Israeli tribunals for not imposing any legal liability for compensation on the trade union in the described cases.[58] However, she directed most of her criticism to the Israeli legislature, which had not provided the Israeli judge with any legal basis to enter awards against

52. Although there are numerous Israeli articles on the issue of equality in employment, only a few of them base their arguments on comparative law with any depth.

53. Lilach Luria, *Applying the Duty of Equality on Trade Unions*, 33 BAR-ILAN L. REV. 293 (2021).

54. National Labor Court 3-25 AIRLINE STAFF COMMITTEE - EDNA HAZIN, 4(1) 365 (1973).

55. Luria, *supra* note 53, at 324.

56. *Id.*

57. *Id*. at 326–28 (citing National Labor Court 14-05-1842 JERUSALEM MUNICIPALITY – KIDAR (2016); National Labor Court 10-09-14705 MOZAFI V. BANK LEUMI (2012); HCJ 104/87 DR. NAOMI NEVO V. THE NATIONAL LABOR COURT (1990)).

58. *Id.* at 334.

discriminatory trade unions (in contrast to discriminatory employers).[59] In so doing, Luria cited comparative law—mainly U.S. and Canadian law—to criticize the Israeli legislature and urge it to provide labor tribunals with authority to act against discriminatory trade unions.[60]

More specifically, Luria argued that in the past, when the Equal Opportunities Law was enacted, the Israeli legislature decided not to embrace the U.S. and Canadian approach because of the differences between those systems and the Israeli legal system. According to Luria, however, due to changes in Israeli industrial relations over the years, which made them more similar to those in the United States and Canada, "now is the time to change the Israeli legislation accordingly" to impose antidiscrimination legal duties on trade unions.[61]

Another article that used comparative law to discuss Israeli law on the right to equality and target its criticism to other entities besides the labor court was Sharon Rabin-Margalioth's article on age discrimination ("ageism").[62] In that article, Rabin-Margalioth referred to the optional different stages of discriminating adults using a comparison to U.S. law. To begin, Rabin-Margalioth explained that unlike the U.S. Congress, which explicitly banned discrimination on the basis of age against people above the age of 40,[63] the Israeli legislature generally prohibited age discrimination without referring specifically to adults, even though it is mainly older people who suffer from such discrimination.[64]

The author then argued that Israeli authorities should embrace a complex policy regarding age discrimination—one that takes into account the different stages at which such discrimination can occur. To support her claims, she turned to comparative law. She suggested that in the initial stage of recruiting workers, courts emulate U.S. law,[65] which had been embraced by the Israeli national court in other matters,[66] and allow only limited exceptions (such as when there are no appropriate candidates from the allegedly discriminated-against group and the exception is clearly necessary to the

59. *Id.* at 335.
60. *Id.*
61. *Id.*
62. Sharon Rabin-Margalioth, *Distinction, Discrimination and Age: A Power Relations Game in the Labor Market*, 32 MISHPATIM 131 (2001–2002).
63. *Id.* at 135–36 (citing U.S. Age Discrimination in Employment Act, 29 U.S.C § 623 (1994)).
64. *Id.* Thereafter, Rabin-Margalioth criticized the Israeli enforcement authorities, which do not act to enforce the Equal Opportunities Law when it comes to age discrimination and even discriminate themselves against candidates and workers who work (or want to work) in the state's authorities on the basis of age. *Id.* at 148–49.
65. Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976).
66. *See* National Labor Court 8-3/51 STATE OF ISRAEL - GESTETNER ISRAEL LTD., 24(1) 65 (1992).

performance of the job).[67] Another exception in the recruitment stage suggested by Rabin-Margalioth was that age discrimination would be acceptable when training would be so long and expensive that it would not be worthwhile to recruit candidates above a certain age. Here again, she turned to a U.S. ruling that applied this exception in a limited manner and suggested emulating it in Israel.[68]

To summarize, when the issue is employees' right to equality, both courts and scholars turn to comparative law to support expansion of the legislature's protection of equality. The way they do so, however, differs in accordance with their different roles in the legal system. We also found a difference with regard to what comparative law they cite: courts turn to a variety of states to support their rulings, while scholars mainly cite North American legal systems. We will return to this point in the conclusion of this article. In the following Part, we will deal with comparativism with respect to collective rights.

Collective Rights

Collective rights, and particularly freedom of association and the right to strike, are not part of the Israeli basic laws. However, like the right to equality, this set of rights has gained constitutional importance over the years, mainly through judicial decisions[69] predominantly based on comparative law.

In the following sections we will refer to specific collective rights and their development in the Israeli legal system based on comparative law through the years: the right to strike, the duty of adequate representation of workers by workers' committees, and freedom of association.

The right to strike

The right to strike was first developed in Israel by Judge Bar-Niv in 1972, not long after the establishment of the labor courts system, many years before Israeli law explicitly (and in a very limited way) established this right.[70] The right to strike was discussed as part of an appeal of an order for

67. Rabin-Margalioth, *supra* note 62, at 162.

68. *Id.* at 163–65 (referring to requirements in the securing business in Israel and comparing it to the ruling in the U.S. case, Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974)). According to the author, Israel policy should be similar to U.S. context in this context. Later, the author referred to other stages in which age discrimination can occur; however, she did so without basing her claims directly on comparative law.

69. And only later on legislation.

70. Note that in Israel, the right to strike was mainly developed as a constitutional right by the National Labor Court. Only in 2014 was a clarification was added to § 19 of The Israeli Collective Agreement

contempt of court issued by the regional labor court against a workers' committee and its members during a strike.[71] In this decision, the National Labor Court ruled that during a strike, the specific work agreement is suspended, and the court should make its decision only in accordance with the basics of collective law.

This precedential decision was based on comparative law, mainly from Europe. The court relied on German law holding that during a strike, a worker cannot be valued separately from her colleagues; rather, the court must value workers as a group, and individual agreements between each worker and the employer should be postponed.[72] Additionally, the court cited an international labor convention regarding freedom of association and workers' right to collective negotiation.[73] The court also referred in its decision to French legislation, as it had been interpreted by French court rulings over the years, providing that a worker's participation in a strike is not deemed to be a breach of their work agreement.[74]

Another aspect of the right to strike—the tension between workers' rights and the economic interests of the employer during a strike—was first resolved in the National Labor Court decision in the *Europe Asia Pipeline Co.* ("*EAPC"*) case.[75] The employer, EAPC, asked the court to order the workers' committee to compensate the company for damages resulting from a strike initiated by the committee, since the strike was not approved by the

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Law (1957) (Isr.), providing that participation in a strike will be not considered a violation of the individual work agreement.

71. National Labor Court 4-4/31 WORKERS' COMMITTEE OF THE COMPANY FOR CABLES AND ELECTRIC WIRES IN ISRAEL LTD. AND OTHERS - THE COMPANY FOR CABLES AND ELECTRIC WIRES IN ISRAEL LTD., 4(1) 122 (1972). In this appeal, the authority of the court to order striking workers to go back to work was also discussed. The order was given after the workers violated an injunction issued by the regional court ordering them to get back to work. In the appeal, the workers also questioned the decision to issue an order against their strike.

72. The court based its decision on German scholarship, to which it referred at the beginning of its decision.

73. C087 - Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87).

74. According to the French ruling, the right to strike basically means that strikes cannot be perceived as a breach of the work agreement. *See* National Labor Court 4-4/31 WORKERS' COMMITTEE OF THE COMPANY FOR CABLES AND ELECTRIC WIRES IN ISRAEL LTD. AND OTHERS - THE COMPANY FOR CABLES AND ELECTRIC WIRES IN ISRAEL LTD., 4(1) 132 (1972).

75. National Labor Court 4-3/37, EAPC'S WORKERS COMMITTEE AND OTHERS - EAPC COMPANY LTD., 8(1) 421 (1977). In this case, the regional court accepted EAPC Company Ltd.'s arguments and determined that the workers committee caused the violation of the employment agreement between the employees and the company. However, the regional court reduced the amounts and required the relevant workers committee members to pay compensation in an amount equivalent three times workers' salaries—an amount that the National Court ultimately did not disturb.

trade union (the Histadrut) and was not followed by a strike notice as Israeli law requires.[76]

Unlike the regional labor court, the National Labor Court stated that awarding compensation for a violation of an individual work agreement during a collective dispute should occur only in rare circumstances. The National Labor Court also criticized the decision of the regional court to turn to English law in its ruling.[77] English law, at least then, in comparison to the civil law system, was considered to be less favorable to workers with regard to collective rights. The National Labor Court explained that English law is different from Israel law in this kind of case, so English law should not be applied in collective matters. The national court also noted that even the English court eventually avoided awarding compensation in collective disputes and did so only as a disciplinary measure.[78]

It is interesting to note that later, however, in another case that reach the Israeli Supreme Court, the Court determined that in cases of illegitimate measures taken by employees during a strike, third parties can sue the workers for their injuries.[79] The Supreme Court based this decision squarely on the Anglo-American tradition.[80] As will be shown below, however, from a comparative perspective, it appears that this decision is an exception to the Israeli labor law system's typical attitude to collective rights and sources of comparison.

In another decision of the National Labor Court, the *Ginstler* case, the court again stated that with respect to collective law, the relevant source of comparison should be the civil law system, not the Anglo-American system. In this case, the question of whether an employer can force its employees to take a vacation during a collective dispute that harms its business was discussed.[81] The court held that the meaning of the term "strike" cannot be

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76. According to § 37(2) of the Settlement of Labor Disputes Law (1957) (Isr.), an unprotected strike (*i.e.*, a strike that did not follow the letter of the law) is not protected from a tort claim made by an employer for workers' violation of the work agreement between the parties.

77. *See supra* note 75.

78. *See* National Labor Court 4-3/37, EAPC'S WORKERS COMMITTEE AND OTHERS - EAPC COMPANY LTD., 8(1) 421, 442 (1977).

79. CivA 593/81 ASHDOD AUTOMOBILE FACTORIES LTD. V. ADAM TZIZIK, 41(3) 169 (1987).

80. In the English and American decisions to which the Supreme Court referred, it was determined that the immunity granted to strikers can be qualified in certain circumstances: when the workers committee acts in bad faith or causes damage to a third party that could have been anticipated, as well as in cases where a legal notice is not given as required by the law or the strike is contrary to a former agreement or commitment made by the trade union.

81. National Labor Court 4-5/36 MOSHE GINSTLER AND OTHERS - THE STATE OF ISRAEL, 8 (1) 003 (1976). This ruling dealt with the question whether the state, as an employer, has a right to force its workers, who have taken organizational measures against the employer, to take a vacation. The court ruled that the decision to force the employees to be on leave was not legal since leave is a matter of the individual work arrangements between the parties and cannot be used as leverage during a collective dispute.

simply based on the language of the law; rather, it should depend on basic understandings of collective law.[82] The court relied on the European legal tradition, which, like the Israeli one, does not have a specific definition of a "strike" in its legislation.[83]

In its discussion of the meaning of "strike" in Israel, the court based its ruling on German law and its broad interpretation of the term "strike" as including several collective actions.[84] The national court explicitly rejected the narrow American interpretation of the term "strike"—that only a complete break in work can be viewed as a strike entitled to the protection of the law—and held that in Israel, other, softer and more partial forms of a strike should also enjoy the protection of the law.[85]

Finally, while discussing the circumstances of issuing injunctions to striking workers in the *Sea Department* case, the national court stated that the source of comparison in this sort of case should *not* be the American legal system.[86] It can be understood from this judgment that the National Labor Court considers the U.S. method, which compares issuing injunctions in general matters to issuing injunctions to striking employees, as having the potential to lead to harm industrial relations in Israel and the rule of law.[87] In this regard, the court clarified again that when it comes to collective matters, the source of comparison should be the civil law system, not the common law system.

THE DUTY OF FAIR REPRESENTATION OF WORKERS BY WORKERS' COMMITTEES

The duty of fair representation of workers by workers' committees is another collective arena in which the National Labor Court clarified that the source of comparison in collective matters should be the European legal approach, not the Anglo-American one. In the *El Al* case, the question of

82. Like the term "equality."

83. National Labor Court 4-5/36 MOSHE GINSTLER AND OTHERS - THE STATE OF ISRAEL, 8 (1) 003 § 37 (1976).

84. *Id.* §§ 45–46.

85. *Id.* at 28 (providing long list of rulings from the United States that do not acknowledge partial strikes).

86. National Labor Court 4-6/35 THE SEA DEPARTMENT EMPLOYEES COMMITTEE - PORTS AUTHORITY, HAIFA PORT THE EMPLOYEES OF THE SEA DEPARTMENT IN HAIFA PORT (1) 345, § 3 (1975).

87. *Id.* In the *Sea Department* case, an appeal was brough to the National Labor Court by the ports' workers committee against an injunction issued by the regional court forcing the striking employees to go back to work. In this case, the court explained that the question of issuing injunctions in collective law matters has to be examined in a different manner than the general question of injunctions in other legal matters. The court also clarified that during the collective bargaining process, injunctions should be issued only rarely, after all other options are exhausted. *Id.* §§ 3–5.

whether and how much the court should interfere in the content of collective agreements when some workers are dissatisfied with them arose.[88] The regional court ruled in favor of intervening in the content of the collective agreement, based on American legal rulings. The National Labor Court rejected this attitude and said that "the duty of fair representation that was developed in the United States and Canada, did not cross the ocean."[89] It explained that this matter should be resolved in accordance with the European legal tradition, according to which the court can interfere in the content of the collective agreement, but should do so only in exceptional cases and in a very limited manner.[90]

In a later case from 1993, *Zim*, the national court clarified that the duty of fair representation of workers by a workers' committee can be recognized by the court.[91] However, here again, the court did so based on the foundations of collective law in Israel, which are based on the European approach, not the American one.[92] The National Labor Court reached similar conclusions in other cases as well, making it clear again that the appropriate source of comparison in the fair representation question is European law.[93]

Freedom of association

When the court was required to define the general framework of the role and scope of employees' freedom of association, here again, it did so based on the European legal tradition and relevant international conventions.[94]

In the *Amit* case from 1995, the National Labor Court dealt with the question of whether employers can establish, or influence the establishment of, a trade union.[95] The court ruled that such involvement is forbidden, basing its decision on several international and European sources, including

88. National Labor Court 4-7/36 EL-AL ISRAEL AIRLINES LTD. - GUY HARUT ET. AL, 8(1) 197 (1977). In this case, the regional court accepted the claims of some of the workers against the workers committee.

89. *Id.* § 27.

90. *Id.* §§ 26–28.

91. National Labor Court 4-12/52 THE NATIONAL ASSOCIATION OF SEA OFFICERS - ZIM - INTEGRATED SHIPPING SERVICES LTD., 26(1) 003 (1993).

92. *Id.* §§ 10–11 (referring to comparative law and favorites European law over U.S. law).

93. *See, e.g.*, National Labor Court 300205/98 SHLOMO AVNI - THE HISTADRUT, 34, 361 (1999); National Labor Court 305/03 HAGIT KODMAN - THE HISTADRUT OF THE CLERKS OF THE ADMINISTRATION AND SERVICES (2006).

94. This is the case even with the initial cases that dealt with this issue indirectly regarding the ability of employers to join legal procedures between two different trade unions. *See, e.g.*, National Labor Court 5-1/30 THE ORGANIZATION OF POSTMEN OF ISRAEL - STATE OF ISRAEL, ISRAEL POST, 1(1) 007 (1969); National Labor Court 1-5/48 THE EMPLOYEES' ORGANIZATION OF BANK MIZRAHI HAMEUHAD LTD. - HISTADRUT HAPOEL HAMIZRACHI IN ISRAEL, 29(1) 283 (1990).

95. National Labor Court 4-30/55 "AMIT" - MACCABI WORKERS' UNION – THE HISTADRUT, 29(1) 61 (1995).

international conventions on freedom of association; the Universal Declaration of Human Rights (1948); ILO international conventions on freedom of association that were ratified by Israel; and the European Community Charter of the Fundamental Social Rights of Workers (1990) (which was *not* ratified by Israel). The court summarized its arguments in this section by citing a statement it had made in a previous ruling: "from now on, in accordance with the international law that binds Israel, employees should enjoy their freedom of association."[96]

Similarly, when the National Labor Court dealt with the legitimacy of dismissing employees during a strike, the court based its decision on European law. In its initial discussion of this matter, in the *Horne & Leibowitz* case,[97] the court ruled that protecting union members and their organization's effort from being harmed by the employer is an integral part of freedom of association. The court based this statement on the European Court of Human Rights's judgment, along with German law.[98] In the *State Employees Union* case, the national court similarly based the employer's obligation to negotiate with the employees' representatives on European law, and particularly on German law, which included this sort of obligation as part of its written law.[99] The national court clarified again that in this kind of case, the Israeli court should *not* turn to American law but rather to European law, because the Israeli labor system more nearly resembles European law, with its positive attitude toward workers' organization efforts.[100]

Finally, in 2013, in a precedential decision, the national court ruled that during the initial stage of organizing employees and until the establishment of a trade union, every statement or interference by an employer is inappropriate interference unless the employer proves otherwise. This ruling was made in the *Pelephone* case, which dramatically changed the balance between employers' property rights and its freedom of expression and employees' rights to freedom of association.[101] The court explicitly based this

96. *Id.* § 20 (citing National Labor Court 4-18 THE HISTADRUT ET AL. V. TEL-AVIV MUNICIPALITY, 12(1) 52, at 73, 79).

97. National Labor Court 1008/00 HORNE & LEIBOVITZ LTD. – THE HISTADRUT, 35(2000) 145 (2000).

98. *Id.* at 162–63 (citing European Court of Human Rights, European Convention of Human Rights 193; D. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 272, 273 (1997)).

99. National Labor Court 400005/98 THE HISTADRUT – THE STATE EMPLOYEES UNION – THE NATIONAL COMMITTEE OF ADMINISTRATIVE AND ECONOMIC WORKERS IN GOVERNMENT HOSPITALS – THE STATE OF ISRAEL, 35(2000) 103 2000. The court elaborates in depth on this obligation, referring throughout to European and German sources. *Id.* at 114–26.

100. *Id.* at 123–24.

101. *See* National Labor Court 12-09-25476, THE HISTADRUT – THE TRADE UNION DIVISION – PELEPHONE COMMUNICATIONS LTD. (2013). Pelephone appealed this decision to the High Court of Justice

precedential decision on comparative law and the European approach to freedom of association.

The national court opened its discussion of comparative law with the statement that we mentioned in the preface of this article, "Comparative law is an 'experienced friend' guiding the interpreter regarding the normative potential of the legal system and in how the interpretive horizon should be expanded."[102] The court also referred to the ILO's leading principles on this matter, and particularly to the ILO Committee on Freedom of Association's reports and recommendations.

Thereafter, the court reviewed at length the views of the ILO and various states.[103] The court first elaborated on the basic principles set out by the ILO, and specifically by the Committee on Freedom of Association, regarding the greater importance of freedom of association of employees as compared to their employer's right to expression. Then, the court determined that this set of principles is consistent with Israeli law regarding the constitutional element of freedom of association and the rights that go with it and would guide the National Labor Court in making its decision in the case.[104]

The court explained that U.S. law considers employers' right to freedom of expression to be of great importance and criticized this view, citing U.S. scholars and National Labor Relations Board member Wilma B. Liebman:

"By effectively giving employers greater freedom to determine whether their workers will have union representation, the current Board's approach threatens the basic, and unique, aim of federal labor law: empowering employees to act collectively and so to counterbalance the power of employers over their work lives . . . . Any balancing of employer and employee rights, the Court observed, must take into account the economic dependence of the employees on their employers . . . ."[105]

Finally, the Court turned to Canadian law and German law and cited scholars from those countries, who have taken the position that an employer

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and was rejected. *See* HCJ 4179/13 COORDINATION OFFICE OF THE ECONOMIC ORGANIZATIONS V. THE NATIONAL LABOR COURT (2014).

102. National Labor Court 12-09-25476, THE HISTADRUT – THE TRADE UNION DIVISION – PELEPHONE COMMUNICATIONS LTD., § 72 (2013).

103. *Id.* §§ 72–78. In this section, the court refers to the ILO's, and particularly the CFA's, statements regarding U.S. and Canadian Law and German law.

104. *Id.* §§ 73–74 (citing GB.307/7 Reports of the Committee on Freedom of Association, 356th Report of the Committee on Freedom of Association, Geneva § 80 (2010); GB 313/ INS/9 Reports of the Committee on Freedom of Association, 363rd Report of the Committee on Freedom of Association, Geneva § 17 (2012); INT'L TRAINING CTR. OF THE ILO, INTERNATIONAL LABOUR LAW AND DOMESTIC LAW, A TRAINING MANUAL FOR JUDGES, LAWYERS AND LEGAL EDUCATORS 58 (2010)).

105. *Id.* § 76 (citing Wilma B. Liebman, *Labor Law Inside Out*, 11 J. LAB. & SOC'Y 9 (2008)).

has a very limited right to freedom of expression, and only as long as it does not harm workers' unionization efforts.[106]

In short, creating precedent and meaningful progress in Israeli law regarding the role and scope of collective rights of employees as against the rights of employers, the court explicitly based its decision on comparative law, especially on the ILO's interpretation. The court rejected the American limited view of collective rights and explicitly preferred European and Canadian views.

THE COMPARATIVE VIEW IN ISRAELI SCHOLARSHIP

Israeli scholarship on collective rights and comparative law appears to turn to collective law to expand or maintain the way the National Labor Court uses comparative law. As will be shown below, interestingly, and maybe not surprisingly, the scholars who write on collective law and use comparative law as the basis for their arguments are the National Labor Court's judges in their capacities as scholars. They tend to do so, just as in their judicial decisions, based on international and European law (as opposed to U.S. law). However, at least with respect the balance of rights between employees (as opposed to between employees and the employer), we found scholars critical of the National Labor Court's rulings; they have based their arguments on U.S. law.

