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STUDIES

THEMATIC CHAPTER: Equality, Inequalities, Discriminations.
Interdisciplinary dialogue attempt of legal and quantitative knowledge

COMPARATIVE LABOUR CASE LAW

INTERNATIONAL LEGAL NEWS

RETROSPECTIVE OVERVIEW OF 2014 COMPARATIVE LABOUR LAW LITERATURE

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International Association of Labour Law Journals

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The **Revue de droit comparé du travail et de la sécurité sociale - English Electronic Edition** is a member of the « *International Association of Labour Law Journals* », a network for exchanging publications and ideas, as well as legal and economic developments.

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RETROSPECTIVE OVERVIEW OF 2014

COMPARATIVE LABOUR LAW LITERATURE



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LABOUR LAW BEYOND NATIONAL BORDERS: THE DEBATE IN 2014

PREFACE: THE RATIONALE BEHIND THE CHOICES MADE

The intense and multifaceted debate in labour law which has taken place both within Italy and beyond our borders encourages deeper consideration of the main themes which have animated it during 2014, too.

To this end this contribution will examine the majority of the reviews forming part of the *International Association of Labour Law Journals (IALLJ)*, renowned for promoting the exchange of ideas among labour lawyers from different countries, both within and outside Europe, on labour law and social security themes, not only of national, but comparative, international and EU-wide interest as well. In recent years the Association's reviews have begun comparing their field with other social sciences (primarily economics and sociology), broadening the horizons in a interdisciplinary perspective which becomes more and more engaging as a result. Specifically in relation to this retrospective overview, the authors analysed twenty-three journals out of a total of twenty-seven member journals belonging to the association in 2014. The remaining four were not taken into account, essentially because of language barriers or difficulty in sourcing the published contributions.¹

Regarding the themes selected for consideration, the authors decided to exclude topics from this analysis that were covered already in the 2013 retrospective overview.²

* This study is the product of the combined reflections of both authors. However, while paragraphs 1, 2 and 5 are the work of Matteo Borzaga, paragraphs 3 and 4 were written by Eva Maria Hohnerlein.

¹ We refer to the following journals: *Industrial Law Journal* (South Africa), *Labour and Social Law* (Belarus), *Labour Society and Law* (Israel), *Pecs Labour Law Journal* (Hungary) and *Russian Yearbook of Labour Law* (Russia). The full list of the IALLJ member journals can be found at this website: www.labourlawjournals.com. Besides, the list of all journals' abbreviations mentioned in this article follows at the end of the chronicle.

² See S. Borelli and E. M. Hohnerlein, "Retrospective overview of 2013 comparative labour law literature", *English Electronic Edition - Revue de droit comparé du travail et de la sécurité sociale* 2014/3, pp. 202-221.

A striking example is the lasting debate on labour law reforms incited by the economic and financial crisis. The essays under review in 2014 focussed again on the negative impact of these reforms on workers' rights, above all in countries most affected by the economic and financial crisis. It is not surprising that the majority of these contributions were published in Spanish and Italian journals, or in journals paying particular attention to comparative aspects, especially within the European Union.³ In this regard, the focus was on the incessant process of reform, a salient feature of the Spanish legal system resulting from the economic and financial crisis.⁴ Authors attempted to evaluate in detail consequences of various reforms in different fields of labour law, including the impact on provisions concerning women workers,⁵ aspects of the right to strike,⁶ or the relationship between a labour law radically reformed and constitutional law.⁷ Finally, the debate in the Spanish journals concentrated on the important issue of the compatibility of such reforms with obligations under the international labour law framework, above all with regard to the freedom of association for trade unions under the International Labour Organisation (ILO) Convention no. 87 of 1948.⁸ In the case of Italy, the debate on the far-reaching reforms of national labour law in the wake of the economic and financial crisis has focused on two topics: firstly, authors discussed extensively the provisions of law no. 92 of 2012 concerning flexible termination measures [It: *flessibilità in uscita*] which amended art. 18 of the Workers' Statute (law no. 300 of 1970) in order to limit the safeguards against unfair dismissal.⁹ Secondly, Italian labour lawyers have considered in detail decree law no. 34 of 2014 (converted into law no. 78 of 2014) which changed the labour law regime of fixed-term work contracts in order to allow greater flexibility than permitted previously under legislative decree no. 368 of 2001 and law no. 92 of 2012.¹⁰

³ See, for example, Suárez Corujo B., "Crisis and Labour Market in Spain", in *ELLJ*, 2014, 1, p. 43; Nogler L., "Das italienische Arbeitsrecht im Kontext der Krise – Teil 1", in *AuR*, 2014, 2, p. 58; Nogler L., "Das italienische Arbeitsrecht im Kontext der Krise – Teil 2", in *AuR*, 2014, 3, p. 93. For contributions on this topic published in non-European journals *cf.* for example, Biasi M., "The Effect of the Global Crisis on the Labor Market: Report on Italy", in *CLLPJ*, 2014, 35, 3, p. 371; Gil y Gil J. L., "Strengthening the Power of Dismissal in Recent Labor Reforms in Spain", in *CLLPJ*, 2014, 35, 3, p. 413.

⁴ Valverde Asencio, A. J., "Un proceso de cambio continuo en el régimen jurídico de la relación de trabajo", in *TL*, 2014, 124, p. 13.

⁵ Rodríguez Fernández M. L., "Efectos de la crisis económica sobre el trabajo de las mujeres", in *RL*, 2014, 1, p. 69.

⁶ Baylos Grau A. P., "Derecho de huelga, crisis económica y gestión sindical del conflicto", in *RDS*, 2014, 66, p. 13.

⁷ Llobera Vila M., "Medidas anticrisis de austeridad y reforma implícita de la Constitución", in *RDS*, 2014, 66, p. 111.

⁸ Guamán Hernández A., "Las críticas del Comité de Libertad Sindical de la OIT a la reforma laboral de 2012", in *RDS*, 2014, 66, p. 201.

⁹ Gargiulo U., "Il licenziamento "economico" alla luce del novellato articolo 18", in *DLM*, 2014, 1, p. 87; Chieco P., "La nullità del licenziamento per vizi "funzionali" alla luce dell'articolo 18 dello Statuto dei lavoratori", in *DLRI*, 2014, 142, 2, p. 331; Guariso A., "Il licenziamento discriminatorio", in *DLRI*, 2014, 142, 2, p. 351; Speciale V., "Il licenziamento disciplinare", in *DLRI*, 2014, 142, 2, p. 363; Aiello F., "Alcune questioni in tema di licenziamento per motivi disciplinari", in *DLRI*, 2014, 142, 2, p. 381; Bolego G. and Nogler L., "Opinioni sul licenziamento per motivi economici", in *DLRI*, 2014, 142, 2, p. 397; Pacchiana Parravicini G., "Il giustificato motivo oggettivo di licenziamento", in *DLRI*, 2014, 142, 2, p. 409; Speciale V., "La riforma del licenziamento individuale tra *law and economics* e giurisprudenza [Parte I]", in *RGL*, 2014, 1, p. 345; Speciale V., "La riforma del licenziamento individuale tra *law and economics* e giurisprudenza [Parte II]", in *RGL*, 2014, 1, p. 447.

¹⁰ This was the first labour law reform adopted by the Renzi government; for details see Romei R., "La nuova disciplina del lavoro subordinato a termine", in *DLRI*, 2014, 144, 4, p. 675; Andreoni A., "I dilemmi sindacali nell'Italia del «Jobs Act»", in *RGL*, 2014, 1, p. 691; Gragnoli E., "La nuova regolazione del contratto a tempo determinato e la stabilità del rapporto di lavoro: introduzione", in *RGL*, 2014, 1, p. 679; Leccese V., "La compatibilità della nuova disciplina del contratto di lavoro a tempo determinato con la Direttiva n. 99/70", in *RGL*, 2014, 1, p. 709; Leone G., "L'utilizzo vincolato del contratto a tempo determinato: cronaca di una morte annunciata", in *RGL*, 2014, 1, p. 729; for further discussion on fixed term work contracts in general, see below, para. 2.4.

A further issue already discussed broadly in the 2013 overview has been the transnational dimension of labour law and, more specifically, the impact of ILO standards on national legal systems. This topic has become particularly important in recent years, because the ILO has altered its strategy in order to respond more effectively to phenomena of the globalised economy (relying on the activation of some pre-existing legal instruments rather than adopting new ones), and also because in the aftermath of the financial/economic crisis and the related dismantling of national labour law, ILO standards have become the last bastion of workers' protection, especially in those countries that suffered most from the economic crisis. The attention paid to international labour law cuts right across all the journals under review. Accordingly, many essays considered the impact of the so-called ILO core labour standards, like the freedom of association for trade unions, the right to collective bargaining, the elimination of discrimination, child labour and forced or compulsory labour.¹¹ Authors also readdressed the relationship between international labour law and the regulation of international trade,¹² and the much disputed issue on the right to strike under ILO conventions on trade unions' freedoms, based on the interpretation that the ILO's monitoring bodies have adopted since the 1950s, but which the employers' group at the International Labour Conference have firmly rejected.¹³ This issue remains quite problematic, mainly because it has contributed significantly to weakening the ILO's supervisory system, thereby undermining the monitoring activity of the ILO on the implementation of international labour standards.

A third area of discussion reviewed already for 2013 is the one concerning so-called whistleblowing - the practice through which a worker either internally alerts his or her own employer, or externally informs a broader public about irregular or dangerous situations that have developed (or are in the course of developing) within the undertaking and that are deemed illegal, unethical, or not correct. There is a common understanding that whistle-blowing requires protection against potential retaliation.¹⁴

Finally, the journals under review included several essays on the role of lay judges in the context of labour disputes,¹⁵ and more generally, on the possibility of resolving such disputes through other methods, such as mediation, negotiation and arbitration, known as alternative dispute resolution.¹⁶

Furthermore, the present overview excluded some newly emerging topics in labour law which entailed only limited discussion so far. An example is the use of social media networks for managing work relationships which might seriously hamper the protection of the privacy of the workforce involved.¹⁷

¹¹ With reference to national legal systems, but also in more general terms: Liukkunen U., Yifeng C., "China and ILO Fundamental Principles and Rights at Work", in *BCLR*, 2014, 86; Bellace J. R., "Human Rights at Work: The Need for Definitional Coherence in the Global Governance System", in *IJCLLIR*, 2014, 30, 2, p. 175; Jimena Quesada L., "La protección internacional de los derechos sociales y laborales", in *RDS*, 2014, 65, p. 13; Servais J.-M., "El Derecho Internacional del Empleo frente a la crisis", in *TL*, 2014, 126, p. 13.