In an article on the trends, legal aspects, and policy of employees' unionization in Israel, Judge Stephen (Steve) Adler, the former Israeli National Labor Court president, wrote, "The organization of workers in Israel has mostly adopted the 'European model' of organizations."[107] Thereafter, when the scholar–judge wished to support the right to freedom of unionization in Israel, he turned first to international law and explained that "international law and the Israeli jurisdiction have recognized freedom of association as a universal human right."[108] He also described how the ILO defined freedom

106. *Id.* §§ 77–78. In this regard, the court cited a Canadian writer, who clarified the limitation of freedom of speech of the employer, David J. Doorey, *The Medium and the Anti-Union Message: Forced Listening and Captive Audience Meetings,* 29 COMPAR. LAB. L. & POL'Y J. 79 (2007) and also referred to the fact that in most Canadian provinces a statement of an employer that has "undue influence" is forbidden. The court also cited the German scholars Manfred Weiss and Christoph Gyo, who asserted that according to German law, "[a]ny measure by an employer or by anybody else violating the employees' freedom of association would be null and void and might lead to sanctions," and "the freedom of expression . . . gives the employer no right to force his opinion on others." Manfred Weiss, *The Interface Between Constitution and Labor Law in Germany*, 26 COMPAR. LAB. L. & POL'Y J. 181, 186 (2005); Christoph Gyo, *Legitimacy of Captive Audiences in Germany*, 29 COMPAR. LAB. L. & POL'Y J. 119 (2007).

107. Stephen Adler, *Workers' Organization in Israel: Trends, Legal Aspects and Policy*, *in* ESSAYS IN HONOR OF ELIKA BARAK-USSOSKIN (2012).

108. *Id.* ch. 1.

of association as a personal freedom of the individual based on collective organization for its achievement.[109] Adler provided further justifications for freedom of association, based on the ILO's principles, before turning to demonstrating how this right developed later in Israeli law.[110]

Similarly, former National Labor Court Judge Elika Barak-Osuskin also turned to comparative law in her scholarship to argue for fortifying the right to freedom of association in Israel.[111] In her discussion of employers' obligation to consult with workers' committees, Barak-Osuskin explained how this right was legally and formally recognized in Israel as well as in European states and in European Conventions.[112] However, while as in Israel this right was mainly developed through judicial rulings as part of the employers' duty of good faith, in the UK, it was set out in a statute, and in Europe it was elaborated on over the years in several directives.[113] Judge Barak-Osuskin, in her capacity as a scholar, was implying that the Israeli judicial development of the employer's obligation to consult with its employees is compatible with explicit European policy.

Professor Frances Raday, unlike those former judges, wrote an article on the obligations of trade unions to their workers that criticized the Israeli approach of not interfering with trade unions' internal affairs, citing US law.[114] After explaining that the right to unionize encompasses workers' right to supervise the activity of trade unions and that the latter is very limited in Israel and primarily based on voluntary arrangements, Raday turned to US scholarship and legislation to argue for the establishment of obligations in Israel similar to those in U.S. law.

Raday firstly cited the arguments of U.S. scholars Harry H. Wellington and Archibald Cox on the importance of such obligations, which were included in the US Labor Management Reporting and Disclosure Act in 1959.[115] Thereafter, Raday discussed several specific obligations of trade

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109. *Id.*

110. *Id.*

111. Elika Barak Osuskin, *A Collective Agreement Contains a Mandatory Part and a Normative Part—Does It?*, *in* ESSAYS IN HONOR OF THEODOR OR 477 (2012).

112. *Id.* at 487–89.

113. In the United Kingdom, it is part of the Trade Union and Labour Relations (Consolidation) Act (1992), p. 4, ch. 2, § 188 (Eng.). In the European Union, this right was developed in Council Directive 2001/23/EC on the approximation of the laws of the Member States 23 relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 82 of 22.3.2001). Past relevant directives are Directive 75/129 from 1975 and Directive 92/56 from 1992.

114. Frances Raday, *Trade Unions: Privileges and Supervision*, 9 EYONI MISHPAT 543 (2013).

115. *Id.* at 548–49; H. Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327 (1958); A. Cox, *The Role of Law in Preserving Union Democracy*, 72 HARV. L. REV. 609 (1959).

unions to their workers and demonstrated how in Israel, Israeli law and the National Labor Court developed them only partly and inconsistently. Raday then described U.S. policy on this issue. Among other things, Raday contrasted U.S. and Israeli policy on managing the voting for trade union representatives,[116] managing the political and economic activity of trade unions,[117] and supervising the question of organizational democracy within trade unions.[118] In all of these matters, Raday recommended the adoption in Israel of the proactive American approach and provided explanations from U.S. scholarship and legislation to support her position.

Since U.S. law is mainly seen as conflicting with collective labor rights and Israeli labor law scholarship is mainly identified with a pro-workers and pro-unions perspective, it was not surprising to find that Israeli scholarship tends to rely on EU law on these matters. Raday discussed US law only as a way to criticize the obligations of trade unions to workers (not toward employers). In short, we can summarize that ultimately, both Israeli scholarship and jurisdiction turn to comparative law on collective right issues mainly to expand employment rights.[119] We can also conclude that the main source of comparison in these cases is clearly European law.

DISCUSSION

So far, we have discussed the equality and collective rights issues regarding which Israeli courts and scholars have turned to comparative law. In this Part, we wish to emphasize the main themes that arise in these areas. More specifically, we will explore the primary purposes of referring to comparative law in the Israeli labor law system and clarify to which legal systems Israeli courts usually turn to, and why. Thereafter, we will discuss Israeli scholarship and emphasize the distinctions between judges and scholars when it comes to comparativism.

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116. Raday, *supra* note 116, at 561–64 (discussing Israel and contrasting it to the United States by referring to the Labor Management Reporting and Disclosure Act, 1959, § 401(e) and Jenkins, *Trade Union Elections*, *in* REGULATING UNION GOVERNMENT 162–73 (M. Estey, P. Taft & M. Wagner eds., 1964)).

117. *Id.* at 558.

118. *Id.* at559.

119. To be sure, expanding the ability of workers to interfere and supervise a trade union's activity may indeed have problematic implications for the trade union's authority and for the notion of collective rights versus employment rights. However, since the main beneficiaries of such a criticism is the individual worker, as opposed to the employer, this sort of perspective is consistent with a pro-workers perspective.

When, for What Purpose, and Where?

When and for what purposes does the Israeli labor law system, and in particularly the National Labor Court, turn to comparative law, and to which countries does it usually turn? From the discussion so far, we can see several reasons for turning to comparative law, and specifically to European law, in the labor courts' judgments over the years.

The first purpose is **to establish and maintain the labor law system as an independent branch of law in the Israeli legal system and to clarify its sources of inspiration**. As discussed above, before the Israeli labor courts system was established, labor disputes were resolved in varied Israeli tribunals, including the Supreme Court. After the Labor court system was established, the National Labor Court acted to base its independent status as a unique and autonomous body in the Israeli legal system.

Since at that time there were only few judgments of the Supreme Court in labor law issues, and these referred mainly to mandatory orders and to English and U.S. jurisprudence, comparative law allowed the National Labor Court to pave a path for future decisions. It helped the National Labor Court clarify that labor issues are a distinct arena that should be mainly based on European law (civil law) as an alternative to English law (common law).[120] Given that the Israeli legal system was developed based on English law during the English mandate, this clarification cannot be taken for granted. However, the fact that many judges at the beginning of Israeli legal history came from European countries, along with the understanding that European law is many times more pro-labor than English law is, enabled the National Labor Court's judges to rely on European law and position it as the decisive legal source for its future decisions.

As mentioned, in equality disputes, the National Labor Court based most of its decisions on a variety of jurisdictions—UK and US law along with European law and even Japanese law.[121] By doing so, the National Labor Court clarified that in employment law matters, the European method is an important source of comparison. Moreover, since U.S. law did not always promote equality in the specific context of employment as opposed to other fields of law, the National Labor Court choose to ground its decisions in other

120. *See generally* Lior Zemer & Neta Nadiv, *Sources of EU Labor Law: Exposure to Influence*, 15 DIN UDVARIM (HAIFA L. REV.) 521 (2022) (Isr.) (showing in detail how in many central labor and employment themes, the Israeli labor law system leaned on the European legal system, and also showing that labor courts usually refer to European law (Directives, Conventions, etc.), not to specific European countries).

121. *See supra* note 41 and accompanying text.

rulings of U.S. courts (such as in matters of race discrimination in education).[122]

Regarding collective rights, however, the National Labor Court has made it clear that its source of comparison is the European legal system,[123] not Anglo-American law[124]—despite the Supreme Court's past tendency to rely on U.S. and English law in collective matters.[125] In this way, the National Labor Court distinguished past jurisprudence, established its independent and autonomous legal method, and identified its aspirational legal sources of comparison when it comes to labor and employment law matters.

The second purpose of using comparative law in the National Labor Court's rulings was **to establish and maintain the status of the National Labor Court as an autonomous and expert court in the field of industrial relations**. Using comparative law in its judgments regarding industrial relations helped the National Labor Court to demonstrate its professional and systematic legal worldview, which rests on methods developed in various Western countries, and to show that it does not operate in a vacuum.

Even though the National Labor Court did not always have to refer to comparative law, especially in more recent decisions, it repeatedly chose to do so to clarify to the various parties in labor law relations disputes what its aspirational normative sources are. By doing so, the National Labor Court helped comparative law become more accessible to the relevant actors. Using comparative law this way also helped the National Labor Court establish trust among employers and employees by showing that a certain decision is the norm in most European countries and therefore should also be the guiding rule in Israel. Finally, it helped to generate legal certainty regarding the

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122. *See, e.g.*, National Labor Court 3-129/56 SHARON PLOTKIN - EISENBERG BROTHERS LTD., 481 (1997); National Labor Court 3/25 AIRLINE STAFF COMMITTEE - EDNA HAZIN, 4(1) PDA 365, at §§ 18, 22 (1973).

123. Zemer & Nadiv, *supra* note 122, at 550–57 (showing how in collective rights issues, along with other themes presented throughout their article, the National Labor Court usually turns to European law in general, and less to specific countries).

124. This clarification was made in several decisions: regarding the right to strike, regarding the question of compensating employers for strikes damages (the *EAPC* case) and against the opinion of the Supreme Court, the meaning of the term "strike" (the *Ginstler* case), and while discussing the circumstances of issuing injunctions to striking workers (the *Sea Department* case). It also arose regarding the duty of fair representation by workers committee (*El Al* case, *Zim* case, *Shlomo Avni* case, *Hagit Kodman* case). And when the court was required to define the general framework of the role and scope of employees' freedom of association (the *Amit* case, the *Horne & Leibowitz* case, the *State Employees Union* case, and the *Pelephone* case).

125. *See, e.g.*, *supra* notes 79–80 and accompanying text; *see also* CivA 167/62 LEO BAECK EDUCATION CENTER V. THE ASSOCIATION OF TEACHERS OF THE HIGH, VOCATIONAL AND AGRICULTURAL SCHOOLS, AND OTHERS, 16 2205 (1962); CivA 256/63 "ATLANTIC" FISHING COMPANY LTD. V. GAD RUBIN, 18(2); CivA 118/64 ELIYAHU GORA V. THE MAYOR, COUNCIL MEMBERS AND CITIZENS OF THE CITY OF TEL-AVIV-JAFFA, 18(2) 564 (1964).

National Labor Court's future decisions and sources of comparison when there is a lacuna in local law.

A third purpose of using comparative law in the Labor Court's rulings is **to establish collective law in Israel**. Before the establishment of the labor courts system, organized labor was rarely discussed and collective labor laws were undeveloped. When the labor court system was established, the Supreme Court in a number of occasions criticized strikes that disrupted employers' activities and even questioned the right to strike in a particular sector (the public service).[126] The appeal to comparative law helped the Labor Court deal with such internal criticisms in the Israeli legal system and to recognize the importance of organized labor in a democratic regime. Furthermore, it even helped the labor court prevent legislative procedures that might have limited the further development of collective labor law in Israel.[127]

Finally, and maybe most importantly, the National Labor Court used comparative law **to develop employment and labor rights in Israel**. As has been shown throughout this paper, from its establishment and until this very day, the National Labor Court has used comparative law to present new norms in the labor field and establish employment and collective rights. As was made clear in the *Hazin* case, for instance, the reference to comparative law was based on a clear normative perspective of the court: the importance of *tikkun olam*.

With respect to the equality challenge, the National Labor Court used comparative law to promise a greater protection of employees' right to equality, whether by abolishing discriminating clauses in collective agreements, simplifying the procedure necessary to prove employment discrimination, embracing the indirect discrimination doctrine, or expanding the amount of compensation available in discrimination cases.[128] Similarly, in collective law matters, the National Labor Court also used comparative law to protect labor rights and the rights of employees to organize—beginning with expanding the right to strike, then expanding the meaning of freedom of association, and finally expanding the role and power of the trade union, even versus the individual worker.[129]

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126. *See, e.g.*, Beer Sheva 127/79 ABUZAR V. THE STATE OF ISRAEL, 33(3) 50; Beer Sheva 678/82 TIER V. THE STATE OF ISRAEL, 36 (3) 386.

127. *See, e.g.*, National Labor Court 4-5/36 MOSHE GINSTLER AND OTHERS - THE STATE OF ISRAEL, 8 (1) 003 (1976) (referring to English legislation regarding strikes); National Labor Court 4-6/35 THE SEA DEPARTMENT EMPLOYEES COMMITTEE - PORTS AUTHORITY, HAIFA PORT THE EMPLOYEES OF THE SEA DEPARTMENT IN HAIFA PORT (1) 345, § 3 (1975) (referring to the La Guardia Act as a bad example for the Israeli legislature).

128. *See supra* Section III.A.

129. *See supra* Section III.B.

In a similar manner, since many of its decisions were based on comparative legislation, the National Labor Court also paved the way for the Israeli legislature to consider foreign legislation.[130] In doing so, comparative law enabled the National Labor Court to generate a holistic agenda of labor and employment law issues, both in courts and through legislation.

Scholarship vs. Jurisdiction

Unlike Israeli case law, which bases its precedential decisions primarily on the European legal system, Israeli scholarship tends to rely more often on U.S. law to promote workers' rights in Israel. Since U.S. law is considered to be less favorable to employment rights, and especially to collective rights, this trend is quite surprising. However, it can be understood based on the unique character of Israeli scholarship, the specific issues on which the Israeli scholar chooses to turn to U.S. law, and its reasons for criticizing Israeli law.

In general, Israeli scholarship is greatly influenced by U.S. scholarship; many Israeli scholars were educated in U.S. institutions and draw inspiration from the American legal perspective in their research.[131] The fact that U.S. scholars write in English, unlike European scholars who sometimes write in their home language, makes the U.S. legal system more accessible to the Israeli researcher who wishes to base her work on comparative sources.

Moreover, as we showed so far, the Israeli scholar chooses to turn to U.S. law in a way that serves her pro-labor-rights motivations. In collective law issues, Israeli scholars use U.S. law to promote the rights of the individual employee vis-à-vis the trade union (not the employer).[132] This was done regarding the right of the individual worker to equality when that right is in conflict with agreements made by trade unions in collective agreements and

130. For example, in the field of equality, the National Labor Court commented in *obiter dictum* in the *Plotkin* case that the statutory limitations period, which at the time stood at six months, contradicted the ruling of the European court. The court also described the existence of commissions for the advancement of women in the workplace that had begun to operate in other countries. These two comments were implemented later by the legislator in legislative amendments that extended the limitation period to three years and created an additional chapter in the law concerning the establishment of an equality commission at work. In collective labor law issues, a reform of the Collective Agreements Law was adopted (Section 33(10) of the Collective Agreements Law), which limited the possibility of harassing employees on the basis of association and established a significant financial sanction against an employer that follows procedures intended to harm freedom of association.

131. Oren Gazal-Ayal, *The Past and Future of Law and Economics in Israel*, 23(3) BAR-ILAN L. STUD. 661, 674 (2007) (showing that 65% of Israeli staff members in Israeli law faculties in the universities completed their studies in U.S. institutions between 2000 and 2007; the author describes this trend as the "Americanization" of Israeli legal scholarship).

132. *See* Luria, *supra* note 53, at 324–35; Raday, *supra* note 114, at 561–64. Indeed, it is arguable in this sort of case, in which the individual right of the employee stands against the general position and power of the trade union, what best serves employment law.

regarding the right of the individual worker (or group of workers) to supervise or criticize a trade union's decisions and activity.[133] This was also the case with equality disputes and age discrimination, where U.S. law seemed to better promote workers' right (as compared to Israeli law) and could serve as a beneficial source of comparison to promote equality in employment.[134]

CONCLUSION

In this article, we wished to examine the sources and purposes of comparativism in the Israeli labor law system in case law and Israeli scholarship. For this purpose, we explored when, how, and why comparativism is being used by Israeli judges and scholars in equality and collective rights disputes. As we tried to show, the use of comparative law in Israel has specific features that stem from the unique characteristics and history of the Israeli legal system—a relatively young system that historically and normatively can draw its source of inspirations from both the European and Anglo-American legal traditions. This reality led to a special way of using comparative law in Israeli labor law tribunals and scholarship.

Additionally, we hope that this article, along with the other essays in this special edition, will help readers identify other, more general, trends in labor and employment law issues; *i.e.*, that it can tell us something more general about the legitimate and preferable sources and ways of comparison for the average judge or scholar who wishes to use comparativism as another tool to develop precedents in their country. We hope that this article can do more than tell us something about the unique nature of Israel regarding employment and labor law; indeed, that it can also be read in a comparative manner and tell as something more general about labor and employment law from a global perspective.

133. *See* Luria, *supra* note 53, at 324–35; Raday, *supra* note 114, at 561–64.
134. See Rabin-Margalioth, *supra* note 62, at 135–65.

AN ANTIPODEAN APPROACH TO COMPARATIVE LABOR LAW

Joellen Riley Munton[†]

The platypus–a small, semi-aquatic, egg-laying mammal with a duck-like bill–is a peculiar Australian creature, entirely idiosyncratic, but apparently sharing features with imported species, like the duck, beaver and mole. The first British naturalists to inspect a cadaver of the species in the late 18th century believed it to be hoax, sewn together from the carcasses of other animals.[1] Such a creature perhaps provides an apt metaphor for Australian labor law's approach to comparative legal study. Australian scholars, law reformers, and (to a lesser extent) jurists are avid observers of the legal developments of other jurisdictions, particularly those jurisdictions with whom we share a common law heritage, and yet the results produced in our system of labor laws have remained peculiarly Australian.

Several features of Australian labor law illustrate this observation, and this article shall address some of them, by drawing on a considerable body of Australian comparative labor law scholarship published over recent years, much of it in this esteemed journal.

In the field of collective labour relations, the scheme of regulation of enterprise bargaining in the current Fair Work Act 2009 (Cth) manifests deliberate borrowings from the United States of America's National Labor Relations Act, and the collective bargaining system in the United Kingdom, but the resulting Australian system continues to bear idiosyncratic, and some would argue quite incoherent features.

In the field of individual employment rights, Australia has also borrowed extensively from international developments, particularly in the creation of statutory schemes dealing with matters the subject of International Labour Organization (ILO) concerns, and some of those will be noted.

In matters regulated largely by judge-made law, notably employment contract law, Australian jurisprudence has long looked to the English common law tradition (as one would expect a federation of former British colonies to do), but in adhering to strict principles of classical commercial contract law is now at odds with important principles of employment law

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1. *See Playtypus*, WIKIPEDIA, https://en.wikipedia.org/wiki/Platypus (last visited Apr. 3, 2024) (citing George Shaw ¶ Frederick Polydore Nodder, *'The Duck-Billed Platypus, Platypus anatinus* 10 NATURALIST'S MISCELLANY 385, 385–86).

developed more recently in the United Kingdom. In departing from developments in the United Kingdom, the Australian High Court has also ignored or eschewed developments from other former colonies, notably Canada and New Zealand.

On the whole, Australian scholars and law reformers have been outward looking over the past century, but the results of their work (manifested in the shape of contemporary Australian labor law) is testimony to the wise advice of Sir Otto Kahn-Freund, that all comparative scholarship needs to be mindful of the need for any transplanted laws to be adapted to the particular political, cultural and historic conditions in the recipient nation.[2]

FROM ARBITRATION TO BARGAINING: BORROWING AND ADAPTING FROM THE NORTHERN HEMISPHERE

Ever since Henry Bournes Higgins' robust defence of Australia's system of conciliation and compulsory arbitration of industrial dispute in *A New Province for Law and Order: Industrial Peace through Minimum Wage and Arbitration* (published in the Harvard Law Review in 1915[3]) it has generally been assumed that the industrial relations system introduced by the Commonwealth government of the newly federated Australian states in 1904 was a peculiarly Australian innovation, a "path-breaking legal innovation . . . introduced principally to stabilise industrial relations at a crucial period of economic development in the colonies".[4] As Ron McCallum reminded us, in the pages of this journal, this supposedly idiosyncratic system was itself the product of borrowing ideas that were "sweeping throughout the industrialised world" at the time.[5] Conciliation statutes had already been enacted in Britain, Canada, and several of the United States of America, although without recourse to compulsory arbitration.[6] The earliest statute adopting compulsory arbitration to resolve industrial disputes was in fact enacted in Australia's close neighbour, New Zealand, in the Industrial Conciliation and Arbitration Act 1894 (NZ), ten years earlier than the Conciliation and Arbitration Act 1904 (Cth). Nevertheless, according to McCallum, Australia's system "established a vigorous labor relations mechanism that was far stronger than its New Zealand counterpart and which lasted throughout the twentieth

2. Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV 1, 6 (1974).

3. *See generally* Henry Bournes Higgins, *A New Province for Law and Order: Industrial Peace through Minimum Wage and Arbitration*, 29 HARV. L. R. 13–39 (1915).

4. Richard Mitchell, Peter Gahan, Andrew Stewart, Sean Cooney & Shelley Marshall, *The Evolution of Labour Law in Australia: Measuring the Change*, 23 AUST. J. LAB. L. 61, 69 (2010).

5. Ron McCallum, *Convergences and/or Divergences of Labor Law Systems: The View from Australia*, 28 COMP. LAB. L. & POL'Y J 455, 458 (2007).

6. *Id.* at 458–59.

century".[7] The fortitude and resilience of the Australian system and its institutions perhaps explains why they have continued to resist complete abolition in the last decade of the twentieth century, when Australian labor relations reformers again set their sights on international models when crafting Australia's new enterprise bargaining system.

In the late 1980s, Australian governments at state and federal level investigated reforms to the system of compulsory arbitration, which at that time operated at both state and federal level. By this time, Australia's idiosyncratic system of arbitrated occupation-based industrial awards had come under criticism for (allegedly) curbing productivity and economic efficiency, and hindering Australia's international trade.[8] Australia never adopted the British style collective bargaining system throughout this time.[9] Two reports conducted at the time proved influential in swaying governments towards the adoption of enterprising bargaining: Professor John Niland's report commissioned by the New South Wales government,[10] and a Business Council of Australia Report.[11] These reports favoured the adoption of a plant level collective bargaining mechanism, akin to the system in the United States.[12]The first federal enactment adopting these recommendations was the Industrial Relations Reform Act 1993 (Cth), introducing collectively bargained "certified agreements" made at enterprise level. According to Ron McCallum the "concepts and ideas underpinning" these new collective bargaining laws were derived from the deregulated labor law mechanisms of Great Britain, and only "to a lesser extent the United States".[13]

A key feature of the new enterprise bargaining system was the right for parties negotiating collective agreements to take "protected industrial action", meaning that coercive tactics such as lock-outs and strikes were now legitimate negotiating tactics. This represented what Naughton has described as a "notable departure from Australia's home-grown arbitral system", in which strikes were in principle illegal, and attracted the intervention of the Conciliation and Arbitration Commission (later named the Australian

7. *Id.* at 460.

8. For an overview of these largely political arguments, *see* Joe Isaac, *The Deregulation of the Australian Labour Market*, *in* JOE ISAAC & RUSSELL D. LANSBURY, LABOUR MARKET DEREGULATION: REWRITING THE RULES 1–13 (Federation Press 2005)

9. Mitchell et al., *supra* note 4, at 69.

10. JOHN NILAND, TRANSFORMING INDUSTRIAL RELATIONS IN NEW SOUTH WALES: A GREEN PAPER (1989).

11. *Business Council of Australia, Enterprise-based Bargaining Units: A Better Way of Working*, REPORT TO THE BUSINESS COUNCIL OF AUSTRALIA BY THE INDUSTRIAL RELATIONS STUDY COMMISSION (1989).

12. McCallum, *supra* note 5, at 463.'

13. *Id.* at 456.

Industrial Relations Commission) to engage in compulsory arbitration of the dispute.[14] As McCallum has explained, however, even the earliest iteration of the new scheme was not faithful to the United States' model from which it was fashioned. It "failed to include many of the safeguards to trade unions and employees that are to be found in the United States laws".[15] One of the safeguards that this new system *did* maintain was a "no-disadvantage test" that ensured that any collective enterprise bargain made without the advocacy of a trade union (these were called "enterprise flexibility agreements"[16]) must pass a test of improving upon the arbitrated industrial award that would otherwise apply to the employees.[17] The idiosyncratic old Australian system remained as a floor of rights, ostensibly preventing any race-to-the-bottom that might have ensued if a truly northern hemisphere system had been adopted.

This aspect of the new system (i.e. the maintenance of an award-based floor of rights) came under attack as successive governments sought to adopt an industrial relations system more conducive to the "neo-classical economic ideas and neo-liberal deregulatory ideologies" which McCallum has described as "indeed infectious in our globalized world".[18] The first version of the Howard Coalition government's Workplace Relations and Other Legislation Amendment Bill 1996 (Cth) was heavily amended under pressure from the Australian Democrats, a now defunct political party which held the balance of power in the Senate at the time. Without those amendments, the no-disadvantage test would have been completely abandoned, as would the award system itself.

One feature of the Workplace Relations regime introduced in 1996 was unique in Australia's history: the introduction of a statutory instrument fixing ostensibly individual employment contract terms, known as the Australian Workplace Agreement, or AWA.[19] Writing at the time of its introduction, Therese MacDermott described this instrument as the "ideological centrepiece" of the new Workplace Relations Act.[20] The concept of a binding individual agreement is of course by no means novel. It adopts the fundamental principal of commercial contract law, and indeed an individual

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14. Richard Naughton, *The New Bargaining Regime under the Industrial Relations Reform Act*, 7 AUST. J. LAB. L. 147, 147 (1994).

15. McCallum, *supra* note 5, at '463–64; *see also* Ron McCallum, *Trade Union Recognition and Australia's Neo-liberal Voluntary Bargaining Law*, 57 RELS. INDUS. 225 (2002).

16. Repealed Industrial Relations Act 1988 (Cth) Part VIB, Division 3.

17. *See id.* §§ 170MC–NC.

18. Ron McCallum, *Plunder Downunder: Transplanting the Anglo-American Labor Law Model to Australia*, 26 COMP. LAB. L & POL'Y J. 381, 382 (2005).

19. For a full description of AWAs, *see generally* Therese MacDermott, *Australian Labour Law Reform: The New Paradigm*, 6 CANADIAN LAB. & EMP. L.J. 127 (1998).

20. *Id.* at 131.

contract-based system had already been introduced across the Tasman in New Zealand, in the form of the Employment Contracts Act 1991 (NZ). The state of Victoria, led by a Coalition premier, Jeff Kennett, had also abandoned its system of state-based arbitrated awards in the adoption of the Employee Relations Act 1992 (Vic). The ideology driving these changes was Thatcherite individualism.[21] The need for specific legislation in Australia to achieve what an ordinary common law contract might do in another jurisdiction was created by Australia's industrial legislative history and the persistence of the award system. An individual employment contract, as a creature of the common law, cannot oust the operation of an arbitrated industrial award made under the authority of a federal statute. So it was necessary to create an even more authoritative statute, to permit contracting out of awards. In the AWA we perhaps see a legislative platypus. A strange and unique looking creature, but one stitched together from patterns found in both British common law and a New Zealand statute, with the overarching purpose of promoting the new global ideology of neoliberalism.

Another aspect of the Howard era reforms (introduced in 2005 by the Work Choices legislation) was the requirement for bargaining representatives to seek and obtain permission to hold a "protected action ballot", before taking any industrial action. (This aspect of the system has been retained in the Fair Work Act.[22]) According to McCallum, the secret strike ballot mechanism introduced in the Work Choices laws was borrowed from the English "labor laws that were first enacted in the 1980s by the government of Prime Minister Margaret Thatcher."[23]

In the end, the Howard Coalition's industrial relations reform agenda overreached. The deeply unpopular Work Choices reforms were enacted following the 2004 election in which the Coalition government secured control of the Senate. Work Choices was designed to kill off the arbitrated award system, once-and-for-all.[24] Instead, the government suffered an ignominious defeat at the ballot box, the Prime Minister himself was unseated, and a new Australian Labor Party government proceeded with its Fair Work reforms. The old arbitrated industrial awards were never reestablished in their original

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21. *See generally* Martin Vranken, *Demise of the Australasian Model of Labour Law in the 1990s*, 16 COMP. LAB. L.J. 1 (1994).

22. *See* Fair Work Act 2009 (Cth) §§ 435–69. For a thorough study of the system, *see* BREEN CREIGHTON, CATRINA DENVER, RICHARD JOHNSTONE, SHAE MCCRYSTAL & ALICE ORCHISTON, STRIKE BALLOTS, DEMOCRACY, AND LAW (2020).

23. McCallum, '*supra* note 5, at 464.

24. *See* Workplace Relations (Work Choices) Amendment Act 2005 (Cth). A full description of this legislation can be found in JOELLEN RILEY & KATHRYN PETERSON, WORK CHOICES: A GUIDE TO THE 2005 CHANGES (2006).

form, but they have provided the basis for a new system of 122 simplified "modern awards" which provide for minimum wages and conditions of work for occupational groups, and continue to underpin a system of collective enterprise bargaining, by way of a "better off overall test" (similar to the original "no-disadvantage test") ensuring that enterprise bargains cannot be made to undercut awards.[25]

The path of Australia's adoption of a new enterprise bargaining based system illustrates Australian law reformers' appetite for international comparison in pursuing new economic policies, but also demonstrates that the adoption of new forms will often require adaptation to accommodate old norms. What McCallum has described as the "egalitarian ideas that underpinned its conciliation and arbitration mechanisms"[26] have proved difficult to eradicate, even as successive governments have sought to respond to the pressures of globalization. Richard Naughton colorfully described the first iteration of an enterprise bargaining scheme in Australia as "grafting" a new "underlying philosophy" onto the existing Industrial Relations Act 1988 (Cth) by inserting "international collective bargaining concepts" formerly unfamiliar to the "home-grown arbitral system".[27] These features included the right to take coercive industrial action, without automatic interference from an industrial relations tribunal, and an obligation on parties to bargain in good faith. Naughton's choice of the word "grafting" is reminiscent of Kahn-Freund's metaphor of organ transplant in his article warning against the potential risks of some uses of comparative law.[28] "Deeply ingrained legal ideologies may set a limit to transplantation."[29] It certainly appears that although the transplantation of enterprise bargaining has not been rejected by the body of Australian labor law, neither has the new organ remained unmodified by its host.

Space constraints preclude a detailed examination of the contemporary enterprise bargaining provisions in Australia in this short article, however one feature is worth noting as an illustration of the way that the Australian system has adapted a borrowed system to accommodate its own ideological commitments. The Australian system of collective bargaining in both the former Workplace Relations Act 1996 (Cth) (as amended by WorkChoices) and the current Fair Work Act 2009 (Cth) contemplates that an employer engaged in enterprise bargaining may be required to negotiate with

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25. For an explanation of modern awards, *see* ANDREW STEWART, ANTHONY FORSYTH, MARK IRVING, RICHARD JOHNSTONE & SHAE MCCRYSTAL, CREIGHTON & STEWART'S LABOUR LAW 314–46 (6th ed. 2016).

26. McCallum '*supra* note 5, at 467.

27. Naughton, *supra* note 14, at 147.

28. Kahn-Freund, *supra* note 2, at 6.

29. *Id.* at 24.

several different bargaining representatives acting on behalf of employees, and not a single trade union which has secured a right to be recognised as the bargaining representative for all employees.[30]

An early case illustrating the inconvenience for employers of this provision was *Qantas Airways Limited*, in which an application by the Australian Services Union for approval of an enterprise agreement voted up by a majority of airlines employees was held up by a challenge from a group of part-time employees who objected to certain terms in the agreement that they alleged favoured full-time employees.[31] The notion that even an employee who is a member of a trade union might elect to appoint another party (and not the union) to represent their interests in bargaining, is undoubtedly an unusual one in other collective bargaining systems.[32]

Perhaps this idiosyncratic Australian provision is explained by the belated adoption of enterprise bargaining by the Australian industrial relations system. By 1993 when the Industrial Relations Reform Act was first passed, and certainly by 2009 when the Fair Work Act was enacted, Australian society had become accustomed to a more highly individualistic regime, preferring the interests of individual employees in selecting their own agents to negotiate on their behalf, over a majority rules approach typical in a trade union recognition process. Or perhaps it reflected the more pragmatic concern of the reformers who wanted to ensure that collective enterprise bargaining would take hold as the principal means of determining wages and working conditions, in circumstances where trade unions had already suffered significant diminution in membership levels.[33] As Ron McCallum noted in 2005, a collective bargaining mechanism that requires a majority of employees to appoint a single trade union in a representative vote "has not worked well in the new economy", and may explain the shrinkage of collective bargaining in jurisdictions requiring trade unions to demonstrate majority support.[34] Sir Otto Kahn-Freund might have explained this as a consequence of the host's own industrial culture, informed by an emergent ideology of individualism and local circumstances, influencing the eventual form of the transplanted organ.

30. *See* Fair Work Act 2009 (Cth) § 174.
31. *Qantas Airways Limited* [2011] FWA 3632.
32. *See* Fair Work Act 2009 (Cth) § 174(3)(b).
33. STEWART ET AL., *supra* note 25, at 837.'.
34. McCallum, '*supra* note 18, at 388.

INDIVIDUAL EMPLOYMENT RIGHTS

Australian law reformers' willingness to look to overseas developments is also manifested in the adoption of a number of statutory schemes speaking to global concerns with the suppression of discriminatory practices, and more effective support of workers' rights to safe work environments. Kahn-Freund opined that it may be easier to imitate another jurisdiction's individual employment law than its system of collective industrial relations, and he suggested that this is illustrated by the fact that most International Labour Organization (ILO) conventions are focused on the promulgation of general standards for individual worker protection.[35]

Certainly aspects of the individual rights of Australian workers have been influenced by the adoption not only of ILO Conventions, but of the laws of other nations. McCallum has noted, for example, that Australia's now extensive suite of anti-discrimination statutes followed the enactment of the US Civil Rights Act in 1964. With the exception of the Prohibition of Discrimination Act 1966 (SA), Australian state and federal anti-discrimination laws lagged international developments by a decade or more.[36]

In a field extensively addressed by ILO Conventions, work health and safety, Australian legislation has tracked developments in the United Kingdom. The first occupational health and safety legislation enacted in an Australian colony was the Factories Act 1885 (Vic). This legislation, and the laws enacted in the other colonies, adopted the British model of legislation at the time.[37] Nineteenth century safety legislation, targeted at the risks created by industrialised work, specified particular regulations to deal with specific risks, for instance, rules mandating fencing of dangerous machinery and management of toxic substances.[38] By the middle of the 20th century, British regulators had recognized that the nature of health and safety risks at workplaces was evolving with new technology, rapidly outpacing a style of regulation designed to prescribe particular risk-management measures. An inquiry led by Lord Robens produced a report (the 'Robens Report') proposing a new approach imposing a broad duty upon all persons in workplaces to

35. Kahn-Freund, *supra* note 2, at 21–22.

36. Current state laws are Anti-Discrimination Act 1977 (NSW); Equal Opportunity Act 2010 (Vic); Anti-Discrimination Act 1991 (Qld); Equal Opportunity Act 1984 (WA); Equal Opportunity Act 1984 (SA); Anti-Discrimination Act 1998 (Tas); Discrimination Act 1991 (ACT). The current Commonwealth legislation comprises the Racial Discrimination Act 1975 (Cth); Sex Discrimination Act 1984 (Cth); Disability Discrimination Act 1992 (Cth); Age Discrimination Act 2004 (Cth).

37. *See* Ron McCallum and Cameron Roles, *Harmonising Occupational Health and Safety Systems*, *in* REMAKING AUSTRALIAN INDUSTRIAL RELATIONS 65, 67 (Joellen Riley & Peter Sheldon eds., 2008).

38. *See* Richard Johnstone and Richard Mitchell, *Regulating Work*, *in* CHRISTINE PARKER ET AL., REGULATING LAW 101, 103 (Oxford University Press 2004); *see also* RICHARD JOHNSTONE ET AL., WORK HEALTH AND SAFETY LAW AND POLICY 40–48 (3d ed. 2012).

adopt whatever means necessary to minimize workplace health and safety risks.[39] Robens style legislation was adopted in most Australian states from the early 1980s.[40] Work health and safety is a matter within state government competency under the Australian Constitution, so in order for the Commonwealth government to influence this important field, it began a program of harmonization, to encourage states to adopt uniform workplace safety laws.[41] The Model Work Health and Safety Act 2011 (Cth) has been adopted in most Australian states and territories.[42] As recommended by the Robens Report, this model legislation focuses on broadly applicable duties to ensure workplace health and safety, "as far as is reasonably practicable".[43] All "persons conducting businesses and undertakings" (PCBUs) owe duties to all workers within their sphere of influence, not only employees, but subcontractors, labour hire workers, trainees and work experience workers, and volunteers.[44] Workers also bear a duty to take reasonable care for their own and others' health and safety at work.[45]

While Australia has looked abroad to other common law countries for these statutory schemes dealing with individual workers' rights, the judge-made law in Australia has shown some divergence, particularly in the field of employment contract law.

COMMON LAW DEVELOPMENTS: DIVERGENCE FROM BRITAIN

Several aspects of contemporary Australian employment law demonstrate a surprising divergence from the law of the United Kingdom. Most recently, in two decisions decided together in 2022, the Australian High

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39. LORD ROBENS REPORT OF THE COMMITTEE ON SAFETY AND HEALTH AT WORK 1970-1972 12 (HSMO London 1972).

40. *See* Occupational Health and Safety Act 1983 (NSW); Occupational Health and Safety Act 1985 (Vic); Occupational Health and Safety Act 1984 (WA); Occupational Health Safety and Welfare Act 1986 (SA); *see also* Occupational Health and Safety (Commonwealth Employment) Act 1991 (Cth) (adopting the Robens approach to the regulation of health and safety in the Commonwealth public service).

41. McCallum & Roles, *supra* note 37, at 65, 69.

42. *See* Work Health and Safety Act 2011 (ACT); Work Health and Safety Act 2011 (NSW); Work Health and Safety Act 2011 (Qld); Work Health and Safety (National Uniform Legislation) Act 2011 (NT); Work Health and Safety Act 2012 (SA); Work Health and Safety Act 2012 (Tas). Western Australia came to scheme belatedly, when it enacted the Work Health and Safety Act 2020 (WA). For an overview of the model legislation, *see Hunter Quarries Pty Ltd v State of New South Wales (Department of Trade & Investment)* [2014] NSWSC 1580 [30]–[44] (Austl.). Victoria has not adopted the model legislation. *See* Occupational Health and Safety Act 2004 (Vic), supported by the Occupational Health and Safety Regulation 2017.

43. Work Health and Safety Act 2011 (Cth) § 17.

44. *Id.*

45. Work Health and Safety Act 2011 (Cth) § 28–29.

Court has rejected the UK Supreme Court's approach to the classification of employment relationships.[46] Some years earlier, a differently constituted bench rejected the established principle in UK employment law that employers and employees necessarily bear mutual duties not to act in a manner calculated or likely to destroy trust and confidence in the relationship (the "duty of mutual trust and confidence").[47]

A close reading of the relevant Australian High Court decisions demonstrates that members of the bench were by no means ignorant of developments in the United Kingdom. Rather, the court expressly considered and rejected English developments, as inappropriate to domestic circumstances. We shall consider these High Court decisions in chronological order.

No mutual trust and confidence

The first significant decision creating a ravine between Australian law and that of the United Kingdom, Canada and New Zealand was the rejection, in *Commonwealth Bank of Australia v. Barker* (*Barker*)[48] of the duty of mutual trust and confidence. Prior to *Barker*, lower courts in several Australian jurisdictions had begun to accept (in principle at least) that Australian law, like the law of the United Kingdom, recognised a mutual duty of trust and confidence in employment relationships, although no case had been prepared to accept that this duty constrained an employer's prerogative to terminate an employment contract with notice, nor required an employer to confer new benefits upon an employee.[49] In *Barker*, the High Court stamped out this development, on the basis that any duty of mutual trust and confidence was too indeterminate to be given a precise meaning, and failed the necessity test for

46. *Construction Forestry Mining Maritime and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (Austl.); *ZG (Operations) Pty Ltd v Jamsek* [2022] HCA 2 (Austl.).

47. For a selection of literature explaining this principle in English law, *see* Douglas Brodie, *A Fair Deal at Work*, 19 OXFORD J.L. STUD. 83 (1999); Douglas Brodie, *Mutual Trust and the Values of the Employment Contract*, 30 INDUS. L.J. 84 (2001); Douglas Brodie, *Mutual Trust and Confidence: Catalysts, Constraints and Commonality*, 37 INDUS. L.J. 29 (2008); Mark Freedland, *Constructing Fairness in Employment Contracts*, 36 INDUS. L.J. 136 (2007); David Cabrelli, *Discretion, Power and the Rationalisation of Implied Terms*, 36 INDUS. L.J. 194 (2007); Douglas Brodie, *Fair Dealing and the World of Work*, 43 INDUS. L.J. 29 (2014).

48. (2014) 253 CLR 169 (*Barker*).

49. *See Russell v Trustees of the Roman Catholic Church, Archdiocese of Sydney* (2007) 69 NSWLR 198 (Austl.); [2007] 72 NSWSC 104 [112] (Austl.); *Rogers v Millenium Inorganic Chemicals* [2009] FMCA 1 [127] (Austl.); *Thomson v. Orica Australia Pty Ltd* [2002] FCA 939; *Rogan-Gardiner v Woolworths Ltd (No 2)* [2010] WASC 290 (Austl.). *See generally* Joellen Riley, *Siblings but not Twins: Making Sense of "Mutual Trust and Confidence" and "Good Faith" in Employment Contracts*, 36:2 MELBOURNE UNIV. L. REV. 521 (2012).

implication by law of a new contract term.[50] Most interesting was the majority's assertion that this duty derived from a different, and foreign, legal system – a jarring statement given white Australia's British heritage.[51] The majority said:

Judicial decisions about employment contracts in other common law jurisdictions, including the United Kingdom, attract the cautionary observation that Australian judges must "subject [foreign rules] to inspection at the border to determine their adaptability to native soil" [citing Traynor[52]]. That is not an injunction to legal protectionism. It is simply a statement about the sensible use of comparative law.[53]

Perhaps most important was the majority's statement that the invention of such a common law duty in Australian employment law would involve the court in impermissible judicial policy-making, and risk incoherence with the extensive regulation of employment relationships by statutory law.[54]

Although the court rejected the English concept of mutual trust and confidence they did not rule out the possibility that Australian employment law might (in an appropriate case) accept a duty to perform employment contracts in "good faith".[55] Justice Kiefel (who later became Chief Justice) took the opportunity to refer to the acceptance of that concept in other legal systems, notably the United States of America,[56] where good faith is held to be a "vitally important ingredient for a modern general law of contract".[57] Australian jurists commonly refer to the legal concepts developed and accepted in other jurisdictions, but their willingness to import those concepts is often constrained by local conditions. This is particularly the case when judges are asked to adjudicate in areas already populated by comprehensive statutory law. The long history of extensive statutory regulation of employment terms and conditions in Australia has therefore influenced the extent to which Australian common law has accepted the transplantation of developments from other jurisdictions.

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50. *Barker* at [36]–[37]. For more detailed discussions of this decision, *see* John Carter et al., *Terms Implied in Law: 'Trust and Confidence' in the High Court of Australia*, 32 J. CONTRACT L. 203 (2015); Lauren Hillbrick, *Why the High Court Went Too Far in Rejecting the Implied Term of Trust and Confidence in its Entirety in the Context of Constructive Dismissal Claims*, 31 AUST. J. LAB. L. 45 (2018).

51. *Barker* at [18], [35]–[41].

52. Traynor, *Statutes Revolving in Common-law Orbits*, 17 CATH. UNIV. L. REV. 401, 409 (1968).

53. *Barker* at [18].

54. *Id.*

55. *Id.* at [42] (French, C.J., Bell & Keane, JJ).

56. *Id.* at [105] (Kiefel, J.) (citing RESTATEMENT (SECOND) OF CONTRACT LAW (AM. L. INST. 1981).

57. *Id.* at [104].