¹² Perulli A., "Fundamental Social Rights, Market Regulation and EU External Action", in *IJCLLIR*, 2014, 30, 1, p. 27.

¹³ Novitz T., "The Internationally Recognized Right to Strike: A Past, Present and Future Basis upon Which to Evaluate Remedies for Unlawful Collective Action?", in *IJCLLIR*, 2014, 30, 3, p. 357; Bellace J. R., "The ILO and the right to strike", in *ILR*, 2014, 1, p. 29.

¹⁴ FASTERLING B., LEWIS D., "Leaks, legislation and freedom to speech: How can the law effectively promote public-interest whistleblowing?", in *ILR*, 2014, 153, 1, p. 71; Bouton K., "Vers une généralisation du lanceur d'alerte en droit français", in *RDT*, 2014, 7-8, p. 471.

¹⁵ Burgess P., Corby S., Latreille P. L., "Lay Judges and Labor Courts: A Question of Legitimacy", in *CLLPJ*, 2014, 35, 2, p. 191; Marshall D., Lagesse P., Beckers M., "Réformer le conseil des prud'hommes?", in *RDT*, 2014, 2, p. 85; Beckers M., Sutra A., "Faut-il prendre au sérieux l'arbitrage en matière prud'homale?", in *RDT*, 2014, 12, p. 731.

¹⁶ Iwamura M., "Autorités non-judiciaires et résolution des différends: une esquisse du droit du travail japonais", in *RDCTSS*, 2014-2, p. 14; Rosioru F., "La médiation des conflits de travail en Roumanie: une voie alternative?", in *RDCTSS*, 2014-2, p. 28; Genova Y., "Autorités et voies non judiciaires de résolution des différends en droit du travail bulgare: Avantages, inconvénients et perspectives", in *RDCTSS*, 2014-2, p. 46; Gil y Gil J. L., "L'arbitrage obligatoire en Espagne à l'épreuve du droit international du travail", in *RDCTSS*, 2014-2, p. 56; Casaux-Labrunée L., "Les modes amiables de règlement des conflits du travail en France: entre effervescence et résistances", in *RDCTSS*, 2014-2, p. 76; Luiso F. P., "La composizione stragiudiziale delle controversie: la procedura di cui all'art. 7, l. n. 604/1966", in *LD*, 2014, 2-3, p. 331.

¹⁷ Fiorentino A., "L'utilisation par le salarié des réseaux sociaux: l'abus de la liberté d'expression nuit à l'emploi", in *RDCTSS*, 2014-2,

The present overview will now consider four distinct labour law areas that have occupied a prominent place in the debates reflected in IALL journals of 2014, avoiding repetition of fields covered in previous reviews: 1) changes in the labour market and the protection of the weakest parties (paragraph 2); 2) the rights at work and the rights to social security of migrant workers (paragraph 3); 3) current issues of social security and vocational education and training (paragraph 4); and 4) health and safety at work (paragraph 5).

CHANGES IN THE LABOUR MARKET AND PROTECTION FOR THE WEAKEST PARTIES

A GENERAL OBSERVATIONS

Throughout 2014, the IALLJ journals paid much attention to the changes in the labour market and to protection for the weakest parties. The direct effects of the economic and financial crisis on the one hand (above all in terms of increasing unemployment and a growth of the informal economy), and the reforms adopted in many, especially European, countries on the other, have consistently reshaped the labour market and its dynamics. More specifically, this has entailed not only the loss of many jobs, but has also worsened overall working conditions for employees. As a consequence, vulnerability among sections of the workforce has increased, and lawmakers and social partners urgently need to take appropriate measures for protecting such groups.

The debate about the different types of vulnerability among workers will be highlighted in the following pages, namely undeclared work, self-employment, atypical work, and the fight against old and new forms of discrimination.

B UNDECLARED WORK AND THE BLACK ECONOMY

With respect to the much debated issue of undeclared work and the black economy,¹⁸ it is important to recall that the majority of the studies under review concern the situation in European countries. The analysis confirms that the phenomenon is becoming increasingly transnational in character, and that its growing importance is closely linked to the issue of migrant work, not only due to external migration towards the EU, but also to internal migration within the EU. There is much evidence that undeclared work and the black economy are essentially fuelled by illegal immigration; moreover there is reason to believe that the EU's and member states' policies of favouring controlled immigration, both temporary and recurrent, tend to create a vicious circle in migrant behaviour, since migrant workers fail to see their interest in complying with fiscal and social security obligations for short (even extremely short) periods of time.¹⁹

p. 87; Llorens Espada J., "El uso de facebook en los procesos de selección de personal y la protección de los derechos de los candidatos", in *RDS*, 2014, 68, p. 53.

¹⁸ We refer here in particular to those in issue no. 2/2014 of the Belgian publication *European Labour Law Journal*, which is almost entirely devoted to this subject.

¹⁹ McKay S., "Transnational Aspects of Undeclared Work and the Role of EU Legislation", in *ELLJ*, 2014, 5, 2, p. 116; McKay S., "Gli aspetti transnazionali del lavoro sommerso ed il ruolo della legislazione europea", in *DLM*, 2014, 1, p. 225; see also *infra* para. 3.2.1.

In the light of specific EU statements on undeclared work²⁰ authors pointed to the crucial issue of defining the concept of undeclared work as a precondition for effectively fighting it, in particular since the definitions used in various national legal systems still differ widely from one another.²¹

Some articles attempted to take a closer look on measures and sanctions to fight undeclared work, considering what form such sanctions should take. Empirical research²² has raised some doubts as to whether mechanisms adopted to encourage regularization of undeclared work can be effective if combined with the threat of persecution under criminal law. Yet labour lawyers writing in the IALLJ journals confirmed that the continuous expansion of undeclared work should be tackled by using a broad range of diversified instruments, based on a positive evaluation of the trend towards combined approaches.²³

C THE PROTECTION OF SELF-EMPLOYED WORKERS

Many of the essays under review were also dedicated to self-employment. Studies on this topic expressed the common concern that, above all in times of economic and financial crisis, companies tend to look explicitly among self-employed workers for additional margins of flexibility which go beyond flexible work arrangements in subordinated work, and that this practice may entail abuses. This may explain why articles published on this topic in 2014 examined the prospects for regulating these types of work relationships, and for adopting specific guarantees of protection for the work relationship itself, and for the social security of self-employed workers.

A closer examination of these essays which covered different areas of the world reveals a fundamental distinction between those concerned with self-employment as such, and those dealing with economically dependent self-employment. This latter type of self-employment which resembles subordinated work from a structural point of view tends to be particularly liable to abuse and therefore needing stronger guarantees. It comes as no surprise that the majority of the articles reviewed concentrated on this second type of independent work.

Among the articles dealing with self-employment in the strict sense, one in particular examined this type of work relationship in two common-law systems, Australia e Canada.²⁴ Focusing on the issue of collective bargaining, the author highlighted that both countries traditionally excluded the self-employed from collective bargaining arrangements. However, such exclusion has now become anachronistic, since the Fordist models of production have been superseded. As the author explains, one of the main pillars of classic labour law is gradually losing ground, *i.e.* the idea that subordinated workers being in a weak bargaining position should be protected first and foremost by means of collective bargaining agreements, whereas the self-employed, being in a strong position, would not need such guarantees. Since the post-Fordist era new types of self-employment with weak bargaining positions have emerged, provoking proposals to create a collective bargaining system tailored to protect their needs. McCrystal's proposal is based on a range of collective bargaining arrangement already in existence in this field, albeit with limited effects as

²⁰ According to the EU, undeclared work means any paid activity which is legal in itself, but which remains undeclared to the public authorities: see in particular the Communication of the Commission of the European Union on undeclared work (COM [98] 219 final, adopted on the 7th of April 1998), p. 4.

²¹ Ales E., "Undeclared Work: An Activity-based Legal Typology", in *ELLJ*, 2014, 5, 2, p. 156; Ales E., "Del lavoro sommerso o, meglio, "non dichiarato": una tipizzazione giuridica fondata sul concetto di "attività remunerata"", in *DLM*, 2014, 1, p. 11; Končar P., "Undeclared Work: An Activity-based Legal Typology. Reflection on the Keynote Paper", in *ELLJ*, 2014, 5, 2, p. 167.

²² Williams C. C., "Public Policy Approaches Towards the Undeclared Economy in European Countries: A Critical Overview", in *ELLJ*, 2014, 5, 2, p. 132.

²³ Mitrus L., "The Fight Against Undeclared Work: Sanctions and Incentives", in *ELLJ*, 2014, 5, 2, p. 174; Waas B., "Undeclared Work: Possible Sanctions on Closer Examination", in *ELLJ*, 2014, 5, 2, p. 187.

²⁴ McCrystal S., "Designing Collective Bargaining Frameworks for Self-Employed Workers: Lessons from Australia and Canada", in *IJCLIR*, 2014, 30, 2, p. 217.

they apply to specific types of precarious self-employed work. The author suggests that this experience could serve as a basis for constructing a general system of collective bargaining for the self-employed. Another essay dealt with the access of self-employed workers, in the strict sense of the term, to specific benefits of the Spanish social security system, according to law no. 35 of 2014.²⁵

Many of the articles on economically dependent self-employment have emphasized the need to regulate this phenomenon and to protect the workers involved, particularly in times of economic crisis. One of the studies has investigated the reasons why national law-makers in Eastern European countries rarely paid any attention to this phenomenon, although they are now an integral part of the EU, whereas various EU member states have adopted protective measures for the self-employed, albeit with mixed results.²⁶ The author argues that Eastern European countries still cling to the classic division between subordinated work (to which labour law applies) and self-employment (to which civil law applies); this division is firmly based on cultural and legal roots which hamper (even partial) progress towards the protection of self-employed workers operating in conditions of economic dependence. Furthermore, some essays examined developments in economically dependent self-employment in Europe during the years of the economic crisis. A comparison of various legal systems revealed that national Parliaments adopted definitions of the phenomenon that differ widely from one country to another.²⁷ This implies that definitions used in different European countries are highly incoherent: Only some systems have introduced a legal definition of economically dependent work so far, while in others the debate on the opportunity of doing so is still going on. Moreover, there is a tendency, even at legislative level, to confuse this type of self-employment with disguised employment. Finally, some studies dealt with more specific issues, for example, with the compensation for loss incurred by self-employed workers following the withdrawal from the contract by the other party under the Spanish legal system.²⁸

D ATYPICAL WORK RELATIONSHIPS

With regard to the so-called atypical work relationships, an analysis of the IALL journals in 2014 shows that authors most frequently examined fixed-term contracts on the one hand, and temporary agency work on the other. Some authors also considered part-time work, but usually these studies dealt not so much (or not exclusively) with this kind of work contract as such, but rather with the gender dimension frequently linked to it.²⁹

Fixed-term employment was an issue mainly in European journals, for the most part in Italian ones. Labour lawyers considered essentially two aspects: firstly, they discussed the compatibility of national laws on fixed-term employment and EU legislation, and secondly, they considered a particular form of fixed-term work, namely fixed-term contracts which terminate "without a cause", that is without an underlying justifying reason. Italian labour law has recently introduced this type of contract which already existed for some time in other legal systems (such as in Germany). In practice, both aspects are closely linked, as the concern about the potential abuse inherent in such contracts was also among the concerns that motivated social partners and EU lawmakers to adopt the framework agreement on fixed-term work, later translated into Directive no. 70 of 1999.

²⁵ Taléns Visconti, E. E., "Reflexiones en torno a los requisitos de acceso a la prestación por cese de actividad de los trabajadores autónomos (tras la aprobación de la Ley 35/2014, de 26 de diciembre)", in *RDS*, 2014, 68, p. 99.

²⁶ Gyulavári T., "Trap of the Past: Why Economically Dependent Work is not Regulated in the Member States of Eastern Europe", in *ELLJ*, 2014, 5, 3, p. 267.

²⁷ Rosioru F., "Legal Acknowledgement of the Category of Economically Dependent Workers", in *ELLJ*, 2014, 5, 3, p. 279.

²⁸ Barrios Baudor G. L., "La compleja delimitación de la indemnización por daños y perjuicios en los supuestos de extinción del contrato de trabajador autónomo económicamente dependiente", in *RL*, 2014, 12, p. 69.

²⁹ And hence the potential types of discrimination deriving from them; see further below para. 2.5.

Besides some very specific articles on the development of fixed-term employment with regard to certain legal systems³⁰ or to individual categories of workers³¹, the debate has turned on the limitations that EU legislation imposed on national lawmakers for regulating fixed-term contracts, both in general, as with regard to the above-mentioned *sui generis* type of fixed-term contracts which terminate “without cause”.

The essays concerned with the first aspect have examined the impact of EU legislation and more particularly the ECJ case-law on regulating fixed-term contracts in the public sector.³² This case law can be assessed positively, as it extends protection (above all from the viewpoint of applying the principle of equal treatment) to workers with fixed-term contracts in the public sector, too; on the other side, there are negative effects as these contracts contribute to creating instability in the regime governing public work in general, because they do not take account of its particular nature. As a consequence, the process of gradually assimilating the public sector employment regime to private labour law, by means of instruments such as the so-called contractualisation of their work relationships, is now accelerated. Other studies have examined national provisions adopted to combat the abuse of fixed-term contracts as imposed by the EU legislation mentioned above.³³

The articles dealing specifically with fixed-term contracts without a justifying cause have largely been published in Italian journals, thus taking account of the Italian reform on fixed-term work contracts in 2014 (the so-called Poletti law, decree law no. 34 of 2014, converted into law no. 78 of 2014). This reform permitted on the one hand to create fixed-term contracts terminating without a cause up to a maximum of 36 months.³⁴ On the other hand, the new regime allows for the contracts originally negotiated to be renewed up to five times. This law reform, probably inspired by the German model, has raised many doubts among Italian legal scholars, also with regard to its compatibility with EU legislation.³⁵

With regard to temporary work arranged through employment agencies, various authors discussed in detail the regulatory aspects of this arrangement.³⁶ Studies analysing several European regimes of temporary agency work that promote these atypical work relationships as tools for making the job market and its regulation more flexible were of particular interest.³⁷

³⁰ Concerning Estonia: Tupay P. K., “Das befristete Arbeitsverhältnis als Ausdruck der Flexicurity nach estnischem Modell”, in *EuZA*, 2014, 7, p. 468.

³¹ Concerning university researchers in the Spanish legal system: Ballester Laguna F., “La deficiente regulación de los límites al encadenamiento de los contratos de trabajo temporales del personal investigador”, in *RDS*, 68, p. 209.

³² Concerning Spain: Mazuyer E., “Critical Analysis of ECJ Case Law on Fixed-Term Contracts in the Public Sector”, in *ELLJ*, 2014, 5, 3, p. 334.

³³ Suárez Corujo B., “Nuevas formulas para combatir la contratación temporal: la indemnización por daños y perjuicios”, in *RDS*, 2014, 65, p. 209.

³⁴ Allowing, with a justifiable reason, to supersede this limit, given that the maximum duration of the first and the second are equalized.

³⁵ Biasi M., “La [a] causalità del contratto a termine in Europa. Riflessioni comparative sulle novità in Italia”, in *DLM*, 2014, 3, p. 763; Romei R., “La nuova disciplina del lavoro subordinato a termine”, *op. cit.*; Gragnoli E., “La nuova regolazione del contratto a tempo determinato e la stabilità del rapporto di lavoro: introduzione”, *op. cit.*; Leccese V., “La compatibilità della nuova disciplina del contratto di lavoro a tempo determinato con la Direttiva n. 99/70”, *op. cit.*; Leone G., “L'utilizzo vincolato del contratto a tempo determinato: cronaca di una morte annunciata”, *op. cit.*

³⁶ García Romero B., “Las Empresas de Trabajo Temporal como agencias globales de empleo”, in *RL*, 2014, 3, p. 69; Evju S., “Il lavoro tramite agenzia nell'ordinamento norvegese”, in *DLRI*, 2014, 141, 1, p. 91; Bassetti F., “Il lavoro in somministrazione: la fornitura di personale e la disciplina del rapporto di lavoro [con l'agenzia]”, in *DLRI*, 2014, 142, 2, p. 197.

³⁷ Chesalina O., “Temporary Agency Work in the Russian Federation”, in *ZIAS*, 2014, 28, p. 33; Krause R., “Arbeitnehmerüberlassung als Instrument zur Flexibilisierung der Arbeitsmärkte”, in *ZIAS*, 2014, 28, p. 113; Razzolini O., “Temporary Agency Work as a Tool for Labour Market Flexibility - Italy”, in *ZIAS*, 2014, 28, p. 153; Robin-Olivier S., “Vers un nouveau régime du détachement des travailleurs?”, in *RDT*, 2014, 2, p. 134.

With respect to part-time work, many essays addressed not only how various European countries regulate this type of work contract,³⁸ but examined the gender aspect which is traditionally associated with this kind of work, including the topic of occupational segregation.³⁹

Although the gender-based approach wholly dominated the discussion of part-time working in the labour law debate in 2014, nonetheless there were those who, while examining the impact of the most recent reforms in German labour law, paused to consider a particular form of part-time work, the so-called *minijobs*.⁴⁰ This peculiar type of part-time work contract, where the salary must not exceed a threshold of 450 euros a month, is to a large extent exempted from ordinary tax and social security contributions, both for the employer and employee.⁴¹ The economic advantages linked to this type of part-time contracts have, over recent years, brought about a quite significant increase in their number and as a result, in the number of people who receive extremely low wages, in the majority of cases quite insufficient to live decently (the so-called working poor).

E THE FIGHT AGAINST OLD AND NEW FORMS OF DISCRIMINATION

A further type of workplace vulnerability concerns various kinds of discrimination which workers often have to contend with. The debate concerns 'traditional' discrimination as well as forms of discrimination that have emerged more recently, as a result of the continuous economic and social change which also is affecting work relationships.

With respect to the traditional forms of discrimination gender discrimination still remains a core issue today: the fight against this form of discrimination is being conducted above all with regard to pay, and the discussions on this topic take place right across the various regions of the globe, not only in non-European journals⁴² but also in European ones.⁴³ As mentioned earlier, some of the articles on gender discrimination have analysed the regulation of part-time working in depth which may entail significant discrimination, including in relation to salary and occupational segregation.⁴⁴ With regard to sex discrimination and the connected topic of equal treatment, there has been some innovative research, for example in Italy, on the role of *gender mainstreaming* in collective bargaining agreements.⁴⁵

³⁸ Blázquez Cuesta M., Moral Carcedo J., "Women's part-time jobs: "Flexirisky" employment in five European countries", in *ILR*, 2014, 153, 2, p. 269; Salladarré F., Hlaimi S., "Women and part-time in Europe", in *ILR*, 2014, 153, 2, p. 293.

³⁹ Sparreboom T., "Gender equality, part-time work and segregation in Europe", in *ILR*, 2014, 153, 2, p. 245.

⁴⁰ Borzaga M., "Luci ed ombre delle più recenti riforme del mercato del lavoro tedesco agli occhi del giuslavorista italiano", in *LD*, 2014, 1, p. 37.

⁴¹ While the employee under such contract is exempted from all social security contributions (but can opt to contribute to the pension scheme), the employer pays a reduced rate to the health insurance and pension insurance.

⁴² Smith M., Stewart A., "Equal remuneration and the Social and Community Services case: Progress or diversion on the road to pay equity?", in *AJLL*, 2014, 27, 1, p. 31.

⁴³ Burton B., "Neoliberalism and the Equality Act 2010: A Missed Opportunity for Gender Justice?", in *ILJ*, 2014, 43, 2, p. 122; Castellano Burguillo M. E., "El impacto de género de las reformas laborales de 2012 y 2013", in *RL*, 2014, 7-8, p. 69.