Defining 'employment'

A second significant departure of Australian from English common law of employment is the more recent rejection of the approach taken by the United Kingdom's Supreme Court in *Autoclenz v. Belcher*[58] to the characterisation of "employment" as a particular relationship attracting the protections of labour laws. *Autoclenz* concerned an employer who sought to avoid statutory obligations by engaging car detailers on contracts that specifically stipulated terms designed to characterise them as independent contractors. The clauses stated that the employer did not assert control over working hours, and purported to permit the workers to delegate the work to others. These clauses had been recommended by an accountant advising the company on a strategy to avoid engaging workers on contracts of personal service which would attract certain statutory employment law obligations.[59] The court in this case was astute to find that the written terms of the contract did not reflect the economic reality of the working relationships, and found that the workers were in fact employees of Autoclenz.

Several Australian decisions at Federal Court level had begun to adopt the same kind of reasoning as the court in *Autoclenz*. Some (but not all) judges showed a willingness to look beyond the written terms of a strategically drafted contract to find that persons described as contractors were in fact employees entitled to certain legal protections.[60] However in 2022, in *Construction, Forestry, Maritime, Mining and Energy Union v. Personnel Contracting Pty Ltd* ('*Personnel Contracting*')[61] and *ZG Operations Australia Pty Ltd v. Jamsek* (*Jamsek*)[62] a High Court majority rejected this approach, finding that where the terms of engagement of a worker are committed to a comprehensive written agreement, a decision-maker may regard only the legally binding terms of that agreement, and must disregard any evidence as to the actual performance of the contract, when classifying the relationship for the purpose of employment laws.[63]

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58. [2011] UKSC 41 (UK); [2011] All ER 745 (UK).

59. [2011] UKSC 41 (UK); [2011] All ER 745, [24]–[29] (UK).

60. *See, e.g.*, *On Call Interpreters Agency Pty Ltd v Commissioner of Taxation (No 3)* [2011] FCA 366 (Austl.); (2011) 206 IR 252 (Austl.); *ACE Insurance Ltd v. Trifunovski* (2013) 209 FCR 146 (Austl.). For a general discussion of the Federal Court's jurisprudence, *see* Carolyn Sutherland, *Judging the Employment Status of Workers: An Analysis of Commonsense Reasoning*, 46:1 MELBOURNE UNIV. L. REV. 281 (2022).

61. [2022] HCA 1 (*Personnel Contracting*) (Austl.).

62. [2022] HCA 2 (*Jamsek*) (Austl.).

63. *Personnel Contracting* at [61] (Kiefel, C.J., Keane & Edelman, JJ.), [162] (Gordon, J.), [203] (Steward, J.). More comprehensive analyses of *Personnel Contracting* and *Jamsek* can be found in Andrew Stewart, Mark Irving & Pauline Bomball, *Shifting and Ignoring the Balance of Power: The High Court's New Rules for Determining Employment Status*, 46:4 UNIV. N.S.W. L.J. 1214 (2023); Eugene Schofield-Georgeson & Joellen Riley Munton, *Precarious Work in the High Court*, 45:2 SYDNEY L. REV.

The majority in *Personnel Contracting* did concede that there may be some special circumstances where evidence of performance of the contract may be relevant, but only where it was argued that the written contract was a deliberate sham (concocted by both parties to deceive a third party[64]) or had clearly been varied, or terminated and replaced by, a subsequent contract.[65] It was not enough to show that the parties had performed their respective obligations in a manner inconsistent with the written contract, nor was it at all relevant that the parties stood in an unequal relationship. The reflections of the English court in *Autoclenz* concerning the relative bargaining power of the parties in that case were specifically rejected by the majority in *Personnel Contracting* and *Jamsek*.[66] A majority of the High Court had adopted the same strict doctrinal approach when interpreting the contract engaging a labour hire worker in *Workpac Pty Ltd v. Rossato*.[67] That case concerned whether a worker who had been engaged on full time rosters for more than a year was a "casual" or a continuing employee. The strict terms of the contract allowing him to be dismissed upon an hour's notice were sufficient to ground a finding that he was a casual employee, notwithstanding his long term, regular engagement.[68]

Cases following *Personnel Contracting* have confirmed that this strict contractual approach applies even to more informal, oral contracts. In *EFEX Group Pty Ltd v. Bennett*,[69] a full bench of the Federal Court held that a worker without any written contract must still be classified according to evidence of the contractual terms agreed at the time he was engaged, and not according to the subsequent performance of his work relationship.[70]

In early 2024, the Albanese Labor government passed legislation to address these decisions of the High Court, by enacting a new Fair Work Act 2009 (Cth) section 15AA to require decision-makers to regard the true nature and practical reality of a working relationship when determining whether the

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219 (2023); Joellen Riley Munton, *Boundary Disputes: Employment and Independent Contracting in the High Court*, 35:1 AUST. J. LAB. L. 79 (2022).

64. The concept of a sham in English and Australian law requires that both parties to a contract have conspired to deceive a third party. *See* GORDON ANDERSON, DOUGLAS BRODIE & JOELLEN RILEY, THE COMMON LAW EMPLOYMENT RELATIONSHIP: A COMPARATIVE STUDY 53 (Edward Elgar 2017) (citing *Snook v. London and West Riding Investments Ltd* [1967] 2 QB 786 (UK)).

65. *Personnel Contracting* at [61] (Kiefel, C.J., Keane & Edelman. JJ.), [162] (Gordon, J.), [203] (Steward, J.).

66. *Personnel Contracting* at [32]–[60].

67. (2021) 95 ALJR 681, 392 ALR 39 (Austl.).

68. The Fair Work Legislation Amendment (Closing Loopholes) No. 2 Act 2024 (Cth) has subsequently amended Fair Work Act 2009 (Cth) § 15A to provide that the practical reality of performance of the work contract is to be taken into account in determining casual status.

69. [2024] FCAFC 35 (Austl.).

70. *Id.* at [11].

worker is covered by provisions of the Fair Work Act. (Notably, this definition applies only to determine the coverage of the Fair Work Act, and will not influence the common law definition of employment for other purposes, such as determination of whether a hirer should be vicariously liable for the acts of a worker, or for the purposes of any other statute relying on the common law definition of employment for coverage.[71]) The new provision adopts the approach taken by a minority of the High Court (Gageler and Gleeson JJ) who had been prepared to adopt the approach taken by the UK Supreme Court in *Autoclenz*.[72]

Once this new provision takes effect, cases decided under the Fair Work Act will conform to the approach adopted in the United Kingdom, and also New Zealand. The Employment Relations Act 2000 (NZ) section 6 provides that decision makers must regard the true nature and practical reality of a relationship in assessing whether the worker is an employee for the purpose of the statute.[73] The adoption of this statutory provision has profoundly affected the application of New Zealand's employment laws, as is manifest in the case of *E Tu Inc v. Rasier Operations BV and Ors* case,[74] which found that Uber drivers were employees for the purposes of statutory employment law protections. In the United Kingdom, Uber drivers have been found to be "workers" (but not necessarily "employees") within the meaning of the Employment Rights Act 1996 section 230(3).[75] In Australia, however, decisions made on the basis of the common law definition of employment have generally found that rideshare drivers, and other precarious workers undertaking jobs allocated by digital platforms, are independent contractors, and fall outside of the minimum statutory protections provided by the Fair Work Act.[76] Many of these decisions were made even before the strict contractual approach was asserted by the High Court in *Personnel Contracting*, so it is not clear that the enactment of section 15AA will bring the workers within the employment protections of the Fair Work Act.

Concern about the exclusion of these kinds of precarious workers from minimum labour standards has prompted the enactment of a new scheme within the Fair Work system, permitting the Fair Work Commission to make "minimum standards orders" covering "employee-like" workers engaged

71. *See* Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, [1094].

72. *Personnel Contracting* at [130].

73. This statutory provision is explained in *Bryson v. Three Foot Six Ltd* [2005] NZSC 34 [5] (N.Z.).

74. [2022] NZEmpC 192 (N.Z.).

75. *Uber BV, Uber London and Uber Britannia Ltd v. Aslam* [2021] UKSC 5 (UK).

76. *See Kaseris v Rasier Pacific VOF* [2017] FWC 6610 (Austl.); *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579 (Austl.); *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807 (Austl.); *Nawaz v Rasier Pacific Pty Ltd T/A Uber BV* [2022] FWC 1189 [243] (Austl.); *Gupta v Portier Pacific VOF* [2020] FWCFB 1698 (Austl.); *Deliveroo Australia Pty Ltd v Franco* (2022) 317 IR 253 (Austl.).

through digital platforms.[77] At the time of writing, these provisions had only just been enacted, and would not come into effect until the end of 2024. In keeping with Australia's tradition of entrusting the conciliation and arbitration of disputes to independent industrial tribunals rather than courts, these new provisions allow parties to apply to the Fair Work Commission to settle an instrument providing appropriate terms and conditions of engagement, much like the old industrial awards, but with a more limited range of matters that can be included. The typically Australian egalitarian instincts, and the traditional preference of methods of dealing with conflict, continue to be reflected in this most recent development in the system for dealing with labour relations.

It is also clear that any new developments in employment contract law in Australia will come from the legislature. The common law courts have proven to be particularly conservative – more conservative even than their British forebears – when it comes to developing the common law to adapt to changing labour engagement practices. The fact that it has taken statutory intervention to develop the common law of employment in Australia is perhaps another illustration of Sir Otto Kahn Freund's observation that "[d]eeply ingrained legal ideologies may set a limit to transplantation" of developments from other jurisdictions.[78] The deeply ingrained legal ideology in Australia's case is arguably the judiciary's fierce commitment to orthodox common law contract principles. Two features of Australian employment law provide an illustration of the way in which classical contract law doctrine has influenced the Australian approach to common practical problems. One is the rejection of the doctrine of joint employment to solve problems arising in triangular working relationships such as labour hire. The other is the Australian approach to the rights of employees in a transfer of undertakings from one business owner to another.

Joint employment

In a world of work where several enterprises may join together to exploit labour, the doctrine of joint employment, providing that each enterprise with control over the worker should be jointly liable for legal obligations arising out of the engagement, makes great practical sense. Joint employment is a doctrine known in the United States, and also in the UK.[79] Australian courts have rejected the concept, on the basis that the liabilities of an employer

77. *See* Fair Work Act 2009 (Cth) Chapter 3A, inserted by the Fair Work Legislation Amendment (Closing Loopholes) No 2 Act 2024 (Cth).

78. Kahn Freund, *supra* note 2, at 24.

79. *See, e.g.*, *Viasystems (Tyneside) Ltd v. Thermal Transfer (Northern) Ltd* [2006] ICR 327 [49], [77] (UK).

should fall only upon the party entering into the formal contract with the worker. So in Australia, a labor hire arrangement, whereby a labor hire agency "lends" workers to a host employer who subsequently asserts day-to-day control over the workers' performance of work, creates no contractual obligations between the host and the worker.[80] The orthodox characterization of a labor hire arrangement under Australian law is that the worker is an employee only of the labor hire agency, and the labor hire agency then delegates their contractual prerogative to control the day-to-day work to the host employer, under a commercial contract with the host.[81] This has proved a convenient doctrine for host employers, who have been able to escape direct responsibility for meeting many employment law obligations in respect of labor hire workers.[82] Engaging staff through labor hire has proved particularly beneficial in the mining and construction industry, where strong unions typically negotiate enterprise agreements with employers. Where a host employer has entered into an enterprise agreement with its directly employed staff, that enterprise agreement will not cover the employees of any labor hire agency providing labor. It is a strategy that also justifies engaging staff as casual employees, with no guarantee of on-going engagement, because the commercial contract between the labor hire agency and the host permits the host to reject a worker at any time. The strategy of using labor hire aids host employers in avoiding the engagement of union labor and paying union-negotiated wages and conditions, and also ensures that the workers do not accrue the entitlements to paid leave that are available to permanent employees. This strategy was at the heart of the *Workpac Pty Ltd v. Rossato* litigation (*Rossato*).[83] Prior to the High Court's decision that the workers concerned were indeed casual employees, the Business Council of Australia had expressed considerable alarm that any change to labor hire practices would cost business and industry billions of dollars.[84]

The widespread practice of labor hire, supported by the orthodox doctrine that the labor hire agency alone is the employer, has created inequities

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80. A host employer will acquire obligations under the Work Health and Safety Act 2011 relevant to their state, as a "person conducting a business or undertaking" in respect of all workers under their control.

81. S*ee Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 [89] (Austl.); *see also Drake Personnel Ltd v Commissioner of State Revenue* [2000] 2 VR 365 (Austl.); 105 IR 122, [54] (Austl.); *Staff Aid Services v Bianchi* (2004) 133 IR 29 (Austl.).

82. For a thorough study of labor hire, *see* ANTHONY FORSYTH, VICTORIAN INQUIRY INTO THE LABOUR HIRE INDUSTRY AND INSECURE WORK FINAL REPORT (2016).

83. (2020) 378 ALR 585 (Austl.).

84. *See* Media Release, Australian Industry Group, *Parliament Needs to Act Quickly to protect Businesses and the Community from 'Double-dipping' by Casuals* (Sept. 13, 2018); Media Release, Australian Industry Group, *Casual Employment Decision Increases JobKeeper Risks* (May 21, 2020); *see also* Scott Barklamb, *Wake-up Call for a Dysfunctional System: Employer Perspectives on Industrial Relations in 2020*, 63:3 J. INDUS. REL. 411, 414–15 (2021).

in the Australian labor market. Two workers can be engaged to perform precisely the same job at the same site, but be paid at different rates of pay and enjoy different access to rights such as paid sick leave, because one is directly employed by the host, and the other is employed by a labor hire agency. The Albanese government has addressed this potential inequity by enacting new provisions in the Fair Work Act 2009 (Cth) allowing unions and employees to seek a "regulated labour hire arrangement order" from the Fair Work Commission, to ensure that the labor hire agency employer provides workers with the same pay and conditions that they would be entitled to if they had been hired directly by the host employer.[85] The provisions are complex and provide for many exceptions and qualifications about when an order can and should be made. Arguably, the addition of so many pages to the statute would not have been necessary if Australian courts had been prepared to develop a doctrine of joint employment to apply in appropriate circumstances.

Transfer of Undertakings

Another area in which Australian court's adherence to strict doctrinal orthodoxy has necessitated a legislative solution to a policy problem is the protection of wages and conditions of work after transfer of undertakings from one business owner to another. European legal systems allow for continuity of employment for employees who remain working in business after a change in legal ownership.[86] Australia continues to adopt the common law doctrine that a contract for personal services is not assignable at law, so when one business owner ceases to operate the business, all employees' employment contracts are necessarily terminated.[87] The new business owner may offer them employment, but will necessarily be offering a new employment contract. The consequences of this position for employees is that they need not accept employment by the new business owner, and it will not be a breach of their employment contract should they refuse to continue working.[88] At the same time, however, it means that the new business owner is not obliged to offer the employees work, and even if the new employer does engage

85. *See* Fair Work Act 2009 (Cth) §§ 306A–306W, inserted by the Fair Work Legislation Amendment Act (Closing Loopholes) Act 2023 (Cth) (effective Nov. 1, 2024).

86. *See* Transfer of Undertakings Directive 2001/23. For explanation of the UK's adoption of this Directive, *see* Catherine Barnard, *The United Kingdom* in Takashi Araki and Shinzo Ouchi (Eds) *Corporate Restructuring and the Role of Labour Law*, 47 BULL. COMP. LAB. RELS. 153, 159 (2003); *see also* Mark Freedland, *Developing the European Comparative Law of Personal Work Contracts*, 28 COMP. LAB. LAW & POL'Y J. 487, 490 (2007).

87. *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 (Austl.).

88. *Id.*

employees of the former business owner, the new employer will not (at common law) be required to offer the same wages and conditions.

The application of this common law doctrine meant that the earliest Australian arbitrated industrial awards could easily have been avoided by employers purporting to sell their businesses to newly incorporated associated companies, but for the inclusion of a provision in the statute foreclosing this strategy.[89] The problem has become more complex with the establishment of a system based on enterprise level bargaining, and indeed the provisions dealing with the survival of bargained-for terms and conditions of employment after a transfer of undertakings have varied with each iteration of the Australia federal statute.[90] The Liberal Coalition government's versions of the statute (in the Workplace Relations Act 1996 (Cth), and particularly after the enactment of the Work Choices reforms) created considerably more latitude for new business owners to avoid the imposition of former agreements.[91] The Fair Work Act provisions favour a presumption that an enterprise agreement will survive a change of business owner, so long as certain conditions are met, but also allow for the Fair Work Commission to hear and determine applications that a different result should ensue.[92]

Even the Fair Work Act provisions, however, do not guarantee the employee continuity of employment. An employee who is not offered employment by the new business owner may seek a special level of severance pay from the former business owner on the basis of a redundancy (meaning that the former employer no longer has a job to be performed), but cannot require the new business owner to continue the employment. Strict adherence to common law contract doctrine has meant that Australian workers have never had the benefit of the European solution to corporate restructuring, in the way that the UK did, at least at the time when the UK was a member of the European Union.

Employment as a fiduciary obligation

A recent decision of the New South Wales Court of Appeal provides one further illustration of Australian judges' resistance to adopting common sense developments from the United Kingdom. In *Anderson v. Canaccord*

89. *See* Conciliation and Arbitration Act 1904 (Cth) § 61(d); *George Hudson Ltd v Australian Timber Workers' Union* (1923) 32 CLR 413 (Austl.) (testing § 61(d)).

90. *See* Trent Sebbens, *Wake, O Wake – Transmission of Business Provisions in Outsourcing and Privatisation*, 16 AUST. J. LAB. LAW 133 (2003).

91. *See* Workplace Relations Act 1996 (Cth) § 581 (holding a transferring instrument would survive for no longer than 12 months, after which the employer would be free to negotiate new terms).

92. *See* Fair Work Act 2009 (Cth) §§ 309–20.

Genuity Financial Ltd[93] an intermediate appellate court overturned the decision of a trial judge who had cited extensively from the decision of Elias J in *Nottingham University v. Fishel* (*Fishel*)[94] to find that a pair of employees did not owe fiduciary duties to their employer. On its face, Elias J's reasons in *Fishel* seem uncontroversial. Employment is a contractual relationship, under which both parties, employer and employee, seek benefits for themselves. To say that an employee undertakes a fiduciary obligation to act only in the best interests of the employer ignores the many circumstances in which employees must be permitted to prefer their own interests, such as when they attempt to negotiate a pay rise, or decide to resign their employment to take up a more favourable opportunity. There will be occasions when an employee who is trusted with the management of particular interests of the employer will bear the more onerous obligations of a fiduciary, and be precluded thereby from making any unauthorised profit, or engaging in any conflict of duties, but the fact that some of an employee's duties may give rise to fiduciary obligations does not make the entire relationship fiduciary by definition. This is the position in the United Kingdom, following *Fishel*. In Australia however, employment has now been stated to be a fiduciary relationship per se.[95] The decision of the New South Wales Court of Appeal was based upon an obiter statement made in a dissenting judgment by Mason J in the High Court in *Hospital Products v. United States Surgical Corporation*.[96] Such is the respect of Australian judges for Australia's own jurisprudence that an obiter statement from a dissenting judgment in the High Court is given precedence over a well-reasoned decision of an English court. The NSW Court of Appeal has reasoned away the inconvenience created by this decision by stating that although all employees are fiduciaries, not all employment duties will fall within the scope of the employee's fiduciary duty. So it is possible in Australia to be a fiduciary (because one is an employee) but to owe no duties as such, because none of one's duties fall within the scope of the fiduciary relationship. Until a matter dealing with this question progresses to the High Court, this rather confusing decision precludes lower courts from adopting the eminently sensible reasoning of Elias J in *Fishel*. And the common law of employment in Australia will diverge in yet another respect from the law in the United Kingdom, despite our common law origins.

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93. [2023] NSWCA 294 (Austl.).

94. *Anderson v Canaccord Genuity Financial Ltd* [2022] NSWSC 58, [1839] (Ward, J.) (Austl.) (citing [2000] IRLR 471, 483).

95. *Id.*

96. (1984) 156 CLR 41, 96–97 (Austl.).

LABOR LAW SCHOLARSHIP

The observations in the preceding sections of this article are but a few examples of Australian approaches to comparative law, focusing on the law as it has been developed by the courts and Parliaments. The brevity of these observations does insufficient justice to the depth of Australian comparative labor law scholarship. One has only to peruse the pages of past issues of this fine journal to see the names of many eminent and emerging Australian labor law scholars, contributing not only peculiarly Australian perspectives in thematic issues but also perspectives formed by extensive comparative scholarship. Although we live and work on an island settled below the equator between the South Pacific and Indian Oceans, many Australian labour law scholars are renowned internationally for their contribution of insightful perspectives on global problems. Drawing only from the list of contributors to this journal in recent years, one can name (in alphabetical order, to avoid any odious assumptions about pre-eminence) Marian Baird, Mark Bray, Stephen Clibborn, Sean Cooney, Rae Cooper, Breen Creighton, Bradon Ellem, Anthony Forsyth, Tess Hardy, John Howe, Richard Johnstone, Ron McCallum, Shae McCrystal, Therese MacDermott, Richard Mitchell, Meg Smith, Andrew Stewart, Joo-Cheong Tham, Chris Wright, and many more scholars who regularly adopt comparative research methods in their analyses of contemporary developments in labor law. Australian scholars have often investigated contemporary legal problems through the lens of comparative law. A recent example is the study by Professors Stewart and McCrystal of the problem of regulating "gig work" in the digital economy. Their study considered legal developments in a range of European jurisdictions before arriving at recommendations for Australian law reform.[97]

One important study undertaken much earlier by a group of eminent Australian scholars sought to test whether the evolution and current shape of Australian labor law can be explained by its legal origins in the common law. A major empirical study undertaken by Richard Mitchell, Peter Gahan, Andrew Stewart, Sean Cooney and Shelley Marshal, sought to apply understandings from the comparative law "varieties of capitalism" literature.[98] Their scientific study concluded that while Australian law makers have engaged in some "legislative borrowing, mainly in the areas of trade union recognition, good faith bargaining, strikes and unfair dismissal" there has been such divergence between all countries in the common law family "to

97. Andrew Stewart & Shae McCrystal, *Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?*, 32 AUST. J. LAB. LAW 4 (2019).