⁴⁴ Blázquez Cuesta M., Moral Carcedo J., "Women's part-time jobs: "Flexirisky" employment in five European countries", *op. cit.*; Salladarré F., Hlaimi S., "Women and part-time in Europe", *op. cit.*; Sparreboom T., "Gender equality, part-time work and segregation in Europe", *op. cit.*

⁴⁵ Ferrara M. D., "Il *gender mainstreaming* nei contratti collettivi: tendenze della contrattazione di genere", in *DLM*, 2014, 2, p. 519.

Other authors considered forms of discrimination that have emerged more recently, in particular, discrimination based on the worker's age,⁴⁶ on their gender identity,⁴⁷ on their health (HIV-AIDS),⁴⁸ and on religion and race.⁴⁹

Finally, regarding the most recent forms of discrimination, IALL journals mainly covered two of them. The first concerns the access to justice for workers who have faced discrimination, not always guaranteed in an effective way, and therefore in need of strengthening.⁵⁰ The second tackles the language dimension emerging above all in relation to migrant workers and will be addressed in the following paragraph.⁵¹



MIGRANTS AT WORK: LABOUR LAW AND SOCIAL SECURITY ISSUES

Globalization has led to a dramatic increase in migration for work and other purposes, a phenomenon that turned into one of the prominent issues discussed by IALLJ authors in 2014. The ILO estimates that 105 million persons are working in a country other than their country of birth.⁵² Labour mobility has become a key feature of global economy. Permanent migration flows to the OECD countries increased sharply in 2014 for the first time since 2007, and also inflows of temporary migrant workers are increasing albeit with large variations across categories.⁵³

Correspondingly, a consistent portion of IALLJ articles took up the topic of migrant work as a central feature of local labour markets in many host states, including the rising number of non-status migrants, the interdependence of migration law and the labour law status of migrants and social rights linked to different types of status under labour law and/or social security law. Most authors took the perspective of the protection (or the lack of protection) of the individual migrant worker,⁵⁴ but some authors focussed on the potential effects of migrant work on the local labour market of the host state, and the effects on the migrant workers' countries of origin, in terms of brain drain.

In general, migrant workers will be treated differently according to their legal status under immigration law: EU states commonly distinguish between EU internal migrant workers, temporary or seasonal migrant workers, highly qualified migrants, migrants posted by their companies or intra-corporate transferees (ICT), asylum seekers, refugees with a recognized refugee status, students, migrants with a permanent residence status, family members of a migrant worker, and last but not least irregular migrants whose visa has expired or those without regular documents. These categories – except for the internal migration in the free movement area of the European Economic

⁴⁶ Alon-Shenker P., "Nonhiring and Dismissal of Senior Workers: Is It All About Money?", in *CLLPJ*, 2014, 35, 2, p. 159; Baseiria Martí J., "La legislación antidiscriminatoria por razón de edad avanzada en Estados Unidos", in *TL*, 2014, 123, p. 109.

⁴⁷ Álvarez Cuesta H., "Igualdad y no discriminación en el trabajo por razón de identidad sexual", in *RDS*, 2014, 65, p. 93.

⁴⁸ Miné M., "Discrimination liée à l'état de santé et licenciement d'un salarié atteint du VIH", in *RDT*, 2014, 2, p. 120.

⁴⁹ Fiorentino A., "Les discriminations religieuses et raciales", in *RDCTSS*, 2014-1, p. 93.

⁵⁰ Santagata de Castro R., Santucci R., "Diritto antidiscriminatorio e accesso alla giustizia: Unione europea, Germania e Italia a confronto", in *DLM*, 2014, 2, p. 335.

⁵¹ Blanpain R., "The Use of Languages in Employment Relations", in *BCLR*, 2014, 87, p. 1.

⁵² Lamarche L., "Human Rights, Social Security and Migrant Workers", in *BCLR*, 2014, 84, p. 9.

⁵³ See OECD, *International Migration Outlook 2015*, OECD Publishing, Paris 2015, pp.16 ff. According to the OECD, the number of asylum seekers in the OECD area has also increased steadily since 2010, reaching a 10-year peak in 2014, but IALL journals have not yet turned on this development in 2014.

⁵⁴ For the limitations of criminal law as a tool to offer protection for vulnerable migrant workers who are subject to abusive employment conditions, see the critical analysis for Spain provided by Correa Carrasco M., "Los derechos de los trabajadores extranjeros y su protección penal", in *RDS*, 2014, 67, p. 45. He refers to criminal law as an instrument to combat the illicit behaviour of employers whereas many countries tend to invoke criminal law rather to criminalize the victims: migrant workers with irregular status under migration and/or labour law.

Area - can be found also in non-European states, namely Australia or Canada, whereas in China some very special problems are linked to internal migration from the rural areas to the urban centres.⁵⁵

The authors highlighted various aspects of the fact that each status entails different possibilities and restrictions concerning integration into the labour market.

A GENERAL ISSUES

The phenomenon of migrants at work has been treated with respect to some more general issues at a micro level, such as language in employment relations⁵⁶ and at a macro level in terms of brain drain and brain gain as effects of international labour migration of highly qualified migrants (Fernández Fernández 2014).⁵⁷

An important aspect of labour relations in international labour mobility is the use of languages in labour relations, a topic often neglected in labour law literature but of the utmost practical impact, e.g. the language of employment documents, access to information, both for companies and posted workers; oral relations between employer and employee, or the language of transnational collective agreements. Language-related circumstances often lead to serious disputes which have not yet received sufficient attention by policy-makers or legislators. Language as a major challenge in cross-border migration of workers is treated in a comprehensive way in an original book authored by Blanpain.⁵⁸

The growing international mobility within multinational enterprises and its impact on labour relations has also been analysed in relation to highly qualified workers. The Spanish labour lawyer Fernández Fernández⁵⁹ reviewed numerous articles on case studies of the mobility of highly qualified workers published by the German *IZA - Forschungsinstitut zur Zukunft der Arbeit* during the period 2001-2013, and he provided a comparative analysis of their conclusions and findings concerning various aspects of brain gain and brain loss, including hidden brain drain and the often neglected gender dimension of the brain drain linked to the downshifting of female migrants' professional attainment when they accept some type of care work or work as domestic aids, far below their professional qualifications.

B VULNERABLE CATEGORIES OF MIGRANT WORKERS

Many authors identified an increasing cause of concern in the situation of migrants with precarious work conditions, in particular migrant workers deemed to be in a situation of vulnerability: irregular migrant workers on the one hand, temporary migrant workers⁶⁰ on the other. Both situations may impact not only the migrant workers' individual and collective rights under labour law, but may be used by employers and legislators as a device to lower labour standards which in turn could have effects on domestic labour conditions.

⁵⁵ Qinxuan P., "Multi-layered Gaps between ILO Conventions and the Chinese Legal Protection for Migrant Women Workers as Domestic Helpers in China", in *BCLR*, 2014, 89, p. 31; Wang Z., "China's "labour shortage" and migrant workers' lack of social security", in *ILR*, 2014, 153, 4, p. 649.

⁵⁶ Blanpain R., "The Use of Languages in Employment Relations", *op. cit.*

⁵⁷ Fernández Fernández R., "La movilidad internacional de trabajadores altamente cualificados (Retos para los juristas a partir de la lectura de los discussion papers del Forschungsinstitut zur Zukunft der Arbeit)", in *RL*, 2014, 4, p. 57.

⁵⁸ Blanpain R., "The Use of Languages in Employment Relations", *op. cit.*

⁵⁹ Fernández Fernández R., "La movilidad internacional de trabajadores altamente cualificados (Retos para los juristas a partir de la lectura de los discussion papers del Forschungsinstitut zur Zukunft der Arbeit)", *op. cit.*

⁶⁰ In practice, temporary migrant workers are a mixed group, in terms of categories and skills. According to the OECD, they include highly skilled engineers or IT consultants on assignment, together with ICT people, working holiday-makers, migrant trainees, au pairs, and seasonal workers in agriculture and hospitality. Different rules of migration law apply to these different categories.

1 - Irregular migrant workers

As Dewhurst reports⁶¹, there are between thirty to forty million irregular immigrants worldwide, enduring precarious working conditions, with low or no payment, long hours, and dangerous conditions of work. Albeit States have engaged in various ways to tackle irregular immigration, these measures could neither eliminate the phenomenon of irregular immigration as such nor the exploitation of these workers. A more recent attempt consists in addressing the pull factors of irregular migration and in simultaneously reducing exploitation, by imposing sanctions on employers of irregular immigrants and by introducing a limited right to back pay. Dewhurst contributes to the discussion on the interplay between immigration law and labour law by analysing three different approaches adopted in different legal systems in dealing with back pay claims of irregular migrants: (1) the model termed "non-protection approach" which disconnects immigration and labour law, and denies labour rights on the assumption that non-protection acts as a disincentive to employment, from the irregular immigrant perspective.⁶² (2) The model termed "protection with consequences approach" which is a compromise solution between non-protection and full protection; it provides for protection under labour law, but not under immigration law, so that the labour law rights cannot be enforced without the consequences of potential detection, detention, and deportation.⁶³ Albeit labour rights are available in this case, they are not enforceable in practice, due to various obstacles, including lack of legal assistance, or the difficulty of proving the employment relationship, but most of all the fear of detection or deportation. (3) The full-protection approach is the model that seeks to avoid the negative consequences of the second model and is seen as the model most in line with the protection of human rights standards. An almost full-protection approach - as the most modern approach in the area of immigrant rights - has been adopted by the 1990 UN Convention on the Rights of Migrant Workers and Members of their Families.⁶⁴ The approach is based on two justifications: the idea that human rights apply to all persons regardless of their legal status, and the idea that the effective protection of fundamental labour rights reduces the employer incentive to hire such workers.⁶⁵ In a similar perspective, Selberg⁶⁶ discusses the situation of illegal (undocumented) migrant workers and policy approaches over time in the case of Sweden, arguing that precarious living conditions, underpaid labour outside the organisational control and protection of the unions constitute a severe challenge to the Swedish welfare state model and have led to Swedish unions organising and representing irregular migrants.⁶⁷ McKay has analysed the transnational aspects of undeclared work and the role of EU legislation in maintaining such irregular work.⁶⁸ She argues that it is

⁶¹ Dewhurst E., "Models of Protection of the Right of Irregular Immigrants to Back Pay: The Impact of the Interconnection Between Immigration Law and Labor Law", in *CLLPJ*, 2014, 35, 2, p. 217.

⁶² The model is based on the very tenuous argument that irregular migrants are attracted to a state due to its labour rights and conditions.

⁶³ Dewhurst E., "Models of Protection of the Right of Irregular Immigrants to Back Pay: The Impact of the Interconnection Between Immigration Law and Labor Law", *op. cit.*, p. 227. This approach is followed by most EU countries and is also closest to that adopted by the EU Sanctions Directive 2009/52/EC of 18 June 2009 (providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals). On the impact of the sanctions directive on Sweden *cf.* Selberg N., "The Laws of "Illegal" Work and Dilemmas in Interest Representation on Segmented Labor Markets: Å propos Irregular Migrants in Sweden", in *CLLPJ*, 2014, 35, 2, p. 247, p. 259 f.

⁶⁴ *Cf.* International Convention on the Rights of Migrant Workers of 1990, entered into force on 1 July, 2003. This Convention has been signed by thirty-eight states, and ratified by forty-eight. No EU member state has yet signed or ratified this treaty (as of November 2015).

⁶⁵ Dewhurst E., "Models of Protection of the Right of Irregular Immigrants to Back Pay: The Impact of the Interconnection Between Immigration Law and Labor Law", *op. cit.*, p. 245.

⁶⁶ Selberg N., "The Laws of "Illegal" Work and Dilemmas in Interest Representation on Segmented Labor Markets: Å propos Irregular Migrants in Sweden", *op. cit.*

⁶⁷ Selberg N., "The Laws of "Illegal" Work and Dilemmas in Interest Representation on Segmented Labor Markets: Å propos Irregular Migrants in Sweden", *op. cit.*, p. 266 f.

⁶⁸ McKay S., "Transnational Aspects of Undeclared Work and the Role of EU Legislation", *op. cit.*; McKay S., "Gli aspetti transna-

the structure of the labour market that drives undeclared work, particularly in the context of transnational migration. She also identifies a global policy trend supported at EU and national state levels that favours temporary, circular and selective migration, and thereby the conditions in which undeclared work grows. McKay also addresses the issue of false (or bogus) self-employment in the context of posting - a form of employment defined as economically dependent self-employment.⁶⁹ Migrant workers are drawn to this form of work, particularly where immigration law does not permit direct employment, as has been the case for Bulgarian and Romanian citizens during the transitional period following EU accession. It has been pointed out that bogus self-employed migrant workers are more vulnerable than dependent employees as they are excluded from collective bargaining, and often also from social insurance systems. The growing phenomenon and its implications are also discussed by Muller who highlights that mobility of bogus self-employment threatens the social model of the host States.⁷⁰

2 - Temporary migrant workers

Various aspects of temporary migrant work are discussed for Australia,⁷¹ Canada,⁷² and for the EU.⁷³ In the case of Australia, Howe is concerned about the effects of visa programmes for temporary overseas migration to fill skill shortages in the domestic economy and the relevance of new pathways to avoid standard visa arrangements.⁷⁴ Legislative debates in Australia clearly reflect the fear that migrant work would lead to the displacement of Australian jobs by foreign workers in semi-skilled occupations in the resources industry. They seek to protect local job opportunities rather than the migrant workers, e.g. by strict obligations for local labour market testing, obligations to invest in the training needs of the local workforce, and to prioritize local workers, recently retrenched workers and other groups with high unemployment rates. Howe's focus is the overall incoherence of the current Australian temporary migration program as such, and the absence of a comprehensive approach of properly identifying skill shortages in the local labour market.

On the contrary, the authors who discussed temporary migration in the case of Canada⁷⁵ drew attention to the precarious migration status of temporary migrant workers in the Canadian Labour force, especially when they lack any formal migration status. The general idea of precariousness in the labour market relates to "limited social benefits and statutory entitlements, job insecurity, low wages, and high risks of ill-health".⁷⁶ Social stratification on the basis of factors as gender, race, and also migration status aggravate precariousness. Migration status is directly linked to inferior conditions of work, and even authorized temporary foreign workers have limited labour mobility,

zionali del lavoro sommerso ed il ruolo della legislazione europea", *op. cit.*

⁶⁹ McKay S., "Transnational Aspects of Undeclared Work and the Role of EU Legislation", *op. cit.*

⁷⁰ Muller F., "Cross-Border Mobility of "Bogus" Self-Employed Workers: A Lack of Legal Framework Coupled with Protection of Economic Rights", in *ELLJ*, 2014, 5, 3-4, p. 306.

⁷¹ Howe J., "Report: Enterprise migration agreements under the subclass 457 visa: Much ado about nothing?", in *AJLL*, 2014, 27, p. 86.

⁷² Marsden S., "Silence Means Yes Here in Canada: Precarious Migrants, Work and the Law", in *CLELJ*, 2014, 18, 1, p. 1; Vosko, L. F., "Tenuously Unionised: Temporary migrant workers and the limits of Formal Mechanisms Designed to Promote Collective Bargaining in British Columbia", in *ILJ*, 2014, 43, 4, p. 451.

⁷³ Hunt J., "Making the CAP Fit: Responding to the Exploitation of Migrant Agricultural Workers in the EU", in *IJCLLR*, 2014, 30, 2, p. 131.

⁷⁴ Howe J., "Report: Enterprise migration agreements under the subclass 457 visa: Much ado about nothing?", *op. cit.*

⁷⁵ Marsden S., "Silence Means Yes Here in Canada: Precarious Migrants, Work and the Law", *op. cit.*; Vosko, L. F., "Tenuously Unionised: Temporary Migrant Workers and the Limits of Formal Mechanisms Designed to Promote Collective Bargaining in British Columbia", *op. cit.*

⁷⁶ Vosko L.F., "Precarious Employment: Towards an Improved Understanding of Labour Market Insecurity", in L.F. Vosko (ed.), *Precarious Employment: Understanding Labour Market Insecurity in Canada*, 2005, McGill University Press, Montreal.

as well as lesser entitlements to health and employment insurance.⁷⁷ A common experience of temporary foreign workers is wage discrimination, poor working conditions, and inability to unionize, as Marsden explains in her article which is based on an empirical study conducted with migrants and migrant-serving agencies in Vancouver, British Columbia. The study indicates that precarious migration status was associated with deskilling, decreased job security and mobility, illegally low pay and long hours, and various health and safety risks. Protection gaps arise mainly from federal law that gives employers a great deal of discretion over the status of temporary foreign workers, aggravating the employer-employee power imbalance. Canada's immigration policies strongly encourage temporary labour migration, but by tying migration status to employer discretion, federal law favours employers and de facto hampers prospects of migrant workers to seek redress for violations of their statutory rights.

Vosko's article addresses the specific problems of temporary migrant workers⁷⁸ in the agricultural sector in securing access to their labour rights through representation and meaningful collective bargaining in Canada (British Columbia). The author shows that temporary migrant workers are ill-served by mechanisms aimed at promoting collective bargaining, e.g. the mechanisms by which the BC Labour Relations Board determines an appropriate bargaining unit. Limits of formal mechanisms are closely linked to labour law's subsidiarity to legal frameworks governing work across borders.

The situation of migrant agricultural workers in the EU displays similar features of precariousness, rights infringements, exploitation and even forms of forced labour, as Hunt has pointed out.⁷⁹ Relief for these problems has been sought through changes in immigration law rather than labour law. In February 2014, a new Seasonal Workers' directive⁸⁰ was adopted, which creates narrowly defined possibilities for a legal right to work and reside for third-country nationals undertaking seasonal work. According to Hunt, a more efficient approach could be to use the EU common agricultural policy as a device to better protect seasonal agricultural workers, by making farm subsidies conditional on respect for employment rights for all workers. Other types of temporary migrant work within the free movement area of the EU are less at risk of exploitation, e.g. in case of intra-corporate transfers.⁸¹ However, in the context of international mobility of posted workers, there is a growing concern among labour law experts that is addressed in various articles.⁸²

3 - Migrant care workers

Additional vulnerability for migrant workers is associated with migrant care work, which stem from the intersection with the intimate nature of their work and the gendered dimension of care work. In the case of Israel, Mundlak and Shamir explored the feasibility of trade unionism for migrant care workers arguing that trade unions are better qualified than other civil society or community organizations to meet the specific needs of migrant care workers, in that they give a political voice to migrant care workers, and contribute to form political agency despite multiple sources of vulnerability.⁸³ This should help "lobby for, implement and translate norms and regulations into effective legal entitlements". In the case of internal migration, China still lacks protection and neglects human

⁷⁷ Marsden S., "Silence Means Yes Here in Canada: Precarious Migrants, Work and the Law", *op. cit.*

⁷⁸ On OECD countries' reliance on temporary migrant workers see e.g. OECD, International Migration Outlook 2015, *op.cit.*, pp. 21 ff.

⁷⁹ Hunt J., "Making the CAP Fit: Responding to the Exploitation of Migrant Agricultural Workers in the EU", *op. cit.*

⁸⁰ Directive on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, Directive 2014/36/EU, OJ 2014 L94/375.

⁸¹ The intra-corporate transfer directive 2014/66/EU of 15 May 2014 which concerns the transfer of highly skilled third-country nationals from international companies to subsidiaries in the EU was not yet a topic in 2014 IALLJ.

⁸² For posting issues see below.