98. Richard Mitchell, Peter Gahan, Andrew Stewart, Sean Cooney & Shelley Marshal, *The Evolution of Labour Law in Australia: Measuring the Change*, 23 AUST. J. LAB. LAW 61 (2010).

imply that historical, political and economic contingency (context) provides a safer way of understanding the development of labor law and its relationships with economic development in a country" than its supposed connections to legal origins.[99] It is reassuring that this study reached essentially the same conclusions as the brief review above: Australian labor law has been influenced, often extensively, by borrowings from other legal systems, particularly when newly elected governments are seeking models for law reform. But at the same time, local conditions and predilections have influenced the shape of adopted laws, often to such an extent that the resultant creature is barely recognizable as a derivative.

V. CONCLUSIONS

In a world of rapidly changing labor market practices, comparative labor law methods offer a means for scholars, jurists and legislators to investigate solutions to the common challenges of our times, described by Professor Katherine van Wezel Stone as the triple threats of flexibilization, privatization, and globalization.[100] Today, Sir Otto Kahn-Freund's observations on the uses and abuses of comparative law are even more pertinent than they were when he wrote in 1974. When questioning Montesquieu's assertion that laws will rarely be transplantable from one country to another because of the geographical, cultural, religious and political differences between nations, Kahn-Freund observed that "people read the same kind of newspaper every morning, look at the same kind of television pictures every night, and worship the same kind of film stars and football teams everywhere".[101] That observation is even more relevant fifty years later in 2024, in the world of global social media networks such as Facebook and TikTok, and international news streaming services. In the main, Australian law makers and labor law scholars are avid followers of international trends, and willing adopters of useful ideas from abroad, although always with an eye to adaptation to Australian conditions. The egalitarian instincts of our earliest industrial relations system based on conciliation and arbitration are continuing to inform statutory law reform, if the Closing Loopholes reform agenda is a fair indicator. Statutory reform will always be necessary while a deeply conservative judiciary committed to orthodox common law doctrines refuses to embrace useful developments

99. *Id.* at 86.

100. Katherine van Wezel Stone, *A New Labor Law for a New World of Work: The Case for a Comparative-Transnational Approach*, 28 COMP. LAB. LAW & POL'Y J. 565, 581 (2007).

101. Kahn-Freund, *supra* note 2, at 9.

from the United Kingdom and other common law countries. In the end, the Australian version of a transplanted idea is likely, like the platypus, to be an idiosyncratic composite of influences, informed by local history, culture and ideology.

AN INCENTIVE-COMPATIBLE ENFORCEMENT MODEL FOR INTERNATIONAL LABOR LAW? LESSONS FROM QATAR'S FORCED LABOR CASE

Maayan Menashe[†]

I. INTRODUCTION

How has the International Labour Organization (ILO) been adapting its regulatory apparatus for transnational labor law enforcement–and how might this regime further evolve to address its pressing contemporary challenges? Inquiries into institutional change in international organizations are not new in legal scholarship, including in the field of international labor law.[1] Yet the question on the right evolutionary path for the ILO remains highly contested. Philip Alston, for example, identified a shift in the ILO's traditional enforcement mechanisms towards a "decentralized and voluntarist system" over a decade ago. These changes have been criticized in light of their "emphasis on soft promotional techniques" where the ILO "remains only nominally at centre stage."[2] Other scholars, on the other hand, have criticized the efficacy of the "traditional" enforcement activities of the ILO, viewed as a mere form of "public shaming."[3] While views have been divided on how exactly the ILO should perform its mission, they all stress that its current enforcement model is in need of reform. Today, as this century-old organization cultivates its future role in an ever-changing global labor regulatory sphere,[4] a reassessment of this enduring debate is as timely as ever. Indeed, while the ILO "has a rich history of reinventing itself in response to shifts in global labor

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1. Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649 (2006); Tonia Novitz, *Past and Future Work at the International Labour Organization: Labour as a Fictitious Commodity, Countermovement and Sustainability,* 17 INT'L ORGS. L. REV. 10, 16–28 (2020).

2. Philip Alston, *'Core Labour Standards' and the Transformation of the International Labour Rights Regime*, 15 EUR. J. INT'L L. 457, 458, 517 (2004).

3. *See, e.g.,* Brian A Langille, *Core Labour Rights – The True Story (Reply to Alston)*, 16 EUR. J. INT'L L. 409, 413, 420 (2005).

4. *See, e.g.,* Adelle Blackett & Laurence R. Helfer, *Introduction to the Symposium on Transnational Futures of International Labor Law*, 113 AJIL UNBOUND 385 (2019); Franz Christian Ebert & Tonia Novitz, *Introduction: International Institutions, Public Governance and Future Regulation of Work: Taking Stock at the International Labour Organization's Centenary*, 17 INT'L ORGS. L. REV. 1 (2020).

conditions," it is now grappling with profound challenges to its effective action.[5] In particular, research nowadays increasingly acknowledges that in light of the limitations of the ILO's enforcement capacities, it should "make a more imaginative and efficient use of the persuasive tools at its disposal,"[6] and adopt incentive-compatible enforcement measures.[7]

Tackling these issues, this article points to a new transformation in the international labor rights' supervisory and enforcement regime. It employs institutional and economic theory combined with insights from the French "economics of convention" school to analyze the work of the ILO's supervisory system and its technical cooperation projects in recent years. Through this unique law and economics lens, the article explores the emergence of a powerful new enforcement model for international labor law.

More specifically, the article applies the economic concept of linkage along with signaling theory, to show how the ILO can use its technical cooperation activities as a linkage facilitator, in a way that induces real change in countries' behavior. These activities have the potential to establish a linkage between countries' compliance with international labor standards and the reputational benefits they acquire from being considered as countries who are complying with international labor standards. The participation in technical cooperation programs can be seen as a credible signal that improves countries' reputation on this matter. By linking this reputational benefit to a set of labor rights commitments, the ILO can create powerful incentives for countries to comply with international labor standards.

The article then demonstrates and refines this broader framework through an in-depth analysis of the recent efforts of the ILO to eradicate forced labor in Qatar. Qatar's laws and practices have facilitated some severe forced labor violations, especially due to its exploitative sponsorship system, the "Kafala." The sponsorship system regulated (at least up to September 2020) the visa and legal residency status of migrant workers in Qatar and is widely considered as a major contributing factor to the conditions of forced labor affecting migrant workers in the country. For a period of a decade, the ILO's supervisory system was engaged in unsuccessful proceedings to bring the country into compliance with the Forced Labour Convention of 1930.

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5. Laurence R. Helfer, *The ILO at 100: Institutional Innovation in an Era of Populism*, 113 AJIL UNBOUND 396, 396 (2019).

6. FRANCIS MAUPAIN, THE FUTURE OF THE INTERNATIONAL LABOUR ORGANIZATION IN THE GLOBAL ECONOMY 243 (2013).

7. Alan Hyde, *The ILO in the Stag Hunt for Global Labor Rights*, 3 LAW & ETHICS HUM. RIGHTS 154, 175 (2009); Brian Langille, *'Hard Law Makes Bad Cases': The International Labour Organization (Nervously) Confronts New Governance Institutions*, 32 INT'L J. COMP. LAB. L. & INDUS. REL. 407, 411 (2016).

However, facing international backlash after being chosen as host of the 2022 World Cup event, Qatar agreed to take part in a much-publicized technical cooperation project with the ILO. As part of this cooperation, Qatar will work with the ILO to align its laws and practices with international labor standards. The project commenced in November 2017 and was later extended to its 'second phase' until the end of 2023.[8]

The article's analysis finds that while Qatar had been initially uninfluenced by the supervisory system's efforts, the ILO's technical cooperation project in the country was able to facilitate some important achievements in the labor rights issues included in its scope. As such, important progress was made in the area of forced labor and towards the effective dismantling of the country's sponsorship system. Yet when it came to international labor rights that were not included in the project, namely freedom of association and non-discrimination, the country's violations remained in place during this time. These results shed light on the potential merits of facilitating the suggested kind of linkage through technical cooperation. At the same time, the fact that Qatar is still engaged in serious labor rights violations points to the inevitable limits of such a regulatory approach. The article explores the possible consequences of the omission of these labor rights violations from the scope of the technical cooperation project. The application of signaling theory to this case suggests that if technical cooperation projects do not require a certain minimum level of labor rights' commitments from participating countries, over time, this will lead to the diminishing effects of their reputational signaling. The implications are rather counter-intuitive: by not requiring enough commitments from participating countries, in the long-term, these projects can lose part of their appeal for countries to participate in them in the first place.

Ultimately, through the empirical investigation of the ILO's proceedings in Qatar, the analysis contributes to the ongoing academic debate on the role of the ILO's supervisory system. While this system has been heavily criticized as not having "real enforcement power"[9] and in "crisis,"[10] the study advances our understanding on how it promotes labor rights compliance

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8. Recently, the ILO and the Government of Qatar signed an agreement to extend their technical cooperation program for another four years. *See ILO and Qatar Sign New 4-Year Programme to Advance Labour Reforms*, INT'L LAB. ORG. (Mar. 4, 2024), https://www.ilo.org/resource/news/ilo-and-qatar-sign-new-4-year-programme-advance-labour-reforms.

9. Langille, *supra* note 3, at 423.

10. Philip Alston, *Facing Up to the Complexities of the ILO's Core Labour Standards Agenda*, 16 EUR. J. INT'L L. 467, 472 (2005); Francis Maupain, *The ILO Regular Supervisory System: A Model in Crisis*, 10 INT'L ORG. L. REV. 117 (2013); Lee Swepston, *Crisis in the ILO Supervisory System: Dispute over the Right to Strik*e, 29 INT'L J. COMP. LAB. L. & INDUS. REL. 199 (2013); Claire La Hovary, *A Challenging Ménage À Trois? Tripartism in the International Labour Organization*, 12 INT'L ORG. L. REV. 204, 226–33 (2015).

through means which are beyond formal or "hard" enforcement. The informational role of the supervisory system is an issue that has been previously touched upon by scholars.[11] Recognizing that information is important, this case study refines existing literature by drawing on the French "economics of convention" approach to show how evaluation and learning are also at the heart of the role of the supervisory system. Building on these three themes (information, evaluation, and learning), the analysis sheds light on how the supervisory system serves as what can be termed a "normative authority" in issues of labor rights' compliance; coordinating expectations and behavior of actors through the articulation of shared values. In addition, this case shows how the supervisory system supported ILO efforts in Qatar by enabling it to send effective "signals" on its labor rights compliance. The supervisory system provided the normative "framing" through which to assess Qatar's reforms, operating as a powerful tool to make its signaling more credible. These reputational signals served as an incentive to undergo the labor law reforms as part of the technical cooperation project. In that sense, by providing reliable evaluation of countries' behavior, the supervisory system can efficiently support various 'external' regulatory efforts where certain benefits are linked to countries' compliance. The high standards associated with the work of this system, not only holds countries to an adequate standard of behavior, but it also enhances the reputational signals countries can benefit from, making it more appealing for them to comply with its guidance. These insights hold implications wider than the current example of technical cooperation projects, as these virtues of the supervisory system can be beneficial for essentially any type of labor rights' compliance initiative.

In addition, this analysis demonstrates how the ILO can harness "external" pressures deriving from numerous regulatory initiatives and dispersed actors towards meaningful labor law reforms in violating countries. It has been acknowledged that one of the ILO's major challenges and causes of inefficiency is its inability to "resonate in the wider world" and mobilize "efforts of a broader range of civil society actors."[12] Indeed, the contemporary arena in which the ILO is operating and in which it has to find its place is comprised with influential public and private transnational actors. The ILO must find ways to "create space for an unlikely but necessary assemblage" of these actors.[13] The article shows how the ILO can work along with and

11. *See, e.g.,* Laurence R. Helfer, *Monitoring Compliance with Unratified Treaties: The ILO Experience*, 71 LAW & CONTEMP. PROBS. 193, 216 (2008); Anne Trebilcock, *Setting the Record Straight about International Labor Standard Setting*, 31 COMP. LABOR L. & POL. J. 101, 111 (2010).

12. Helfer, *supra* note 5, at 400.

13. Blackett & Helfer, *supra* note 4, at 389.

effectively utilize these powerful forces as part of its strategic mission. Moreover, a well-known problem when thinking of these "external" forces as instigators for regulatory change is that they are often sporadic and can even be arbitrary. In response, the article draws a path through which the ILO can potentially channel the diverse pressures exerted by external transnational actors towards a higher-level and more holistic strategy for the promotion of international labor rights. Through these processes, it is argued, the ILO can regain influence in the design and management of an increasingly polycentric global labor regulatory sphere.

The article is structured as follows: Section II presents the study's argument on the possible emergence of a new, incentive-compatible, enforcement model for the ILO. Section III tests out how the suggested enforcement model applies in practice to the Qatari technical cooperation with the ILO. Then, section IV broadens the discussion and considers the possible implications of this analysis for the ILO's enforcement and supervision activities. Through the lens of the Qatari case, it proposes a particular understanding of how the supervisory system works most efficiently, and accordingly of how its function should be understood. It also sketches a renewed role for the ILO in the contemporary arena of global labor governance. Finally, this section assesses the limitations of the envisioned model and, more generally, the limits of the normative capacity of the ILO's enforcement model in transforming existing social practices and perceptions. Section V concludes.

II. THE EMERGENCE OF A NEW ENFORCEMENT MODEL? AN INSTITUTIONAL LINKAGE AND SIGNALING THEORY FRAMEWORK

This section will explore the emergence of a new enforcement model for the ILO, one in which its technical cooperation activities are harnessed as linkage facilitators, in a way which incentivizes countries to comply with international labor standards. From an institutional economics point of view, the concept of institutional linkages refers to the interaction of social, political, economic, or organizational factors across different domains in a particular complementary manner. When domains are linked, the gains derived in one can be transferred to another, and thus help to sustain a specific strategy involving both. This way, the overall payoffs gained can be higher than in a situation where strategies are chosen separately in each domain. Such institutional linkages therefore expand equilibrium possibilities, making it

feasible to engage in more beneficial institutional arrangements.[14] Crucially, such linkages can be used as means of enforcement, incentivizing actors to follow socially desirable arrangements by tying their compliance to consequences in different matters.[15]

This ability of linkages to enforce particular arrangements has also been considered in relation to countries' compliance with international law. According to rational choice theories, countries will comply with international agreements when the benefits of compliance outweigh the costs.[16] When making such cost-benefit calculations, governments often follow their "myopic self-interest," that is, they consider the short-term outcomes of a particular decision in isolation from other issues. Such a tendency might lead countries to violate international commitments in particular incidents where they believe that the benefits are justifiable. However, the linking of issues to one another can serve as a possible solution. Namely, international institutions can create such linkage where countries' compliance with a given obligation will bear consequences in a different realm. The additional implication of the violation of the agreement can incentivize countries to resist their narrow self-interests in favor of other positive benefits. Compliance then becomes a rational move.[17]

Previous research has pointed to the benefits of using linkages specifically as a response to circumstances where central enforcement is weak or absent. Oona Hathaway refers to "collateral consequences" of treaty membership as "the anticipated consequences for, among other things, foreign aid and investment, trade, and domestic political support."[18] According to her argument, the linkage of these consequences to states' compliance with international law may incentivize states to comply with their legal commitments, even in situations where they would prefer not to.[19] As Hathaway argues: "[c]ountries' concerns for their reputations and for aid, trade, and other benefits that are sometimes linked to treaty commitment and compliance can be used more effectively than they currently are to strengthen the influence of international law."[20]

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14. Masahiko Aoki, *Endogenizing Institutions and Institutional Changes*, 3 J. INSTITUTIONAL ECON. 1, 14–18 (2007).

15. *Id.* at 15; MASAHIKO AOKI, CORPORATIONS IN EVOLVING DIVERSITY: COGNITION, GOVERNANCE, AND INSTITUTIONAL RULES 97–99 (2010).

16. ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW 59 (2014).

17. ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 121–27 (1st ed. 2005).

18. Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 502 (2005).

19. *Id.* at 504–506.

20. *Id.* at 533.

Insights from the literature on linkages can serve as a useful framework to understand, and to possibly shape, ILO technical cooperation activities. Technical cooperation, or "development cooperation," refers to the ILO's country-level practical assistance in the application of international labor standards. It "supports the technical, organizational and institutional capacity of ILO constituents . . . to facilitate meaningful and coherent social policy and sustainable development."[21] The claim put forward is that technical cooperation activities can establish a linkage between on the one hand, adherence to international labor standards and on the other hand, the contribution to countries' reputation. This is considering two central features of these activities. First, technical cooperation, by its nature, assists countries in their compliance' efforts, and promotes their application of ILO conventions[22] and the comments of ILO supervisory bodies.[23] Yet, technical cooperation extends beyond "purely technical aspects"[24] and encompasses innovative approaches to increase their effectiveness.[25] They are designed to be an appealing process; "sensitive and responsive, above all, to . . . national needs"; "capture the changing interests and priorities of the national constituents"; and "serve the[ir] strategic objectives."[26] In addition, of particular relevance is the growing emphasis on the visibility of the results of technical cooperation.[27] This involves "[e]ffective marketing strategies"[28] and includes measures of data accessibility, reporting, transparency and visualization. The idea is that "[u]sing ILO communication systems and providing such information in the public domain contributes to greater awareness and appreciation of decent work outcomes."[29] These efforts to publicize countries' progress, naturally lead to an improved image of their labor rights record.

Accordingly, in addition to their typical role in assisting countries to comply with international labor standards, a second usage of technical cooperation activities can be identified. It is argued that technical cooperation

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21. ILO, DEVELOPMENT COOPERATION INTERNAL GOVERNANCE MANUAL 8 (2015).

22. ILO, THE ROLE OF THE ILO IN TECHNICAL COOPERATION: PROMOTING DECENT WORK THROUGH FIELD AND COUNTRY PROGRAMMES 6, 17, 54 (2006).

23. ILO, IMPROVING THE IMPACT OF INTERNATIONAL LABOUR STANDARDS THROUGH TECHNICAL COOPERATION – A PRACTICE GUIDE 14 (2008).

24. DEVELOPMENT COOPERATION INTERNAL GOVERNANCE MANUAL*, supra* note 21, at 9.

25. THE ROLE OF THE ILO IN TECHNICAL COOPERATION*, supra* note 22, at 5.

26. International Labour Conference, 87th Sess., *Conclusions Concerning the Role of the ILO in Technical Cooperation*, ¶¶ 14–15 (1999). *See also* THE ROLE OF THE ILO IN TECHNICAL COOPERATION*, supra* note 22, at 3.

27. THE ROLE OF THE ILO IN TECHNICAL COOPERATION*, supra* note 22, at 4; ILO Governing Body, 325th Sess., GB.325/POL/6, 2, 9, (Nov. 12, 2015).

28. *Conclusions Concerning the Role of the ILO in Technical Cooperation*, *supra* note 26, ¶ 6.

29. ILO Governing Body, 325th Sess., GB.325/POL/6, *supra* note 27, at 7.

activities provide countries with a particular benefit: the positive reputation they obtain as countries that are compliant with international labor standards. Through such positive reputation, countries can gain better access to an array of "external" benefits, such as trade, investments, and international acceptance. The ILO holds a central role in the granting of such positive reputation, as it is in a position to "label" countries as complying with labor standards or infringing them. This is in light of the ILO's expertise and legitimacy, as well as its unique capacity to monitor and evaluate countries' compliance through the work of its supervisory system. In particular, when the ILO is engaged in technical cooperation, procedures through which countries acquire good reputation in terms of their labor law compliance are facilitated. This is reinforced by the practical involvement of the ILO in assisting countries with their compliance endeavors, and by the efforts the ILO is making in publicizing technical cooperation projects.[30]

Case studies which analyze the ILO's technical cooperation projects demonstrate the reputational benefit that countries gain from these activities. Adelle Blackett, for example, examines the ILO's technical cooperation involvement in a labor law reform in West and Central African countries part of the Organization for the Harmonization of Business Law in Africa ("OHADA"). The idea was to engender a regional harmonization of their laws in order to provide stability for investors.[31] As Blackett assesses, these efforts were "intentionally designed to contrast with the perception of the degree of difficulty for those interested in 'doing business' on the ground."[32] It is thus understood that by seeking the technical assistance of the ILO in these reforms, states sought to acquire a positive reputation for investments in these countries.

The reputational benefit countries gain from technical cooperation is also apparent in Colin Fenwick's study on labor law reforms. Among these, Fenwick describes the ILO's support to the operation of the Better Factories Cambodia program. According to this program, the United States would increase Cambodia's export quotas if the relevant factories "substantially" complied with fundamental labor standards, but without determining how this clause should be implemented.[33] This means that the additional quotas

30. On the importance of information for countries' reputation, *see, e.g.,* Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L.J. 231, 235, 244 (2009).

31. Adelle Blackett, *Beyond Standard Setting: A Study of ILO Technical Cooperation on Regional Labor Law Reform in West and Central Africa*, 32 COMP. LAB. L. & POL. J. 443, 455 (2011).

32. *Id.* at 445.

33. Colin Fenwick, *The ILO and National Labour Law Reform: Six Case Studies*, *in* LABOUR REGULATION AND DEVELOPMENT: SOCIO-LEGAL PERSPECTIVES 235, 241 (Shelley Marshall & Colin Fenwick eds., 2016).

were to be granted essentially on a discretional basis, upon the assessment of the US that this condition has been met. In other words, we can say that Cambodia would enjoy these trade benefits if it had, in the eyes of the US, sufficient reputation on labor law compliance. In these circumstances, the ILO's assistance in establishing a "credible" monitoring system[34] and in appeasing the US' concerns that the country's labor adjudication system was indeed independent,[35] can be seen as measure that provided Cambodia with this required reputation.

Likewise, as Fenwick describes, El Salvador faced a similar reputational need: to reassure the US that the country was 'taking steps' to comply with internationally recognized workers' rights, in order not to lose its preferential access under the Generalized System of Preferences ("GSP") trade regime.[36] As this vague condition was to be assessed by the US, the challenge facing El Salvador to improve its image in the eyes of the US can also be seen as a matter concerning the reputation of the country. As a response, the ILO was asked to assist the country in reforming its labor laws, which eventually resulted in El Salvador maintaining its GSP entitlement.[37] By contributing to the assessment that the country is indeed "taking steps" to comply with labor rights, the technical assistance provided by the ILO can be seen again as contributing to the required reputation.

Considering the positive labor rights reputation that countries are gaining by participating in technical cooperation, these programs can be used to create a linkage between such reputational benefits and their commitment to international labor rights. In that sense, the benefits countries derive from technical cooperation can serve as a "carrot" that can mitigate states' reluctance and persuade them to oblige to international labor standards.[38] At present, it is well acknowledged that there is certain "complementary"[39] or

34. *Id.* at 241.
35. *Id.* at 242.
36. *Id.* at 249.
37. *Id.* at 251.
38. Referring to the "mainstreaming" of international labor standards in technical cooperation programs, Tsotroudi and Agustí Panareda describe "an increasing recognition of the ILO's normative mandate as one of its main comparative advantages in the framework of partnerships for development." *See* Katerina Tsotroudi & Jordi Agustí Panareda, *The ILO's Dialogical Standards-Based Approach to International Labour Law*, *in* THE ROLES OF INTERNATIONAL LAW IN DEVELOPMENT 110, 123 (Siobhán McInerney-Lankford & Robert McCorquodale eds., 2023). Indeed, practice demonstrates the ability of technical cooperation to influence towards greater compliance with international labor standards. *See, e.g.,* Isabelle Boivin & Alberto Odero, *The Committee of Experts on the Application of Conventions and Recommendations: Progress Achieved in National Labour Legislation*, 145 INT'L LAB. REV. 207, 211, 219 (2006); Kari Tapiola, *What Happened to International Labour Standards and Human Rights at Work?*, *in* INTERNATIONAL LABOUR ORGANIZATION AND GLOBAL SOCIAL GOVERNANCE 51, 58 (Tarja Halonen & Ulla Liukkunen eds., 2021).
39. THE ROLE OF THE ILO IN TECHNICAL COOPERATION*, supra* note 22, at 54.

"link"[40] between technical cooperation and the ILO's supervisory efforts to tackle violations,[41] yet this is still "not in the sense of introducing conditionality but of offering better targeted support."[42] Moreover, technical cooperation is already a highly significant tool at the ILO's disposal,[43] however, as we shall see, the insights of the current analysis suggest that it might be able to hold even greater potential in the coming future.[44]

This suggested strategy of harnessing reputation to promote compliance is not new to international law scholarship,[45] and it points to the relevance of signaling theory to this case. Signaling is the transmission of information by an actor, through an observable action, taken in order to demonstrate certain qualities it possesses in situations of asymmetrical information.[46] However, a signal will only be effective if it entails a cost that makes this action worthwhile solely for actors that actually possess the inferred qualities.[47] This means that a signal that does not entail a cost renders it difficult for others to distinguish between actors that possess the qualities and those who do not. Signaling theory has been previously applied to relationships between countries. It has been argued, for example, that states can use signaling to convey their reputation for cooperativeness, a reputation they will benefit from in future international relations.[48] For such signaling to be effective, states must show that they are able to resist short-term, non-reputational benefits associated with violations, in favor of future opportunities associated with having

40. ILO, DECENT WORK: REPORT OF THE DIRECTOR-GENERAL 20 (1999).

41. Tsotroudi and Agustí Panareda describe the "increased synergy" between the ILO's promotion of international labor standards and its technical cooperation programs. *See* Tsotroudi and Agustí Panareda, *supra* note 38.

42. DECENT WORK: REPORT OF THE DIRECTOR-GENERAL, *supra* note 40.

43. At of the time of writing, the ILO conducts 701 projects across the world with a total budget of $550.32 million. *See The International Labour Organization in 2024*, INTERNATIONAL LABOUR ORGANIZATION, https://www.ilo.org/DevelopmentCooperationDashboard/ (last visited March 6, 2024).

44. *See* in particular the observations of Tsotroudi and Agustí Panareda on the current challenges and opportunities to the effective integration of international labor standards through technical cooperation: Tsotroudi & Agustí Panareda, *supra* note 38, at 128, 130–35. Relatedly, scholars have commented on the current unrealized potential of technical cooperation projects: Blackett, *supra* note 31, at 485; Alston, *supra* note 10, at 473; MAUPAIN, *supra* note 6, at 252.

45. *See, e.g.,* KEOHANE, *supra* note 17, at 131; Scott Barrett, *International Cooperation and the International Commons*, 10 DUKE ENV'T. L. & POL'Y F. 131, 138–39 (1999); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 426–28 (2000); Andrew T. Guzman, *Reputation and International Law*, 34 GA. J. INT'L & COMP. L. 379 (2006). On the potential limitations of reputation, *see* Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487, 496–99 (1997); George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. 95 (2002); Brewster, *supra* note 30, at 254.

46. Michael Spence, *Job Market Signaling*, 87 Q. J. ECON. 355, 356–58 (1973).

47. *Id.* at 358–59.

48. JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 83, 172–73 (2005).

a good reputation.[49] In particular, it has been argued that international legal commitments[50] and human rights protection[51] serve as a signal to indicate the reputation of the country as protecting property rights, and thus to encourage investments.[52]

Moreover, we see that the notion of a "cost" here is clearly time-sensitive: states incur a cost in the short term in order to signal their intention to move to an equilibrium of long-term benefits. In these circumstances, states are subject to a situation of "time inconsistency." This idea refers to a situation where "the optimal plan of the present moment is generally one which will not be obeyed."[53] In the future, states can reassess their original policies in favor of more short-term preferences. As the relevant actors, such as investors, are aware of this "time inconsistency,"[54] they are less likely to be influenced by the states' policies in the first place. As a response to this problem, states can tie their own hands and "pre-commit" themselves to ensure that their future behavior is consistent with their present policy.[55] That is, states can make credible commitments by employing "institutional arrangements which make it a difficult and time-consuming process to change the policy rules."[56]

We understand then that for a country to send a credible signal on its reputation in labor law compliance, it is necessary to demonstrate a sufficient cost. Countries' compliance with labor standards entails certain short-term costs, such as reduced autonomy to firms and the resulting adjustment costs for states, and therefore meets this requirement. By committing to labor rights compliance through technical cooperation, a country is demonstrating that it is willing to pay this cost, in the short-term, and by that signaling its shift towards a long-sighted view of its labor-market development. Moreover, as the associated costs of these commitments are incurred in the present period, the country prevents future inconsistent behavior on its behalf. This means that compliance-commitments as part of technical cooperation activities can send a credible signal that will improve countries' reputation; these

49. Guzman, *supra* note 45, at 384–86.

50. Beth A. Simmons, *Money and the Law: Why Comply with the Public International Law of Money*, 25 YALE J. INT'L L. 323, 324–25 (2000).

51. Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83 (2002).

52. *Id.* at 88–94.

53. R. H. Strotz, *Myopia and Inconsistency in Dynamic Utility Maximization*, 23 REV. ECON. STUDS. 165, 165 (1955–1956).

54. Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819, 821 (2000).

55. Strotz, *supra* note 53, at 165, 173.

56. Finn E. Kydland & Edward C. Prescott, *Rules Rather than Discretion: The Inconsistency of Optimal Plans*, 85 J. POL. ECON. 473, 487 (1997).

reputational benefits can serve as a leverage for countries to agree to such compliance in the first place.

III. QATAR AND THE 2022 WORLD CUP: A CASE STUDY

A. Qatar's Forced Labor Violations

Concerns over Qatar's policies and how they facilitate forced labor have centered on the treatment of the large population of migrant workers in the country.[57] Perhaps the most notorious policy was Qatar's sponsorship system, the "Kafala," which required that employers act as visa sponsors to migrant workers.[58] Under this system, employers controlled the ability of migrant workers to reside in the country; and workers were not able to change jobs, leave their jobs or leave the country without the employers' permission. Moreover, because employers arrange their workers' resident permits, this enabled them to confiscate passports or leave workers undocumented.[59] For this type of arrangement to be considered as "forced or compulsory labour" according to the Forced Labour Convention, it should meet its definition of work which is exacted "under the menace of any penalty and for which the said person has not offered himself voluntarily."[60] But this is an issue that cannot be determined across-the-board. As Hila Shamir observes, while temporary migrant worker programs "do indeed inherently and necessarily limit migrant workers' market mobility and bargaining power to some extent, the degree of harmfulness of these limits and restrictions is contingent on the wider context of employment and labor market practices."[61] Roger Plant similarly notes in this regard that "it can be difficult to draw hard and fast distinctions between lawful and unlawful practices."[62] In these circumstances,

57. *See generally* ILO Governing Body, 320th Sess., GB.320/INS/14/8, ¶¶ 44–58 (Mar. 27, 2014).

58. For critical assessments, more generally, of the kafala (sponsorship) system of the Persian Gulf states, *see, e.g.,* Azfar Khan & Hélène Harroff-Tavel, *Reforming the Kafala: Challenges and Opportunities in Moving Forward*, 20 ASIAN PAC. MIGRATION J. 293 (2011); Heather E. Murray, *Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries*, 45 CORNELL INT'L J. 461 (2012).

59. ILO Governing Body, 320th Sess., *supra* note 57, ¶¶ 49–54.

60. International Labour Organization, Forced Labour Convention art. 2(1), June 28, 1930, No. 29.

61. Hila Shamir, *The Paradox of "Legality": Temporary Migrant Worker Programs and Vulnerability to Trafficking*, *in* REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 471, 493 (Prabha Kotiswaran ed., 2017).

62. Roger Plant, *Combating Trafficking for Labour Exploitation in the Global Economy: The Need for a Differentiated Approach*, *in* REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY, *supra* note 61, at 436.

the ILO supervisory system plays a critical role in identifying whether particular arrangements constitute forced labor.[63]

How then did the supervisory system assess the arrangements of Qatar's sponsorship system? Its Committee of Experts on the Application of Conventions and Recommendations ("CEACR") had expressed concerns over this system as early as 2008. Under the relevant legislation at the time, migrant workers could change their employer without its consent only if they obtain a governmental approval. In addition, the law provides for the deportation of migrant workers in a number of cases and their mandatory stay in certain areas for a period of two weeks, which is renewable; procedures which employers were abusing against workers. After assessing these provisions, the CEACR expressed its concern regarding the "disproportionate power" employers can exert on migrant workers and asked the government to provide information on legislative steps taken on this matter.[64]

Qatar replaced this arrangement in a 2009 legislation, but did not make it easier for migrant workers to change employers. Again, consent was required from the current and future employer or, in certain cases, from the government. In addition, the law prevented migrant workers from leaving the country without the employer's permission. The CEACR expressed its concern for both limitations in a 2012 Observation, and called on the government, among other things, to provide information on measures that would allow for appropriate flexibility in changing sponsors.[65]

In 2013, the sponsorship system became the subject of a representation under Article 24 of the ILO Constitution, made by the International Trade Union Confederation ("ITUC") and the Building and Woodworkers International ("BWI"). This led to the appointment of an ILO tripartite committee to examine the forced labor allegations. In a 2014 report, the Committee noted that Qatar's arrangements "make it difficult for workers who may be facing abusive situations to leave."[66] For example, workers could leave the country without the employers' consent only after publishing a notice in two daily newspapers.[67] And, workers who left their job without permission may be detained, deported, fined or face criminal charges.[68] Given these

63. Lee Swepston, *Trafficking and Forced Labour: Filling in the Gaps with the Adoption of the Supplementary ILO Standards, 2014*, *in* REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY, *supra* note 61, at 396.

64. International Labour Conference, 98th Sess., *Report of the Committee of Experts on the Application of Conventions and Recommendations: Report III (Part 1A)*, at 407–08 (2009).

65. International Labour Conference, 101st Sess., *Report of the Committee of Experts on the Application of Conventions and Recommendations: Report III (Part 1A)*, at 559 (2012).

66. ILO Governing Body, 320th Sess., *supra* note 57, ¶ 54.

67. *Id.*, ¶ 50.

68. *Id.*, ¶ 61.

disproportionate restrictions, the committee concluded that "certain migrant workers in the country may find themselves in situations prohibited by the [Forced Labour] Convention."[69] The committee considered that the government must "suppress the use of forced labour" and in particular "review without delay the functioning of the sponsorship system."[70]

The government seemed responsive to these comments, stating in a 2014 discussion before the ILO's Conference Committee on the Application of Standards ("CAS"), that it was "considering the review of the sponsorship system."[71] The government then declared that it has taken these comments into account when preparing a draft for a new bill that would repeal the sponsorship system.[72] However, according to this draft, workers would be permitted to change employers without their consent only after a fixed-term contract expires or, in the case of contracts of unlimited duration, after five years.[73] The possibility of also applying to the government for a release was later added.[74] We see then, that despite the government's statements, these arrangements still set significant limitations on the ability of migrant workers to leave their employer. Employers could, for instance, replace existing fixed-term contracts with new contracts of an unlimited duration, and by that tie their workers for a period of five years.[75] Moreover, with no limitation to the duration of fixed-term contracts, employees could be tied to their employer for even longer periods of time.[76] And, practice shows that the release of a worker through a petition to the government only happens infrequently.[77] In addition, the bill does not address the restrictions on migrant workers' ability to leave the country. In light of these limitations, the CEACR expressed the need for the new legislation to both ease the conditions of leaving an employer and amend the exit visa requirement.[78] The provisions of this draft bill were discussed again in 2015, when the CAS urged the government to completely abolish the sponsorship system.[79]

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69. *Id.*, ¶ 62.

70. *Id.*, ¶¶ 63–65.

71. International Labour Conference, 103rd Sess., *Conference Committee on the Application of Standards: Extracts from the Record of Proceedings*, at 13 Part II/47 (2014).

72. International Labour Conference, 104th Sess., *Report of the Committee of Experts on the Application of Conventions and Recommendations: Report III (Part 1A)*, at 168 (2015).

73. *Id.*

74. ILO Governing Body, 323rd Sess., GB.323/INS/8(Rev.1), at 8 (Mar. 27, 2015).

75. ILO Governing Body, 329th Sess., GB.329/PV, ¶ 247 (Mar. 24, 2017).

76. International Labour Conference, 106th Sess., *Report of the Committee of Experts on the Application of Conventions and Recommendations: Report III (Part 1A)*, at 223 (2017).

77. International Labour Conference, 105th Sess., *Report of the Committee of Experts on the Application of Conventions and Recommendations: Report III (Part 1A)*, at 210 (2016).

78. Report of the Committee of Experts, 104th Sess., *supra* note 72, at 168.

79. International Labour Conference, 104th Sess., *Conference Committee on the Application of Standards: Extracts from the Record of Proceedings*, at 14 Part II/25 (2015).

Amidst these developments, a complaint under Article 26 of the ILO Constitution was initiated in 2014 over the same problematic policies.[80] In response, an ILO high-level tripartite mission to Qatar was undertaken in 2015. The mission concluded that despite recent measures taken by the government, numerous challenges remained.[81] Accordingly, the ILO's Governing Body expressed its "concern regarding the gravity of the issues raised" and the urgency for the Government to address them.[82] And, while Qatar was requested to take further action, the decision on whether to set up a Commission of Inquiry was postponed.[83]

Later that year, Qatar adopted a new legislation, stating again that this replaces the sponsorship system.[84] It positioned that by enacting this law, "[a]ll the requests made of Qatar in connection with the complaint had been met."[85] Later on, the government declared in a discussion before the CAS that "there was no doubt that it had abolished the sponsorship system."[86] Despite these assertions, this law did not make substantial modifications to workers' ability to change employers. And, while the law provided for migrant workers to leave the country without the prior approval of their employer, this was allowed only following a governmental approval, and in this case, employers may still object to this departure. Moreover, under this law, employers remained responsible for dealing with workers' passports and issuing their residency permits.[87] The CEACR accordingly requested the government to modify the law "as a matter of urgency." The required amendments that the CEACR listed on these matters were an exact repetition of the amendments it had listed one year before;[88] emphasizing that no real progress had been made. As the CEACR later noted, "the new law does not abolish the sponsorship system, as indicated in the Government's report."[89] These requested amendments were also ignored the following year.[90] Moreover, although the CAS urged the government to amend this new law before it comes into force,[91] the law entered into force in 2016 in its original form.[92]

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80. ILO Governing Body, 322nd Sess., GB.322/INS/14/1, at 5–7 (Nov. 13, 2014).
81. ILO Governing Body, 323rd Sess., GB.323/INS/8(Rev.1), *supra* note 74, at 29.
82. *Id.*, ¶ 7.
83. ILO Governing Body, 323rd Sess., GB.323/PV, ¶ 149 (Mar. 27, 2015).
84. ILO Governing Body, 325th Sess., GB.325/INS/10(Rev.), ¶ 9 (Nov. 12, 2015).
85. ILO Governing Body, 325th Sess., GB.325/PV, ¶ 171 (Nov. 12, 2015).
86. International Labour Conference, 105th Sess., *Conference Committee on the Application of Standards: Extracts from the Record of Proceedings*, at 16 Part II/137 (2016).
87. Report of the Committee of Experts, 105th Sess., *supra* note 77, at 210–11.
88. *Id.* at 211.
89. *Id.* at 344.
90. Report of the Committee of Experts, 106th Sess., *supra* note 76, at 224.
91. Conference Committee, 105th Sess., *supra* note 86, at 16 Part II/145.
92. ILO Governing Body, 329th Sess., GB.329/INS/14(Rev.), at 3 (Mar. 24, 2017).

Qatar responded to CEACR's requests by amending its law in early 2017. This amendment relates to the possibility of migrant workers exiting the country, and it removes the previous requirement of notifying the governmental authority prior to each trip. The government declared that by this new amendment it "has repealed the exit permit" and that leaving the country has now became "a worker's intrinsic right."[93] However, according to the amended law, workers must still notify their employer before every departure from the country, and the employer still has a right to object.[94] Hence, no real change was made with regard to the employers' control over workers' ability to leave the country; nor on their ability to change jobs.[95]

Ultimately, throughout the ILO proceedings taking place between 2008–2017 no meaningful progress was made with Qatar's policies facilitating forced labor. During this time, the Governing Body continuously postponed the decision on setting up a Commission of Inquiry,[96] while also repeatedly requesting Qatar to avail itself of ILO technical assistance to address its violations.[97] The ILO's efforts to establish a technical cooperation project in Qatar advanced in February 2017, with a visit to Doha from the Organization's technical delegation.[98] This was followed by three additional rounds of discussions between July and October 2017. Eventually, on October 31, 2017, an agreement on a three-year technical cooperation program was concluded between the ILO and Qatar.[99] The agreement, which was subsequently extended,[100] includes five areas of action: wage protection; labor inspection and occupational safety and health; replacing the kafala system; forced labor; and promoting workers' voice.[101] As part of this agreement, Qatar expressed a commitment to align its laws and practices with

93. *Id.* at 3, 7.

94. ILO Governing Body, 329th Sess., GB.329/PV, *supra* note 75, ¶ 248.

95. ILO Governing Body, 329th Sess., GB.329/INS/14(Rev.), *supra* note 92, at 3.

96. ILO Governing Body, 325th Sess., GB.325/INS/10(Rev.), *supra* note 84, ¶ 10; ILO Governing Body, 326th Sess., GB.326/INS/8(Rev.), ¶ 11 (Mar. 24, 2016); ILO Governing Body, 329th Sess., GB.329/INS/14(Rev.), *supra* note 92, ¶ 3.

97. ILO Governing Body, 320th Sess., *supra* note 57, ¶¶ 64–65; ILO Governing Body, 325th Sess., GB.325/INS/10(Rev.), *supra* note 84, ¶ 10; ILO Governing Body, 328th Sess., GB.328/INS/11(Rev.), ¶ 13 (Nov. 10, 2016); ILO Governing Body, 329th Sess., GB.329/INS/14(Rev.), *supra* note 92, ¶ 3.

98. ILO Governing Body, 329th Sess., GB.329/INS/14(Rev.), *supra* note 92, at 25.

99. ILO Governing Body, 331st Sess., GB.331/INS/13(Rev.), ¶ 3 (Nov. 9, 2017).

100. The initial three-years period of the project was extended until June 2021, following which the ILO and Qatar agreed to continue the cooperation through a "second phase," which ran until December 2023. *See* INTERNATIONAL LABOUR ORGANIZATION, BRIEFING NOTE 4 (February 2023), https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/---ilo-qatar/documents/briefingnote/wcms_868345.pdf. As aforementioned, a further extension was recently agreed on until 2028.

101. ILO Governing Body, 331st Sess., *supra* note 99, at 31–32.

international labor standards and principles.[102] The Governing Body subsequently closed the complaint procedure under article 26.[103]

B. Qatar's Technical Cooperation as a Linkage Facilitator

This section moves on to the period following the commencement of the technical cooperation project in Qatar. It tests how the study's linkage proposal applies to this case by exploring the two "linked" components: the reputational benefits Qatar gained from the project; and the compliance commitments that were achieved as result.

1. Technical Cooperation as a Reputational Signal

In recent years, Qatar has been on a quest to increase its soft power on the global stage. Its dependency on rentier income derived from its natural resources,[104] has compelled the country to diversify its economy and attract investments.[105] Qatar is also a geographically small country, surrounded by large and powerful states in the Persian Gulf and Middle East.[106] These factors, among other things, have led the country to adopt foreign policy measures aimed at enhancing its regional and international influence and attractiveness, including an "aggressive global campaign of branding."[107] Such efforts became all the more critical during Qatar's regional isolation from June 2017 till January 2021. At this time, a United Arab Emirates-Saudi led coalition imposed an economic and diplomatic boycott on Qatar as a response to its alleged support for terrorism and its relations with Iran.[108] It has been argued that Qatar addressed this situation by employing public diplomacy as a strategic communication tool,[109] by projecting "shared ideas, identities, values and interests of Qatar to the international community."[110]

It is in this context that Qatar's hosting of the 2022 World Cup has been described as a "reputation-promoting message,"[111] and a "signal" on the

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102. *Id.*, ¶ 4.
103. *Id.*, ¶ 5.
104. MEHRAN KAMRAVA, QATAR: SMALL STATE, BIG POLITICS 10, 142–43 (2013).
105. Paul Michael Brannagan & Richard Giulianotti, *The Soft Power–Soft Disempowerment Nexus: The Case of Qatar*, 94 INT'L AFF. 1139, 1149 (2018).
106. KAMRAVA, *supra* note 104, at 5, 48.
107. *Id.* at 48, 66.
108. Andreas Krieg, *Introduction*, *in* DIVIDED GULF: THE ANATOMY OF A CRISIS 1, 4 (Andreas Krieg ed., 2019).
109. Hamad Al-Muftah, *Qatar's Response to the Crisis: Public Diplomacy as a Means of Crisis Management*, *in* DIVIDED GULF: THE ANATOMY OF A CRISIS , *supra* note 108, at 234.
110. *Id.* at 250.
111. Brannagan & Giulianotti, *supra* note 105, at 1146.

country's qualities.[112] Qatar's administrative body that manages the hosting of the event, states that it "has always understood legacy as the most important outcome."[113] It also noted its aspiration that this will contribute to Qatar's reputation as a "stable investment opportunity"[114] and "a regional and global leader in events hosting."[115] Qatari authorities have also referred to the hosting of the World Cup as a means to improve the negative image of the country in the eye of the West.[116]

Despite these aspirations, Qatar's successful bid to host the 2022 World Cup had an opposite effect on the country's reputation. The spotlight suddenly put on Qatar has led to a great deal of negative press, primarily concerning its human and labor rights violations.[117] The Guardian, for example, reported in September 2013 on its investigation of Qatar's preparations for the World Cup. Under the headline of "Revealed: Qatar's World Cup 'slaves'" it reported largescale abuse and exploitation of migrant workers.[118] The following day, it reported that ITUC estimates that "about 12 labourers will die each week unless action is taken" and that the World Cup's construction in Qatar "will leave 4,000 migrant workers dead."[119] Similarly, Qatar was facing ongoing negative statements, reports and campaigns by

112. J Jonathan Grix & Paul Michael Brannagan, *Of Mechanisms and Myths: Conceptualising States' "Soft Power" Strategies through Sports Mega-Events*, 27 DIPL. & STATECRAFT 251, 265 (2016).