⁸³ Mundlak G., Shamir H., "Organizing migrant care workers in Israel: Industrial citizenship and the trade union option", in *ILR*, 2014, 153, 1, p. 93.

dignity for one of the most vulnerable social groups, namely migrant women workers as domestic helpers: as women, as migrants with rural *Hukou* and being domestic workers, they face triple disadvantages entailing insufficient access to social welfare and public services, and exclusion from the labor law system because they are not considered as “employees”. The author Qinxuan draws the attention to the persisting legal gaps in ILO standards and in the Chinese domestic legal system, and highlights the barriers that make ILO instruments ineffective in China.⁸⁴

C POSTED WORKERS

Posting of workers is a particular form of temporary migrant work that has been addressed under various aspects, as a sincere concern not only felt by lawyers, but also for the political debate on European integration. The fundamental question with posting is how much employment protection should host states provide to posted workers? This issue has occupied the EU and national legislatures, the EU Court of Justice, national courts and now even the European Committee of Social Rights, established in the framework of the Council of Europe’s Social Charter.⁸⁵ Special vulnerability has been associated with the posting of economically dependent self-employed migrant workers, especially in the construction sector.⁸⁶ But posting is also seen as a privilege for some migrant workers who may derogate from domestic labour law rules. This applies in particular to those migrants who as economically independent workers can profit from the liberalization of economic activities.⁸⁷

The EU legislator has recently amended the legal framework on posting⁸⁸ which has prompted several articles in 2014 labour law journals.⁸⁹ This new directive aims to prevent, avoid and combat the abuse and circumvention of the applicable rules by undertakings taking improper or fraudulent advantage of the freedom to provide services under EU law. Some authors are rather pessimistic about the improvements to be expected in practice, as the normative context related to the free movement of services based on a neoliberal concept of market integration rather than on the protection of core labour rights still allows for normative spaces with “lesser protection” that employers can use in order to cut down employment costs.⁹⁰

⁸⁴ Qinxuan P., “Multi-layered Gaps between ILO Conventions and the Chinese Legal Protection for Migrant Women Workers as Domestic Helpers in China”, *op. cit.*

⁸⁵ The case law of the ECJ on posting which restricted employment protection that posted workers would receive in the host state was criticized by some states and trade unions, especially in Northern Europe. For an appraisal of posting cases under Norwegian law that were brought before the EFTA Court (and the Norwegian Supreme Court), and a posting case under Swedish law submitted to the ECSR see Barnard C., “European Developments. More posting”, in *ILJ*, 2014, 43, 2, p. 194.

⁸⁶ Muller F., “Cross-Border Mobility of “Bogus” Self-Employed Workers: A Lack of Legal Framework Coupled with Protection of Economic Rights”, *op. cit.*; Lillie N., Wagner I., Berntsen L., “Distacco dei lavoratori, violazione delle norme e cambiamento istituzionale”, in *DLR*, 2014, 141, 1, p. 71.

⁸⁷ Robin-Olivier S., “Vers un nouveau régime du détachement des travailleurs?”, *op. cit.*

⁸⁸ The aim of the new Enforcement Directive (Directive 2014/67/EU) of 15 May 2014 is to improve the implementation and application in practice of the previous Directive on the posting of workers (Directive 96/71/EC), thereby guaranteeing better protection of posted workers and a more transparent and predictable legal framework for service providers.

⁸⁹ McKay S., “Transnational Aspects of Undeclared Work and the Role of EU Legislation”, *op. cit.*; Muller F., “Cross-Border Mobility of “Bogus” Self-Employed Workers: A Lack of Legal Framework Coupled with Protection of Economic Rights”, *op. cit.*; Robin-Olivier S., “Vers un nouveau régime du détachement des travailleurs?”, *op. cit.*

⁹⁰ With special emphasis on the construction sector: see Lillie N. *et al.*, “Distacco dei lavoratori, violazione delle norme e cambiamento istituzionale”, *op. cit.*, p. 80 f. who consider the integrated European context as a factor that allow employers to circumvent the limits imposed by national regulations. This entails a segmentation of the protections in the labour market to the detriment of migrant workers.

D SOCIAL SECURITY FOR MIGRANT WORKERS

Finally, and in addition to labour law challenges, migrant workers may also face restrictions under migration law that severely impact access to social security benefits. In the era of economic globalization and in view of new patterns of migration and human rights developments, there is an urgent need for a coherent and workable body of international social security law. An increasing number of countries today have entered into bilateral or multilateral social security agreements to safeguard social protection for migrant workers in their life course. Several authors discuss these contemporary developments, in particular the human rights perspective,⁹¹ the overall international legal framework,⁹² the links between the different hemispheres of the globe,⁹³ regional initiatives in Latin America,⁹⁴ Africa⁹⁵ and Europe.⁹⁶ Special attention has been paid to recent unilateral solutions to tackle contemporary challenges in the field of migrant work. National initiatives may be aimed at increasing social protection for migrants, as in the case of informal migrant workers in Costa Rica,⁹⁷ or in the Philippines which developed a Magna Charta of rights for Filipinos working overseas.⁹⁸ India has developed a mixed approach, combining unilateral measures aimed at restricting the withdrawal of accumulated social security contributions by foreign nationals and an array of bilateral arrangements to improve fair treatment and social security of Indian workers abroad.⁹⁹ A trend towards territoriality of rights is reported for Australia which relies on restrictive unilateral responses to new types of immigration from poorer non-Western countries,¹⁰⁰ whereas the Netherlands attempt to renegotiate bilateral social security relations in order to limit the export of social benefits.¹⁰¹

IV SOCIAL SECURITY AND VOCATIONAL TRAINING

Social security developments and social policy responses to the enduring impact of either demographic and/or economic challenges have again been a special focus in almost all IALLJ journals analysed for the 2014 overview. Authors concentrated on two major areas of social protection: old-age protection schemes providing for long-term benefits, and protection against the risk of unemployment - a risk with blurring boundaries to various protection schemes beyond unemployment insurance *stricto sensu*, such as sickness insurance, invalidity benefits for those with diminished abilities to work or even pre-retirement schemes for the unemployed at advanced working age. Current pension reforms and underlying policies are the most prominent topic debated with respect

⁹¹ Lamarche L., "Human Rights, Social Security and Migrant Workers", *op. cit.*

⁹² Arellano Ortiz P., "Social Security Protection for Migrants. A Need for Legal Intervention", in *BCLR*, 2014, 84, p. 31.

⁹³ Vonk G., "Social Security Rights of Migrants. Links between the Hemispheres", in *BCLR*, 2014, 84, p. 47.

⁹⁴ Jiménez Fernández A., "Social Security Coordination in Ibero-America: Ibero-American Multilateral Agreement on Social Security", in *BCLR*, 2014, 84, p. 71.

⁹⁵ Olivier M., "Social Security Developments in the SADC Region and Future Prospects for Coordination", in *BCLR*, 2014, 84, p. 81.

⁹⁶ Pennings F., "Coordination of Social Security within the EU Context", in *BCLR*, 2014, 84, p. 117. On recent case law developments of European social coordination law *cf.* Chiaromonte W., Giubboni S., "I regolamenti europei di sicurezza sociale nella recente giurisprudenza della Corte di Giustizia", in *RGL*, 2014, I, p. 481.

⁹⁷ Gatica López G., Pacheco-Jiménez J. F., "International Migration in Costa Rica: Challenges from the Present Context", in *BCLR*, 2014, 84, p. 125.

⁹⁸ Ofreño R. E., Sale J. P., "Social Security and Migrant Workers in the Philippines: Social Protection for the Country's Economic Protectors", in *BCLR*, 2014, 84, p. 167.

⁹⁹ Pellissery S., Dey Biswas S., Sengupta M., "Social Security for Migrants in a Segmented Economy. The Case of India", in *BCLR*, 2014, 84, p. 153.

¹⁰⁰ Boucher A., Carney T., "Social Security for Migrant Workers and their Families in Australia", in *BCLR*, 2014, 84, p. 187.

¹⁰¹ Van Everdingen M., Fehling P., Werner-de Buck T., "Bilateral Treaties in the Netherlands", in *BCLR*, 2014, 84, p. 215.

to EU member states.¹⁰² Yet the issue of old-age protection and the implications of pension systems and different pension models have also raised considerable attention among authors from other parts of the world (Peru, Mexico, Argentina, Malaysia, and New Zealand).

The second significant current legal issue in the area of social protection debated in 2014 is the role of unemployment schemes, their link to employment policies, and to policies aimed at improving employability and labour market participation. This overarching topic has been explored extensively among scholars from EU countries. Still, two publications considered employment policies in non-European states.¹⁰³

In addition to the numerous publications related to these specific social contingencies several articles have embarked on more general issues of legal doctrine in social protection law, for example, on the interplay between the European financial sustainability regime and the evolution of social insurance, welfare benefits or employment policies,¹⁰⁴ on concepts of fraud in social security in Spain, and the tensions between fraud detection and personal data protection,¹⁰⁵ or on the use of foreign legal doctrines such as the German concept of victim's compensation for a variety of social benefits introduced in Poland¹⁰⁶ which provide protection for different risks and damage likely to impact strongly on the normal course of life. The specific compensation schemes may cover severe health damage following obligatory vaccination, injuries that individuals suffer in non-work related accidents when they are performing activities in the public interest, damage from environmental disasters or damage that political activists suffered during the post war totalitarian regime and which entailed unemployment and later very low public pensions.

Another more general topic that is linked to the overall structure and the legal features of social protection is the topic of minimum income guarantees and the species of non-contributory benefits that should protect against gaps in contribution-based social security schemes.¹⁰⁷ Minimum income guarantees provided as non-contributory

¹⁰² For Portugal: Reinhard H.-J., "Portugal in der Sozial- und Finanzkrise: Rentenkürzungen verfassungswidrig aber kein Verstoß gegen die EMRK", in *ZIAS*, 2014, 1, p. 94; Slovenia: Mrzljak M., "The Pension reform in Slovenia in 2013", in *ZIAS*, 2014, 1, p. 105; Spain: Toscani Giménez D., "La revalorización de las pensiones en la Ley 23/2013, de 23 de diciembre y su constitucionalidad", in *RL*, 2014, 2, p.91; Rodríguez-Piñero y Bravo-Ferrer M., Casas Baamonde M. E., "El factor de sostenibilidad de las pensiones de jubilación y la garantía de la suficiencia económica de los ciudadanos durante la tercera edad", in *RL*, 2014, 5, p. 1; López Gandía J., "La dimensión constitucional de la reforma de las pensiones", in *RL*, 2014, 5, p. 25; Ruesga Benito S., "En recuerdo de los trabajos del comité de expertos para la elaboración del factor de sostenibilidad de las pensiones públicas. La visión de un experto perplejo", in *RL*, 2014, 5, p. 51; Tortuero Plaza J. L., "Ley 23/2013, de 23 de diciembre, reguladora del Factor de Sostenibilidad y del Índice de Revalorización del Sistema de Pensiones de la Seguridad Social: régimen jurídico", in *RL*, 2014, 5, p. 109; Suárez Corujo B., "Las increíbles pensiones menguantes: la metamorfosis del sistema público de pensiones a través del factor de sostenibilidad", in *RL*, 2014, 5, p. 131; González Ortega S., "El nuevo régimen de revalorización de las pensiones", in *RL*, 2014, 5, p. 153; Alemán Páez F., "El régimen fractal de la jubilación. Marco institucional y consideraciones críticas de un reformismo inacabable", in *TL*, 2014, 123, p. 57; Italy: Casillo R., "Benessere pensionistico e scarsità delle risorse dopo la L. 214/2011", in *DLM*, 2014, 2, p. 371; Casillo R., "Profili di (in)sostenibilità giuridica e sociale dell'attuale tutela pensionistica di vecchiaia", in *DLM*, 2014, 3, p. 611; Andreoni A., "Le pensioni nel passo del gambero", in *RGL*, 2014, 1, p. 237.