113. SUPREME COMMITTEE FOR DELIVERY & LEGACY, LEGACY BOOK 7, https://www.workerswelfare.qa/sites/default/files/docs/SC-Legacy-Book-EN.pdf (last visited Aug. 20, 2023).

114. *Id.* at 20.

115. *Id.* at 30.

116. P Paul Michael Brannagan & Richard Giulianotti, *Soft Power and Soft Disempowerment: Qatar, Global Sport and Football's 2022 World Cup Finals*, 34 LEISURE STUD. 703, 711 (2015).

117. *Id.* at 714.

118. Pete Pattisson, *Revealed: Qatar's World Cup 'Slaves'*, GUARDIAN (Sept. 25, 2013), https://www.theguardian.com/world/2013/sep/25/revealed-qatars-world-cup-slaves.

119. Robert Booth, *Qatar World Cup Construction 'Will Leave 4,000 Migrant Workers Dead',* GUARDIAN (Sept. 26, 2013), https://www.theguardian.com/global-development/2013/sep/26/qatar-world-cup-migrant-workers-dead.

newspapers,[120] NGO's,[121] global union federation,[122] and human rights bodies.[123] These highlighted the exploitative working conditions of migrant workers, describing in particular issues of freedom of movement and forced labor, delayed or non-payment of wages and safety and health violations. From 2015 till 2017 there was also a dispute against FIFA regarding these issues, held before the National Contact Point (NCP) of Switzerland, under the OECD Guidelines for Multinational Enterprises.[124] Following the mediation process in this dispute,[125] and in light of the general backlash from the Qatari World Cup controversy, FIFA responded, among other things, by adopting a Human Rights Policy[126] and reforming its bidding requirements for hosting countries to include, for the first time, human and labor rights conditions.[127] Ultimately, Qatar was put in a position where it was relatively responsive to calls for change.[128]

These developments contextualize the understanding of the ILO's technical cooperation project as holding significant signaling properties, and that is meant to improve its reputation[129] and appease the global protests on this

120. *See, e.g., Qatar*, GUARDIAN, https://www.theguardian.com/world/qatar (last visited Mar. 6, 2024).

121. *See, e.g., Qatar*, AMNESTY INT'L, https://www.amnesty.org/en/countries/middle-east-and-north-africa/qatar/ (last visited Mar. 6, 2024); *Qatar*, HUM. RTS. WATCH, https://www.hrw.org/middle-east/n-africa/qatar (last visited Mar. 6, 2024).

122. The ITUC, for example, launched a campaign to "re-run the vote" on the hosting of the 2022 World Cup. *See Re-Run the Vote: No World Cup without Workers' Rights*, ITUC, https://www.rerunthevote.org (last visited Oct. 31, 2019). This website has since been removed, which reflects the shift in the ITUC's approach towards Qatar, as will be further discussed below. Another example is the BWI's submission of a "Specific Instance" complaint to the National Contact Point of Switzerland, under the OECD Guidelines for Multinational Enterprises, regarding human and labor rights violations by FIFA related to the construction of facilities for the World Cup in Qatar. For an overview of the procedure, *see Fédération Internationale de Football Association (FIFA) and Building and Wood Workers International (BWI)*, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, https://mneguidelines.oecd.org/database/instances/ch0013.htm (last visited Mar. 6, 2024).

123. *See, e.g., Qatar*, THE OFF. OF THE HIGH COMM'R FOR HUM. RTS., https://www.ohchr.org/EN/Countries/MENARegion/Pages/QAIndex.aspx (last visited Mar. 6, 2024).

124. *Fédération Internationale de Football Association (FIFA) and Building and Wood Workers' International (BWI)*, *supra* note 122.

125. SWITZERLAND NCP, FINAL STATEMENT, SPECIFIC INSTANCE REGARDING THE FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION (FIFA) SUBMITTED BY THE BUILDING AND WOOD WORKERS' INTERNATIONAL (BWI) (May 2, 2017), https://www.seco.admin.ch/dam/seco/de/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/NKP/Statements_konkrete_F. . .lle/Abschlusserkl. . .rungen/Abschlusserkl. . .rung_FIFA_BWI.PDF.download.PDF/Abschlusserkl. . .rung_FIFA_BWI.PDF.

126. FIFA, *FIFA's Human Rights Policy*, https://img.fifa.com/image/upload/kr05dqyhwr1uhqy2lh6r.pdf (last visited Mar. 6, 2024).

127. FIFA, *Guide to the Bidding Process for the 2026 FIFA World Cup*, https://img.fifa.com/image/upload/hgopypqftviladnm7q90.pdf (last visited Mar. 6, 2024).

128. J James M. Dorsey, *The 2022 World Cup: A Potential Monkey Wrench for Change*, 31 INT'L J. HIST. SPORT 1739, 1740–41, 1743–44 (2014).

129. The New York Times recently presented a harsh critique on the ILO's work in Qatar ahead of the World Cup, describing Qatar's "lobbying" at the ILO and the technical cooperation project in the

matter.[130] First, the agreement on the technical cooperation led directly to the ILO Governing Body's linked decision to close the complaint procedure under article 26,[131] while also removing the threat of setting up a commission of inquiry, "the strongest measure among the organization's supervisory procedures"[132] and which countries try to avoid.[133] Indeed, Qatar too has reportedly tried to avoid such an outcome.[134]

Moreover, the signing of the agreement has led to a noticeable shift in the attitudes towards Qatar. The ILO, for example, described the developments in Qatar as "a momentous step forward in upholding the rights of migrant workers."[135] Of note is the shift in the position of the ITUC. As mentioned above, the ITUC was a central critic of the labor rights conditions in Qatar, including through its own campaigns and by launching ILO proceedings against the country. Yet, immediately after the conclusion of the technical cooperation agreement, the ITUC's General Secretary referred to "a new era for employment rights in Qatar, with workers' lives and livelihoods being protected."[136] This swift endorsement could be attributed to the ITUC's

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country as "a yearslong campaign of political maneuvering that helped turn the International Labor Organization, the United Nations workers' rights watchdog, from critic to ally." The piece reports, for example, that "on the eve of the World Cup, officials with the Qatari labor ministry asked the U.N. agency to refrain from any commentary that could overshadow the tournament," and that "[s]hortly before the World Cup kickoff, as part of a regular meeting with the I.L.O., the Qatari government had a request, one that one labor official described as casual, almost off handed: Could the agency let Qatar have its soccer spotlight without any distracting commentary?" *See* Rebecca R. Ruiz and Sarah Hurtes, *In World Cup Run-Up, Qatar Pressed U.N. Agency Not to Investigate Abuses*, NEW YORK TIMES (Mar. 11, 2023), https://www.nytimes.com/2023/03/11/world/europe/qatar-world-cup-ilo-labor.html.

130. The ILO itself describes, as part of its annual progress report on the technical cooperation program, activities where it has directly appeased concerns of "the football world" on this matter: "The ILO has engaged with a number of the entities organizing or participating in the World Cup, including FIFA, the UEFA Working Group on Human Rights, national football associations and sponsors. This included providing briefings on the status of the labour reforms, and also providing support to selected football associations and sponsors in their due diligence efforts with regard to the hotels where they will be staying during the tournament." *See* ILO, PROGRESS REPORT ON THE TECHNICAL COOPERATION PROGRAMME BETWEEN THE GOVERNMENT OF QATAR AND THE ILO ¶ 107 (November 2022), https://www.ilo.org/wcmsp5/groups/public/—-arabstates/—-ro-beirut/—-ilo-qatar/documents/publication/wcms_859839.pdf.

131. ILO Governing Body, 331st Sess., *supra* note 99, ¶ 5.

132. Kari Tapiola & Lee Swepston, *The ILO and the Impact of Labor Standards: Working on the Ground after an ILO Commission of Inquiry*, 21 STAN. L. & POL'Y REV. 513, 517 (2010).

133. *Id.* at 524–25.

134. The New York Times investigative story on the matter reports that "Qatar's campaign at the International Labor Organization" included "an intense and divisive lobbying effort to head off an investigation" [that is, a commission of inquiry], and that "[c]urrent and former labor officials recalled Qatari officials crowding the agency's negotiating rooms in Geneva, urging them not to investigate." *See In World Cup Run-Up, Qatar Pressed U.N. Agency Not to Investigate Abuses*, *supra* note 129.

135. *Landmark Labour Reforms Signal End of Kafala System in Qatar*, ILO (Oct. 16, 2019), https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_724052/lang—en/index.htm.

136. *ILO Decision Heralds New Era for Workers' Rights in Qatar. Saudi Arabia and the UAE Must Follow Its Lead*, ITUC CSI IGB (Nov. 8, 2017), https://www.ituc-csi.org/ilo-decision-heralds-new-era-for.

participation in the discussions leading up to the technical cooperation agreement. The involvement of the ITUC in the finalization of this agreement was facilitated by the ILO, who arranged two meetings between ITUC's General Secretary and the government of Qatar.[137] It can therefore be inferred that when Qatar agreed to this technical cooperation project, it knew that it would gain not only the support of the ILO, but also ITUC's. As it later turned out, besides their involvement in the design of the technical cooperation project,[138] ITUC, along with additional international workers' organizations, were also involved in its implementation, through collaborations with the ILO and the government of Qatar.[139] These actors are conducting semi-annual meetings, "ensuring the involvement and support of Global Union federations in the implementation of the programme."[140] This shows that the technical cooperation has been used to some extent as a "package deal," where Qatar benefits from reputational signals through actions and communications of both the ILO and international workers' organizations.

More so, the specific arrangements of the technical cooperation were also designed to provide a particularly effective signal. As such, the ILO and Qatar hold various high-profile events;[141] the ILO is enhancing the capacities of Qatari officials in effectively communicating its labor reforms to "media and the academic community"; and even hosted a meeting with editors-in-chief and journalists "to discuss ethical and accurate reporting on labour migration, forced labour and fair recruitment."[142]

In addition, a central requirement for a signal to be effective is its "observability."[143] In the current digitalized world this requires online presence. This is achieved by the ILO's Project Office for the State of Qatar having a designated X/Twitter account[144] and webpage.[145] The website provides up-to-date information on Qatar's labor rights efforts and "achievements."[146] It also includes news articles written by the ILO, with complementing titles

137. ILO Governing Body, 331st Sess., *supra* note 99, ¶ 3.

138. ILO, FINAL INDEPENDENT EVALUATION FOR TECHNICAL COOPERATION PROJECT FOR THE STATE OF QATAR – PHASE 2, ¶ 39, https://www.ilo.org/wcmsp5/groups/public/—-ed_mas/—-eval/documents/publication/wcms_909390.pdf (last visited March 6, 2024).

139. ILO Governing Body, 334th Sess., GB.334/INS/8, ¶¶ 22–23 (Nov. 8, 2018).

140. ILO Governing Body, 337th Sess., GB.337/INS/5, ¶ 49 (Nov. 7, 2019).

141. *Resources on Qatar*, ILO, https://www.ilo.org/beirut/countries/qatar/facet/lang—en/index.htm (last visited March 6, 2024).

142. ILO Governing Body, 337th Sess., *supra* note 140, ¶ 28.

143. Brian L. Connelly et al., *Signaling Theory: A Review and Assessment*, 37 J. MANAG. 39, 45 (2011).

144. ILO Project Office for the State of Qatar, X/TWITTER, https://twitter.com/iloqatar?lang=he (last visited March 6, 2024).

145. *ILO Project Office for the State of Qatar*, ILO, https://www.ilo.org/beirut/projects/qatar-office/lang—en/index.htm (last visited March 6, 2024).

146. *Id*.

such as "landmark labour reforms signal end of kafala system in Qatar."[147] The website also contains multimedia items, such as photos of domestic workers "enjoying their day off"[148] or videos on "Qatar Workers Fun Run 2019,"[149] and as such is adapted to the current social media trends for consuming information. The content is constantly updated, enhancing the "signal frequency."[150]

Moreover, in this particular case, the technical cooperation project has also proven to be a signal that is better suited than traditional ILO instruments in reaching the relevant "receiver." Indeed, a signal that can be more easily detected by a given receiver is characterized in the literature as a "stronger" signal.[151] Normally, the typical way in which ILO activities signal on countries' compliance with labor rights is through the reports and discussions of its supervisory system. It is understood then that this type of signal will be effective if it is intended to respond to pressures arriving from the ILO's tripartite constituents, especially other countries.[152] On the other hand, this form of signaling will be less effective when the pressures on countries to comply with labor rights arise from external processes, from various non-state actors. In the current case, Qatar was indifferent to the pressures it faced from the ILO's supervisory system and only became responsive to these demands when it faced pressures coming from activists, journalists, NGOs and trade union campaigns taking place outside the internal discussions of the ILO's supervisory system. In these circumstances, the signal conveyed through the technical cooperation project effectively reached this broader range of transnational actors that Qatar needed to appease,[153] and therefore served as the right signal to the countries' specific needs.

147. *Landmark Labour Reforms Signal End of Kafala System in Qatar*, *supra* note 135.

148. ILO Arab States, FLICKR, https://www.flickr.com/photos/iloarabstates/albums/with/72157710151197901 (last visited March 6, 2024).

149. *Multimedia*, ILO, https://www.ilo.org/beirut/projects/qatar-office/WCMS_724979/lang—en/index.htm (last visited March 6, 2024).

150. Connelly et al., *supra* note 143, at 53–54.

151. *Id.* at 53.

152. As Helfer points out: "[t]he organization's legal and policy pronouncements are primarily aimed at 'insiders well-versed in politically acceptable 'ILO speak,'' but they are much less intelligible to outsiders:" Helfer, *supra* note 5, at 400.

153. According to the ILO's Independent Evaluation of the project: "[t]o address the widespread interest in labour rights in Qatar in the run up to, and during the FIFA World Cup 2022, the TCP [technical cooperation project] produced several communication products on the status of the labour reforms. These products were widely viewed by the media and other institutions and individuals interested in the situation of workers in the country." *See* (including for the specific online metrics): *Final Independent Evaluation for Technical Cooperation Project for the State of Qatar – Phase 2*, *supra* note 138, ¶ 97.

2. Technical Cooperation as a Means to Catalyze Labor Rights Compliance

The second component of the study's linkage proposal was that the country on the receiving end of the reputational benefits will also sufficiently comply with international labor rights. In the present case, Qatar's technical cooperation with the ILO began in late 2017 and included Qatar's commitment to tackle forced labor, while explicitly agreeing that its' relevant laws be "implemented, reviewed, and revised in line with the comments of the ILO Committee of Experts."[154]

Qatar soon took on various measures to act upon these commitments. In September 2018, a new law was introduced concerning migrant workers' need for an exit visa. It established that those migrant workers covered by Qatar's labor law would be able to leave the country without having to obtain a permit from their employer. However, this law would not apply to several categories of workers, including domestic workers. In addition, under this law, employers could submit a request to retain the need for employer's approval for up to 5% of their workforce, provided it is justified by the nature of their work.[155] With regard to the provisions restricting the transfer to another employer, these remained unchanged at this point.[156]

When considering the signaling effects involved along with these reforms, it is noteworthy that different bodies of the ILO communicated a slightly different narrative. The CEACR evaluated these legislative developments while noting the abovementioned shortcomings. It accordingly asked the government to remove the obstacles on migrant workers' ability to change jobs (with reasonable notice) and to provide a clear legal framework for such a transfer. It also urged the government to remove the exit visa requirement for migrant domestic workers, as per the arrangement for workers covered by the labor law.[157] The communications team of the technical cooperation's Project Office for the State of Qatar also acknowledged the shortcomings of the current exit permit arrangements. However, with somewhat greater emphasis on the achievements, the overall message in this case was rather positive, with, for example, a headline announcing the "End of exit permits for most migrant workers in Qatar."[158]

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154. ILO Governing Body, 331st Sess., *supra* note 99, ¶ 31.

155. ILO Governing Body, 334th Sess., *supra* note 139, ¶ 13.

156. International Labour Conference, 108th Sess., *Report of the Committee of Experts on the Application of Conventions and Recommendations: Report III (Part A)*, at 430 (2019).

157. *Id.* at 430–31.

158. *End of Exit Permits for Most Migrant Workers in Qatar Welcomed*, ILO (Sept. 4, 2018), https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_638754/lang—en/index.htm.

As the technical cooperation proceeded, a draft of a Ministerial Decision was announced, eliminating the exit permit requirement to additional types of workers previously excluded from this new arrangement, including domestic workers.[159] These changes came into force in January 2020, with the Head of the ILO Project Office for the State of Qatar describing this change as "an important milestone in the government's labour reform agenda."[160] In addition, in September 2020 Qatar amended its law to eliminate the "no-objection certificate" required from workers in order to change employers. And so, the new arrangement allows workers to terminate their employment, including in order to transfer to another employer, by giving written notice of one or two months, and after the probation period. A change of employers (rather than just terminating their contract) would also require some bureaucratic requirements vis-à-vis the government. Within the probation period, a transfer is possible with one month written notice, but requires the new employer to provide certain compensation to the current employer.[161] The ILO Project Office in Qatar announced that taken together, "these steps mark the end of kafala in the country."[162] ITUC, similarly, announced that with these steps the technical cooperation program "today succeeded in dismantling the kafala system."[163]

However, despite these positive assertions, problems remain with these new arrangements. Among them, the exception allowing employers to request that the exit permit requirement still apply on up to five percent of their workforce (but exceptions cannot be requested for domestic workers).[164] Moreover, Human Rights Watch clarifies that although the exit permit requirement was abolished for domestic workers, according to the new arrangement they are the only workers required to inform employers that they wish to leave at least seventy-two hours in advance. This requirement is especially problematic given the particular vulnerability of domestic migrant workers. This could lead not only to the belief that employers' consent is required, but it also provides an opening for employers to try and prevent their workers

159. ILO Governing Body, 337th Sess., *supra* note 140, ¶ 17.

160. *Exit Permits Consigned to History for Almost all Migrant Workers in Qatar*, ILO (Jan. 16, 2020), https://www.ilo.org/beirut/projects/qatar-office/WCMS_734411/lang—en/index.htm.

161. ILO Governing Body, 340th Sess., GB.340/INS/11, ¶ 21 (November 2020); International Labour Conference, 109th Sess., *Application of International Labour Standards 2021: Report III/Addendum (Part A)*, at 285 (2021).

162. *Landmark Labour Reforms Signal End of Kafala System in Qatar*, *supra* note 135.

163. *Qatar Dismantles Kafala System of Modern Slavery*, ITUC CSI IGB (Oct. 16, 2019), https://www.ituc-csi.org/qatar-dismantles-kafala.

164. ILO Governing Body, 340th Sess., *supra* note 161, ¶ 19.

from leaving.[165] Indeed, research by Amnesty International shows that in practice employers often file false charges of criminal offenses against these workers, without the risk of facing legal consequences for doing so.[166] Domestic workers were once again singled out, with an additional, and possibly substantial, obstacle to leaving the country. However, ITUC's statement nevertheless announced that "Exit visas for workers – including domestic workers [. . .] – have been eliminated. These workers have the same rights as all workers in Qatar. The same non-discriminatory law will apply for all workers including domestic workers."[167]

Qatar's engagement with the ILO's technical cooperation agreement has also provided the country with an additional reputational signal, related to its aspiration towards becoming a leader in the Gulf region. ITUC's statement addresses this need, by stressing that:

> Workers want to work in the Gulf states… but they also want decent work where they are treated fairly and with dignity and respect. While we witness the changes in Qatar, sadly this is not the case in neighboring countries where migrant workers are still treated as less than human with few rights and freedoms.[168]

Overall, despite remaining shortcomings,[169] the technical cooperation has managed to lead to important reforms towards the effective dismantling of the sponsorship system in Qatar. These efforts have received positive reactions from the ILO and ITUC, among others, providing Qatar with the sought-for reputational signals. These reputational signals, however, did not always correspond with the actual progress made.

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165. *Qatar: End of Abusive Exit Permits for Most Migrant Workers: But Domestic Workers Will Have to Notify Employers Before Leaving*, HUM. RTS. WATCH (Jan. 20, 2020), https://www.hrw.org/news/2020/01/20/qatar-end-abusive-exit-permits-most-migrant-workers.

166. *Reality Check 2020: Countdown to the 2022 World Cup. Migrant Workers' Rights in Qatar*, AMNESTY INT'L (2020), https://www.amnesty.org/download/Documents/MDE2232972020ENGLISH.PDF.

167. *Qatar Dismantles Kafala System of Modern Slavery*, *supra* note 163.

168. *Id.* ITUC also praised Qatar for setting "a new standard for the Gulf States." *See ILO Decision Heralds New Era for Workers' Rights in Qatar*, *supra* note 136.

169. Besides issues concerning the regulatory design in the country, there are also compliance gaps in terms of the effective implementation of these numerous reforms. *See* ILO, PROGRESS REPORT ON THE TECHNICAL COOPERATION PROGRAMME BETWEEN THE GOVERNMENT OF QATAR AND THE ILO, ¶ 9 (November 2023), https://www.ilo.org/wcmsp5/groups/public/—-arabstates/—-ro-beirut/—-ilo-qatar/documents/publication/wcms_901686.pdf.