¹⁰³ For New Zealand: Fletcher M., Duncan G., "Developments in Social Legislation and Policy in New Zealand 2013", in *ZIAS*, 2014, 1, p. 47, and for Peru: Gamarra Vilchez N., "Le droit du travail et la sécurité sociale au Pérou: Évolutions et défis de ces vingt dernières années", in *RDCTSS*, 2014-1, p. 40.

¹⁰⁴ Bonardi O., "La nuova governance sociale europea", in *RGL*, 2014, 1, p. 257; Faioli M., "Deprivazione materiale, assistenza sociale e diritti sulle cose", in *RGL*, 2014, 1, p. 279; Sgroi A., "La tutela dei diritti previdenziali e assistenziali nella crisi", in *RGL*, 2014, 1, p. 221; Bekker S., Klosse S., "The Changing Legal Context of Employment Policy Coordination. How do Social Policy Issues Fare after the Crisis?", in *ELLJ*, 2014, 5, 1, p. 6.

¹⁰⁵ Fernández Orrico F.J., "La teoría de los cuatro elementos del fraude en las prestaciones de seguridad social", in *RL*, 2014, 1, p. 85.

¹⁰⁶ Stopka K., "Über die soziale Entschädigung in Polen", in *ZIAS*, 2014, 1, p. 1.

¹⁰⁷ For Spain: García Romero M. B., "Lagunas de cobertura del sistema español de seguridad social y la necesaria reordenación del nivel no contributivo", in *RDS*, 2014, 68, p. 67; for Italy: Bozzao P., "Reddito di base e cittadinanza attiva nei nuovi scenari del

universal benefits can also be conceptualized as an instrument to enhance equity in terms of gender equity as well as in terms of intergenerational equity, whereas contributory social security systems tend to result in distributive inequity as they reproduce disadvantages accumulated in the labour market.¹⁰⁸ Finally, some authors paid special attention to the governance of social security reform throughout the reform process and emphasized the fundamental role of social dialogue. It is disturbing that important recent reform legislation for pensions and for employment policies has been enacted without any substantial social dialogue, as disregarding this principle may aggravate risks of precariousness of individuals and provoke failure in intended results and thus further corrections in the future.¹⁰⁹

A OLD-AGE PROTECTION

Legal scholars in Spain scrutinized extensively the impact of some recent rather radical savings measures on the right to an appropriate and sustainable old-age pension. Only in 2011 reform legislation had announced the introduction of a novel “sustainability factor” to the public pension system by 2027 to meet the demographic challenges of increased life expectancy and the retirement of the baby boomers. But already in 2013, a new reform (Law 23/2013) departed from the previous approach, not only anticipating the implementation of the novel sustainability factor, but also linking this factor more to the overall budgetary stability of the public pension system than to the evolution of life expectancy in Spain.¹¹⁰ The reform entailed much critical analysis in the 2014 publications: some authors commented that the legislator tried to conceal the true impact of the new sustainability factor when referring to it as a merely “parametrical change to the existing pension calculation parameters” whereas, in reality, this mechanism for pension calculation and adjustment implies “a silent metamorphosis”¹¹¹ of the public pension system. Authors complained in particular that no social dialogue took place before the reform was enacted, which might explain why the legislator refrained from considering alternative interventions such as the gradual increase of the retirement age and of the contribution period.¹¹²

Some authors also wondered why the reform legislation relied without further debate on the proposals of a Commission of independent experts - composed of economists only¹¹³ who were not aware of constitutional constraints and who, moreover, were not as independent as they were supposed to be, as some of these experts had professional links to the private insurance sector.¹¹⁴ Many critical comments stressed the negative implications

welfare”, in *RGL*, 2014, I, p. 325; Bronzini G., “Che fine ha fatto il reddito minimo garantito?”, in *RGL*, 2014, I, p. 335.

¹⁰⁸ For Argentina: Minoldo S. T., Sazatornil M. J., “Inequidades distributivas de la previsión social contributiva. Aproximación al caso argentino”, in *TL*, 2014, 127, p. 143.

¹⁰⁹ For Spain: López Gandía J., “La dimensión constitucional de la reforma de las pensiones”, *op. cit.*; Suárez Corujo B., “Las increíbles pensiones menguantes: la metamorfosis del sistema público de pensiones a través del factor de sostenibilidad”, *op. cit.*; Monereo Pérez J. L., “Diálogo social y reforma de las pensiones: ¿de las políticas de consenso sociopolítico al dirigismo político?”, in *RL*, 2014, 5, p. 73.

¹¹⁰ The Spanish sustainability factor is comprised of two distinct elements: the factor of intergenerational equity which strives to establish equal conditions for all retirees, irrespective of the demographic cohort they belong to, applicable as of 2019; and the factor of annual adjustment of the pension dependent on the relation between income and expenditure of the retirement system, applicable as of 2014. Interventions on the adjustment rules are among the preferred measures to achieve immediate short-term savings in pension expenditure.

¹¹¹ Suárez Corujo B., “Las increíbles pensiones menguantes: la metamorfosis del sistema público de pensiones a través del factor de sostenibilidad”, *op. cit.*

¹¹² Rodríguez-Piñero and Bravo-Ferrer M., Casas Baamonde M. E., “El factor de sostenibilidad de las pensiones de jubilación y la garantía de la suficiencia económica de los ciudadanos durante la tercera edad”, *op. cit.*

¹¹³ Alemán Páez F., “El régimen fractal de la jubilación. Marco institucional y consideraciones críticas de un reformismo inacabable”, *op. cit.*

¹¹⁴ Suárez Corujo B., “Las increíbles pensiones menguantes: la metamorfosis del sistema público de pensiones a través del factor

of the reform on the adequacy and sufficiency of pension benefits, as the new factor would limit initial pension amounts and subsequent indexation of pensions, thus aggravating old-age poverty risks, in particular for low wage earners. Spanish scholars thus casted serious doubts on the conformity of the reform with constitutional principles about pension guarantees, and argued that these principles needed to be reconciled or coordinated with rather than subordinated to the newly introduced constitutional principle of budgetary stability.¹¹⁵

As a result of the cumulative effects of various consecutive modifications¹¹⁶, more pensioners may have to rely on a minimum pension, financed directly from the State budget. According to Spanish scholars, the new sustainability factor with its two different elements would be the pathway to replace social security pensions with social assistance pensions which are subject to different and very limited adjustment rules. The reform will also penalise disadvantaged groups on the labour market, in particular women. Moreover, several authors have stressed that the reform contains the implicit objective of favouring private pension schemes which will increase overall social inequalities rather than providing for a general solution to prevent poverty in old-age.¹¹⁷

Prior to Spain, Italy had adopted far-reaching demographic adjustments to the Italian public pension system in 2011 by linking every age-related parameter to changes in the life expectancy. The debate about the rationalities of this reform continued in 2014 publications, as several authors explored the links between constitutional guarantees for pensioners and financial constraints of resources in the light of the current political, economic and legislative situation, and the value and notions of solidarity in times of permanent austerity.¹¹⁸ A critical appraisal of the current old-age pension system focussed on its legal and social (un)sustainability in respect of the principles of solidarity¹¹⁹ and equity, from a general, class and inter/intragenerational perspective, and on the implications of increasing retirement age in the recent reform, which can be also viewed as a departure from a much more advanced retirement scheme with flexible retirement access adopted two decades ago.¹²⁰

The need to adapt pension systems to an ageing society and to improve protection against old-age poverty is reflected also in 2014 journals with respect to Malaysia and several Latin American countries. The main public pension system in Malaysia which consists of a fully funded Provident Fund has been supplemented recently by a voluntary Private Retirement Scheme open to all residents aged 18 and above. Another reform initiative encouraged workers to

de sostenibilidad", *op. cit.*; Ruesga Benito S., "En recuerdo de los trabajos del comité de expertos para la elaboración del factor de sostenibilidad de las pensiones públicas. La visión de un experto perplejo", *op. cit.*; Monereo Pérez J. L., "Diálogo social y reforma de las pensiones: ¿ de las políticas de consenso sociopolítico al dirigismo político?, *op. cit.*

¹¹⁵ López Gandía J., "La dimensión constitucional de la reforma de las pensiones", *op. cit.*; Tortuero Plaza J. L., "Ley 23/2013, de 23 de diciembre, reguladora del Factor de Sostenibilidad y del Índice de Revalorización del Sistema de Pensiones de la Seguridad Social: régimen jurídico", *op. cit.*; González Ortega, S., "El nuevo régimen de revalorización de las pensiones", *op. cit.*; Toscani Giménez D., "La revalorización de las pensiones en la Ley 23/2013, de 23 de diciembre y su constitucionalidad", *op. cit.*; Alemán Páez F., "El régimen fractal de la jubilación. Marco institucional y consideraciones críticas de un reformismo inacabable", *op. cit.* On the criteria to prove the conformity of pension reforms with international standards developed by the European Committee of Social Rights under the European Social Charter and the criteria applied by the Committee of Economic, Social and Cultural Rights according to the Facultative Protocol to the International Covenant on Economic, Social and Cultural Rights see López Gandía J., *op. cit.*, p. 36 ff.