IV. LESSONS FOR ILO ENFORCEMENT AND SUPERVISION

A. The Role of the Supervisory System

The supervisory system's initial inability to influence Qatar's compliance during a decade-long proceeding seemingly indicates the weakness of this enforcement model, especially when compared to the achievements of the technical cooperation project. However, an examination of the role played by the supervisory system through the lens of this study's legal-economic analysis reveals functions that were crucial to making these positive changes possible.

1. The Supervisory System as a "Normative Authority"

As part of this article's institutional economic analysis, it also relies on the French "economics of convention" school. The economics of convention approach is useful in the present context in light of its particular focus on the way that institutions, and especially the regulative power of law, coordinate actors' interactions to achieve conventions around common goals.[170] According to this approach, law is seen as an institution through which individuals develop a shared understanding of situations in which they interact, and by that it guides them in coordinating their actions. But because law "has to be interpreted and mobilized by socio-historical actors in situations," it embeds the social practice in which it operates.[171] In other words, the various actors who interpret and operationalize law are themselves engaged in the "production of law."[172] These theories are therefore especially helpful for the analysis of the course of events in this case, which were characterized by numerous "battles" over legal narratives. At the same time, what this perspective adds to other institutional approaches is a greater stress on law's normativity; the idea that law is more than simply a record or "mirror" of social conventions, it also shapes them, projecting "an account of what they should be, or could

170. Rainer Diaz-Bone & Robert Salais, *Economics of Convention and the History of Economies. Towards a Transdisciplinary Approach in Economic History*, 36 HIST. SOC. RES. 7, 8 (2011); Christian Bessy, *The Dynamics of Law and Conventions*, 40 HIST. SOC. RES. 62, 63 (2015).

171. Rainer Diaz-Bone, Claude Didry & Robert Salais, *Conventionalist's Perspectives on the Political Economy of Law. An Introduction*, 40 HIST. SOC. RES. 7, 8–9 (2015).

172. Rainer Diaz-Bone, *Institutionalist and Methodological Perspectives on Law - Contributions of the Economics of Convention*, 40 HIST. SOC. RES. 23, 34 (2015) (citing CLAUDE DIDRY, NAISSANCE DE LA CONVENTION COLLECTIVE. DEBATS JURIDIQUES ET LUTTES SOCIALES EN FRANCE AU DEBUT DU XXE SIECLE (2002)).

become." In that sense, law is a normative frame of reference, used to coordinate expectations and behavior through the articulation of shared values.[173]

These ideas shed light on the functions performed by the supervisory system in this case. They highlight that a major characteristic of the supervisory system that surfaces here is that it operates by serving as what can be termed a "normative authority." By this term I refer to the ability of the supervisory system to provide persuasive normative guidance, in a broader, more subtle, sense than binding rulings on countries' legal requirements.[174] As discussed, reputational concerns were arguably a major factor in this technical cooperation project. In order for Qatar to improve its reputation, there was a need to verify its planned reforms and provide a confirmation of its compliance. Yet, simply claiming that Qatar meets its legal requirements is insufficient. From a sociological perspective, the meaning of a legal standard is also at play. In this case, different actors including Qatar, ILO bodies, trade unions, civil society and the media – have each had their own interpretations on the matter. Thus, the economics of convention approach stresses that the coordination function of law is dependent upon its ability to change actors' beliefs and create shared interpretations around legal norms. This entails a certain authoritative mechanism that could evaluate Qatar's planned reforms according to a convincing and acceptable understanding of international labor standards. The CEACR arguably had what it takes to perform this normative role in light of its "prestige" as a representative and independent body of experts that conducts "an objective and impartial review."[175]

Moreover, according to the economics of convention approach, social coordination is achieved not only by information dissemination, but also through the evaluation of conventions. The legal system is then seen as a realm where the conventions are constantly challenged, evaluated and transformed. From this point of view, it was not only Qatar's behavior that was evaluated in this case, but the labor law norms themselves as they were being applied. In particular, when existing conventions for the societal coordination of labor matters become inappropriate to meet new needs of emerging industrial labor relations, these arrangements will be contested by actors, and legal procedures will be initiated in search of new solutions.[176] In our case, the

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173. Simon Deakin, *The Invention of Law*, *in* L'ÉCONOMIE EST UNE SCIENCE REFLEXIVE: CHÔMAGE, CONVENTION ET CAPACITÉ DANS L'ŒUVRE DE ROBERT SALAIS 203 (Christian Bessy & Claude Didry eds., 2022).

174. For the supervisory system's lack of authoritative force, in a strict-legal sense, *see* Claire La Hovary, *The ILO's Supervisory Bodies' 'Soft Law Jurisprudence'*, *in* RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW 316, 326–28 (Adelle Blackett & Anne Trebilcock eds., 2015).

175. Maupain, *supra* note 10, at 120.

176. Diaz-Bone, *supra* note 172, at 27.

norms against forced labor did not initially foresee the kind of economic coercion and exploitation demonstrated in the Kafala system, as opposed to older forms of forced labor.[177] This is not to say that legal concepts are not flexible enough to encompass such adaptation,[178] but that some kind of a consensus had to be reached to that effect. In that sense, the legal system's need to be sufficiently grounded in the social context also limits its potential as an instrument of change.[179] In the Qatari case, the Kafala system resulted in recent years in extreme power imbalances, leading numerous actors to start challenging the legitimacy of this arrangement. This accordingly opens a way for the CEACR to scale-up states' practice. Different actors will then argue for different interpretations of legal norms, each pushing towards different arrangements around which to coordinate.[180] Qatar, in our case, has argued all along the way that numerous "weaker" versions of its Kafala system were compliant with the legal requirements against forced labor, while the CEACR continuously disagreed and insisted on the need to completely abolish this system. Therefore, while various actors had their own interpretation as to the appropriate behavior in these circumstances, the supervisory system contributed to eventually reaching a resolution on this matter and to provide a "closer."

Furthermore, it follows from the discussion thus far that conventions emerge through learning processes, a function supported by the capability of the legal system to store and then retrieve information drawn from social practices.[181] In relation to the current case, the supervisory system's longstanding practice is to rely on its previous decisions to support its legal conclusions on countries' compliance, facilitating a learning process from the experience of other countries in similar situations. Accordingly, now that Qatar has accepted the supervisory system's approach, this might serve as the new benchmark for other countries and mark the emergence of a new convention on this matter. This lends weight to the ITUC's aforementioned statement that "Qatar has set a new standard for the Gulf States, and this must be followed by Saudi Arabia and the UAE."[182]

177. Plant, *supra* note 62, at 425.
178. Simon Deakin, *Juridical Ontology: The Evolution of Legal Form*, 40 HIST. SOC. RES. 170 (2015).
179. *Id.* at 182.
180. Diaz-Bone, Didry & Salais, *supra* note 171, at 9.
181. Deakin, *supra* note 173.
182. *ILO Decision Heralds New Era for Workers' Rights in Qatar*, *supra* note 136.

2. The Supervisory System and Effective Signaling

Another lens through which to understand the role of the supervisory system in supporting the ILO's efforts in this case is through signaling theory. We have seen that prior to the technical cooperation project, Qatar repeatedly argued that its previous reforms bring the country to full compliance with international labor standards. These previous signals were contradicted by numerous conflicting signals and were accordingly not convincing.[183] Qatar thus needed a more "credible" signal, which was achieved through the technical cooperation project. Through its labor law reforms, Qatar is conveying a certain cost that it incurs, which serves as a signal.

But signaling does not take place in vacuum. In order for this signal to be effective, there is a need for a third-party to provide a meaningful frame of reference against which to assess these reforms; in other words, to establish whether they entail a "cost." This is the cognitive role provided by the ILO here: it provides the "framing"[184] through which to perceive Qatar's signaling. The ILO generates the content of the signals in this respect; creating standards that countries can benchmark themselves against. This normative framing provided by the law serves as a powerful tool to make the signal more credible.

In practice, this framing function was provided by the supervisory system's "normative authority" as to what should be considered an acceptable behavior with regards to international labor rights. Throughout the project, the CEACR provided crucial information on Qatar's conformity with international labor standards, continuously evaluating its reforms and providing ongoing guidance on regulatory deficiencies. This can be seen from the initial agreement on the project, when Qatar committed to revise its sponsorship system "in line with the comments of the ILO Committee of Experts." The CEACR's later assessments of Qatar's steps similarly ensured that it is indeed delivering these commitments. By upholding Qatar to a sufficient level of compliance, these activities confirm the required "cost" and thus contribute to its reputation. In that sense, the high standards that the supervisory system requires from countries is exactly what can make it appealing for countries to follow its requirements.

This case has also highlighted the relative strength of the CEACR for this purpose, as compared to two other trustworthy bodies: the ILO's Project

183. Connelly et al., *supra* note 143, at 54.

184. "Framing" can be understood, broadly speaking, as "the process by which people develop a particular conceptualization of an issue or reorient their thinking about an issue." *See* Dennis Chong & James N. Druckman, *Framing Theory*, 10 ANN. REV. POL. SCI. 103, 104 (2007).

Office in Qatar and the ITUC. As we have seen, the statements of these bodies reflected slightly different interpretations concerning Qatar's reforms, presenting the achievements made in a more positive light. These divergent reactions might be explained by the different nature of each of these bodies. The ILO's Project Office and the ITUC rely, as part of their work, on their collaboration with the Qatari government and need to ensure its continued cooperation, one that is motivated to a large degree by the country's image projection. Indeed, we have seen that the ITUC was given a dominant role by the ILO, in both reaching the technical cooperation agreement with Qatar and in the execution of the agreement. The CEACR, on the other hand, was relatively isolated from the ongoing technical cooperation project. This arguably allowed it to maintain a more critical approach towards the remaining shortcomings in the country's reforms.

B. The Limits and Prospects of the Linkage Proposal

While the technical cooperation project in Qatar has managed to reach some significant achievements in the issues included in its scope,[185] including crucial reforms to the sponsorship system, major labor rights violations were not addressed. That was the case with principles of freedom of association and the Discrimination (Employment and Occupation) Convention,[186] issues the supervisory system has already determined at the time that Qatar was violating.[187] Yet, the project does not include any commitment to freedom of association as such and promotes instead alternative measures for "workers' voice"; and, while the project naturally relates to the discrimination against migrant and domestic workers, it does not address other bases of discrimination that were found to be violated, such as gender-based discrimination.[188]

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185. *See generally* the project's annual "progress reports": ILO Governing Body, 334th Sess., *supra* note 139; ILO Governing Body, 337th Sess., *supra* note 140; ILO Governing Body, 340th Sess., *supra* note 161; ILO, *Progress Report on the Technical Cooperation Programme between the Government of Qatar and the ILO* (December 2021), https://www.ilo.org/wcmsp5/groups/public/—-arabstates/—-ro-beirut/—-ilo-qatar/documents/publication/wcms_832122.pdf (last visited Mar. 6, 2024); *Progress Report on the Technical Cooperation Programme between the Government of Qatar and the ILO* (November 2022), *supra* note 130; *Progress Report on the Technical Cooperation Programme between the Government of Qatar and the ILO* (November 2023), *supra* note 169.

186. (adopted 25 June 1958, entered into force 15 June 1960) No. 111.

187. For the latest reports on these issues *see* Qatar (Case No 2988) (Sept. 28, 2012) Report of the Committee on Freedom of Association No 382 (GB.330/INS/4 June 2017); International Labour Conference, 111st Sess., *Report of the Committee of Experts on the Application of Conventions and Recommendations: Report III (Part A)*, at 654–59 (2023).

188. This is not in the project's "areas of action" and not dealt by in a comprehensive manner, although some activities on this issue occasionally take place. *See, e.g., Progress Report on the Technical Cooperation Programme between the Government of Qatar and the ILO* (November 2022), *supra* note

If the technical cooperation project addressed all labor rights violations in Qatar, this would have reflected a more holistic approach in the management of global labor governance efforts. Under this scenario, the ILO leverages the pressures Qatar faces from transnational activism campaigns to address migrant and World-Cup related violations, towards reforms in issues that Qatar faces less pressure to address. This is because, the reforms that Qatar has undergone under the technical cooperation project were, to a large extent, the result of pressure exerted from trade unions, civil society and the media. Moreover, by involving global union federations in the technical cooperation project, the ILO created a situation where Qatar's cooperation in the project was in practice bartered for an end to their campaigns against the country. Indeed, literature has long acknowledged that while transnational activism campaigns can have a major role in leading to positive change in companies and countries,[189] a well-known problem with these efforts is that they can be "fickle" and "selective,"[190] and inevitably focus on issues that grasp the attention of international audiences. Therefore, there is concern that global attention will be attracted only by certain labor or human rights violations, such as those triggering strong emotional empathy, while neglecting more "ordinary" workplace violations.[191] The current case aligns with this concern, as much of the media coverage and reports dealt, quite naturally, with fatal accidents and forced labor of migrant workers. The violations of freedom of association and discrimination, despite their severity, received less international attention. This means that Qatar's incentives to address its violations were higher in the former type of labor issues. In these circumstances, if the technical cooperation was to address all of these labor rights violations, or, at least include issues according to a rationalized key (for example, all violations of fundamental rights), that would have contributed to a more well-designed global labor governance.

130, ¶ 32. As this is put by the ILO itself: "while the design of the programme did not prioritize gender equality as a key driver, it ensured that reforms (e.g., dismantling the kafala system, establishing a minimum wage, etc.) apply to both men and women . . . ." *See* ILO, FINAL INDEPENDENT EVALUATION OF THE TECHNICAL COOPERATION PROGRAMME IN QATAR (2018 – 2021), at 36, https://www.ilo.org/ievaldiscovery/#asljcqw (last visited Mar. 6, 2024).

189. *See, e.g.,* GAY W. SEIDMAN, BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS, AND TRANSNATIONAL ACTIVISM (2009); MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998).

190. P Philip Alston & James Heenan, *Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?,* 36 N.Y.U. J. INT'L L. & POL. 221, 241–42 (2004).

191. Gay Seidman, *Transnational Labour Campaigns: Can the Logic of the Market Be Turned Against Itself?*, 39 DEV. CHANGE 991, 994–96 (2008).

In practice, however, reality is more complicated, and there is only so much that the ILO can realistically achieve in such single country intervention. As Fenwick explains, "the ILO is not in any sense the master of the circumstances in which it is called upon to advise. On the contrary: in an institutional and in a political sense, the ILO is constrained by the national context."[192] The fact that the technical cooperation did not address all labor rights violations in this case suggests that there are limits to the described enforcement model, one which lacks coercive enforcement and depends on countries' cooperation. The selection of issues to include in the scope of the technical cooperation project is ultimately determined through negotiations.[193] As described, the ILO has been pressuring Qatar since 2014 to undergo a technical cooperation project and in 2017 was engaged in several rounds of discussions on this. At the end of 2017, with only five more years until the World Cup, the ILO had a limited window of opportunity to act. At this point in time, Qatar was also in perhaps the most susceptible state. If it was to gain any reputational benefits from this event, it had to deal with its publicity crisis fast and effectively. Moreover, from June 2017 Qatar also became regionally isolated. Coincidently or not, four months after the start of this diplomatic isolation the project agreement was signed. In these circumstances, the agreement the ILO finalized may well be its only realistic option.

What are the possible consequences then of the technical cooperation project not addressing all of Qatar's labor rights violations? From a signaling theory perspective, the details of this cooperation point to the spreading of positive reputational signals that are potentially wider than Qatar's actual commitments or actions taken. While the technical cooperation does not attempt to address all of Qatar's labor rights violations, the nuances of its actual commitments cannot always be properly reflected in these signals. The overall message from the technical cooperation is the appearance of approval of Qatar's policies by the ILO and major global union federations, previously strong critics of the country. In other words, Qatar is enjoying a reputational benefit as a country that is taking major steps to comply with international labor rights, but without actually complying with all of its labor rights' obligations.

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192. Fenwick, *supra* note 33, at 237–38.

193. Specifically on the absence of freedom of association from this project, the ILO has noted that Qatar's Ministry of Labour "has discussed this subject in many meetings with the ILO and the ITUC/GUFS [global union federations]" but that "[s]ecuring freedom of association was met with refusal from the Government of Qatar." *See Final Independent Evaluation for Technical Cooperation Project for the State of Qatar – Phase 2*, *supra* note 138, ¶ 38.

According to signaling theory, when the signal does not correlate with the quality it is signaling on (the "fitness" of the signal) or when the signaling actor is trying to deceive on such quality (the signal's "honesty"), the signal's reliability is affected.[194] In the short-term, such a discrepancy can be misleading. As discussed, technical cooperation can be seen as a way for Qatar to "pre-commit" itself to the policy reforms it has agreed to undertake, and by that enhance the credibility of the signal. Accordingly, drawing on the trustworthiness of the ILO, even if Qatar did not yet fully achieve all of its promised reforms, or if it is still engaged in other violations, the signal can still be credible. This means that in the short term, Qatar may well receive some immediate reputational benefits without the need to actually comply with minimum labor standards.

However, over a longer period of time the signaling effects take a different form, because countries' actions are constantly monitored by the supervisory system. Countries that have been using technical cooperation projects to gain "expressive benefits" via signaling,[195] without substantially changing their behavior, will eventually be exposed. This augments the problem of "signal inconsistency," which hinders the effectiveness of the communication.[196] Therefore, in the long term, such practices can lead to a more skeptical view of technical cooperation projects and their potential to ensure a sufficient level of compliance. In terms of signaling theory, a deterioration in the "cost" involved in technical cooperation projects is at play. It can thus be argued that if countries participating in technical cooperation projects do not sufficiently respect labor rights, these projects will lose, with time, their ability to provide reputational benefits to participating countries, and subsequently lose a major part of their appeal.

V. CONCLUSION

The case of Qatar exemplifies the potential of reputational incentives to lead to meaningful change in countries. For many years, Qatar seemed obstinately resistant to the supervisory system. On the eve of the announcement of its hosting of the World Cup, the country reportedly announced it had no intention of abolishing its sponsorship system.[197] However, with the international pressures that followed this announcement, a stark shift in Qatar's approach was evidenced. Today, Qatar has taken significant steps to reform this

194. Connelly et al., *supra* note 143, at 52.

195. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 2011 (2002).

196. Connelly et al., *supra* note 143, at 54.

197. Khan & Harroff-Tavel, *supra* note 58, at 301.

system. At the same time, this case also highlights that for such positive change to occur, the proper institutional arrangements need to be in place to harness these forces in support of desirable objectives. It is in this context that this article has examined the various ILO proceedings in the country. Through the lens of this study's institutional economic analysis, this article has advanced our understanding of contemporary enforcement models of the ILO.

First, this case demonstrates the potential of this study's linkage proposal. It shows that the supervisory system and technical cooperation projects can mutually support each other's work and create highly efficient incentives for countries to comply with labor rights. By doing so, the article sketches a middle ground between the old "hard" versus "soft" law divide; one which works on states' interests while relying on, and strengthening, the ILO's traditional enforcement mechanisms. At the same time, the inevitable limits of such an approach were also observed. As the ILO is unable to coerce a country into compliance, any labor rights achievements are dependent upon countries' willingness to cooperate. The tools at the disposal of the ILO can create incentives for countries to enact labor law reforms, but there will be cases where these types of incentives might not suffice. The fact that Qatar remains a culprit of several serious labor rights violations, it was observed, results in a discrepancy between the reputation gained from taking part in this project and the country's actual commitments. Such an outcome holds implications that span wider than the success of this particular project in Qatar. Namely, if technical cooperation projects do not ensure that participating countries are committed to a basic level of labor standards, they risk deteriorating their signaling effects, arguably leading in the long term to a weakening of their appeal.

Furthermore, the article has provided new insights on the work of the ILO's supervisory system. This case study refines our understanding on how the production and dissemination of information; the evaluation of conventions and norms of acceptable labor practices; and the facilitation of learning processes among countries stand at the heart of the enforcement measures of the supervisory system. By acting as what can be termed a "normative authority" in the realm of international labor rights, it provides persuasive normative guidance on international labor standards, fostering coordination by creating shared beliefs around international legal norms. Moreover, this case has also shown how the supervisory system's competency in evaluating countries' behavior can provide powerful "framing" that supports effective signaling on countries' reputation. This way, the supervisory system serves as a "gatekeeper" to the various benefits associated with such reputation. In

that sense, by linking the work of the supervisory system to other regulatory initiatives, this not only helps the supervisory system's decisions to become more influential – it also contributes to the effectiveness of these other initiatives. It is suggested then that the supervisory system should not be seen as an irrelevant or weak system in need of reform. This system has been doing what it does best: providing trustworthy assessments of countries' levels of compliance. But these virtues of the supervisory system uncovered in this article are not confined to technical cooperation projects and can potentially play a valuable role in a broader set of situations, within the framework of the ILO and beyond. It can afford important support that fuels essentially any kind of regulatory initiative where the reassurance on countries' compliance grants them with certain benefits. This research thus opens the way to further consider how the supervisory system can be better linked with trade and investment arrangements, corporate social responsibility, and social certification initiatives.

Finally, the analysis in this case also has broader implications for the role of the ILO more generally, and for its future development. The contemporary global labor regulatory sphere is characterized by numerous regulatory initiatives, which are run by a wide range of influential private and public actors. These initiatives often utilize various branding and communication techniques as their mode of operation. Indeed, "the ILO needs to be able to work effectively in these new realities by establishing new relationships with the private sector and finding new methods of intervention."[198] These realities were clearly manifested in the Qatari case study, where the terrain in which the ILO operated was highly influenced by campaigns of media, trade unions and civil society. The analysis showed how the ILO can harness these diverse forces towards meaningful labor law reforms. First, the ILO managed to create a "package deal" where both its own traditional proceedings and different transnational activism campaigns were ceased as a result of Qatar's cooperation. Second, the ILO adapted its traditional signaling activities to communicate to a broad spectrum of receivers. By extending its communications beyond its internal tripartite structure, these signals were better suited to a regulatory arena that is influenced by diverse non-state actors. Moreover, the article also highlights how the ILO can potentially channel these forces towards a more comprehensive regulatory approach. These new insights open a way for future research on the design and management of this increasingly polycentric, communications-driven global governance regime.

198. Guy Ryder, *Relevance of the ILO in the Twenty-First Century*, WARWICK PAPERS IN INDUSTRIAL RELATIONS, NO. 98, UNIV. OF WARWICK (2014), https://www.econstor.eu/bitstream/10419/119759/1/791224902.pdf.