¹¹⁶ With respect to the combined effects of reforms hampering economic sufficiency in old-age further saving measures affecting pensioners have to be considered, like e.g. co-payments for health services, cuts in social services at local level, etc. *cf.* López Gandía J., "La dimensión constitucional de la reforma de las pensiones", *op. cit.*

¹¹⁷ Rodríguez-Piñero y Bravo-Ferrer M., Casas Baamonde M. E., "El factor de sostenibilidad de las pensiones de jubilación y la garantía de la suficiencia económica de los ciudadanos durante la tercera edad", *op. cit.*

¹¹⁸ Casillo R., "Benessere pensionistico e scarsità delle risorse dopo la L. 214/2011", *op. cit.*

¹¹⁹ As a contribution-based social insurance scheme the Italian public pension system has no redistributive objectives and the resulting protection in old-age is operating as an insurance scheme, mitigated by internal solidarity within the collectivity of the affiliated.

¹²⁰ Casillo R., "Profili di (in)sostenibilità giuridica e sociale dell'attuale tutela pensionistica di vecchiaia", *op. cit.*; Andreoni A., "Le pensioni nel passo del gambero", *op. cit.*

work beyond the age of 55 and, moreover, extended the liability to contribute to the Provident Fund beyond the age of 55 up to the age of 75. According to the authors, these features of the pension scheme confirm that there is little space for redistributive elements, and that priority is given to individual responsibility over solidarity concepts in combatting old-age poverty.¹²¹ The lack of solidarity is a well-known feature in privatised pension systems in Latin America based on individual savings accounts. Although some states adopted comprehensive pension re-reforms to return to or strengthen public pension systems, Latin American scholars admit that old-age protection in Latin American still continues to suffer from various flaws, which may be linked to the fragmentation of many special schemes (as in Mexico), but most often to the intrinsic shortcomings of contributory pension systems in labour markets characterized by high levels of informality.¹²²

B UNEMPLOYMENT AND EMPLOYMENT PROMOTION POLICIES

Unemployment benefit schemes and their recent evolution in the light of European guidelines on so-called activation concepts have been a focus in several IALLJ publications throughout 2014. Analysis concentrated on the one hand on the overall influence of EU economic policy and budgetary objectives on national social protection in case of unemployment, and on the understanding of activation as a key to increasing labour market participation. On the other hand, comparative analysis has provided some insight into the differences of national unemployment benefit schemes and into different priorities in employment policies, despite of a common European umbrella which, however, seems to be based on a rather orthodox economic understanding of labour market policies.¹²³ Unemployment periods may be used to enhance professional skills and qualification by giving priority to training and education over work in return for benefits, as in Denmark where jobseekers can rely on efficient employment services. By contrast, in countries with budgetary difficulties and less efficient employment services as in Spain or Italy, the activation elements in employment policies are centred around a “work first” approach, rather than on a human capital approach.¹²⁴ Changes in employment security legislation as well as in social protection legislation, as in the case of Sweden’s sickness insurance, suggest an increasing risk for vulnerable categories of becoming unemployed, while unemployment tends to be viewed as a problem of individual responsibility. This may reduce social protection for those in condition of special vulnerability, e.g. in case of impaired working capacity due to sickness and/or invalidity.¹²⁵

¹²¹ Tolos H., Wang P., Zhang M., Shand R., “Retirement systems and pension reform: A Malaysian perspective”, in *ILR*, 2014, 153, 3, p. 489.

¹²² For Mexico cf. Mendizábal Bermúdez G., “Analyse der “Quasi-Renten” in Mexiko - zwischen Privatisierung und staatlicher Finanzierung”, in *ZIAS*, 2014, 1, p. 208.; for Argentina: Minoldo S. T., Sazatornil M. J., “Inequidades distributivas de la previsión social contributiva. Aproximación al caso argentino”, *op. cit.*; for Peru cf. Gamarra Vilchez and various issues of the Peruvian Journal *Análisis Laboral* that deal with attempts to reform the private pension systems (*AL*, May and October 2014), and with the issue of social protection for the self-employed (*AL*, July, August and December 2014).

¹²³ Gundt N., “The Right to Work, EU Activation Policies and National Unemployment Benefit Schemes”, in *ELLJ*, 2014, 3-4, p. 349; Bazzani T., “La protection contre le chômage en temps de crise au Danemark, en Italie et en Espagne”, in *RDCTSS*, 2014-1, p. 68 - english version: “Unemployment benefits during the crisis: Denmark, Italy and Spain”, in *RDCTSS*, 2014-3, p. 50.

¹²⁴ There are efforts in both countries to improve employment services, as some authors have stressed: cf. for Italy: Varesi P. A., “La protezione sociale del lavoratore tra sostegni al reddito e politiche attive”, in *DLM*, 2014, 2, p. 507; Varesi P. A., “I livelli essenziali concernenti i servizi per l’impiego e la sfida della “garanzia per i giovani””, in *DLRI*, 2014, 142, 2, p. 185; Bazzani T., “La protection contre le chômage en temps de crise au Danemark, en Italie et en Espagne”, *op. cit.* - english version: “Unemployment benefits during the crisis: Denmark, Italy and Spain”, *op. cit.*; for the problems in implementing efficient public employment services and the role of private placement services in Spain cf. Ballester Pastor I., “Ajustes estructurales y asunción de compromisos internacionales en la reforma de la reglamentación de las agencias de colocación: desafíos pendientes para España”, in *RL*, 2014, 2, p. 15; for the good practice experience of regional public orientation and placement services in Andalusia cf. Sánchez-Rodas Navarro C., “La orientación e intermediación directa en el empleo”, in *TL*, 2014, 125, p. 89.

¹²⁵ Westregård A., “Changes in the Swedish sickness insurance system and labour law due to influence of flexicurity”, in *EuZA*, 2014, 7, p. 30.

Despite many examples of retrenchment in the protection of the unemployed there are also cases of increasing protection or of adapting schemes to counterbalance current problems of the labour market in times of economic recession.¹²⁶ An interesting case of extending protection is the creation of protection schemes for the self-employed that are forced to give up their business activities. Spain adopted such a scheme in 2010 on a semi-voluntary basis as protection was granted only when the self-employed had coverage for professional risks such as work accidents. A 2014 reform abolished this prerequisite for protection.¹²⁷ Italian scholars assessed the introduction of new instruments to protect the unemployed and analysed improvements in the highly fragmented Italian unemployment protection schemes since 2012.¹²⁸

C VOCATIONAL EDUCATION AND TRAINING FOR YOUNG PEOPLE AND SENIOR WORKERS

The high rates of youth unemployment are a constant challenge in many parts of Europe.¹²⁹ Labour law scholars from Italy and Spain have explored extensively various measures and policies that either the EU¹³⁰ and/or member states have adopted to provide more education, training and professional qualifications for young people. 2014 publications focused in particular on the Youth Guarantee Strategy which was agreed by the European Council in April 2013 and is currently in the process of implementation at member state level.¹³¹ Various scholars took critical account of the initiatives that support labour market integration of young people, including measures aimed at up-grading professional education systems. Authors were interested in particular in the use of special traineeship contracts, contracts with professional training objectives, and the initiatives to combat the abuse of such traineeships.¹³² Special attention has been paid to national labour law reforms that attempt to tackle youth employment

¹²⁶ Cf. for Germany the use of unemployment benefits to balance short-time work at the outset of the economic crisis in 2008/2009: Brecht-Heitzmann H., Röns B., "Labour and social welfare measures to combat the crisis in Germany", in *ELLJ*, 2014, 5, 1, p. 63.

¹²⁷ Cf. Taléns Visconti, E. E., "Reflexiones en torno a los requisitos de acceso a la prestación por cese de actividad de los trabajadores autónomos (tras la aprobación de la Ley 35/2014, de 26 de diciembre)", *op. cit.* The benefit is granted after a waiting period of 12 months after closing the business. The reasons justifying the protection include economic losses of a certain degree, losses due to force majeure, loss of the license required to run the business, and in case of female entrepreneurs also gender violence, divorce or judicial separation.

¹²⁸ Cf. Garofalo D., "Il finanziamento delle misure di sostegno al reddito dopo la riforma Fornero", in *RGL*, 2014, I, p. 305; Varesi P. A., "La protezione sociale del lavoratore tra sostegni al reddito e politiche attive", *op. cit.* Scholars also turned to specific features and challenges of the revised Italian unemployment benefit schemes, for example the bilateral solidarity funds (Giubboni S., "I fondi bilaterali di solidarietà nel prisma della riforma degli ammortizzatori sociali", in *DLRI*, 2014, 144, p. 715) or the implications of the reform on the unemployment protection of prisoners (Caputo G., "La tutela contro la disoccupazione dei detenuti lavoratori alla luce della riforma degli ammortizzatori sociali", in *LD*, 2014, 4, 697).

¹²⁹ According to the third European Quality of Life survey data (2011-2012), the risk of deprivation among young people from all social backgrounds has increased, cf. Eurofound, *Developments in working life in Europe: EurWORK annual review 2014, 2015*.

¹³⁰ These policies include among others: the EU Youth Strategy (2010-2018) to provide more and equal opportunities to young people and to enhance active citizenship; the Youth Guarantee Strategy for people under 25 aimed at helping them access the labour market by promoting apprenticeships and traineeships and by offering non-formal learning environments; the youth employment package to help Member States tackle youth unemployment and social exclusion: cf. Eurofound, "Developments in working life in Europe", *op. cit.*

¹³¹ For the national implementation of the Youth Guarantee in Spain cf. Rodríguez-Piñero y Bravo-Ferrer M., Valdés Dal-Ré F., Casas Baamonde M. E., "El Real Decreto-Ley 8/2014: Garantía Juvenil y nuevo marco territorial de las políticas de empleo", in *RL*, 2014, 9, p. 1; Gómez Torres M. J., Ordóñez Sierra R., "Las transiciones de la formación al trabajo de los jóvenes españoles en el marco de las medidas contempladas en la estrategia de emprendimiento y empleo joven 2013/2016", in *TL*, 2014, 127, p. 179; Costa Reyes A., "El modelo español de formación dual", in *RDS*, 2014, 68, p. 13; in Italy: Varesi P. A., "La protezione sociale del lavoratore tra sostegni al reddito e politiche attive", *op. cit.*; Varesi P. A., "I livelli essenziali concernenti i servizi per l'impiego e la sfida della "garanzia per i giovani"", *op. cit.*

¹³² For Italy: Garofalo D., "Gli interventi legislativi sul contratto di apprendistato successivi al T.U. del 2011", in *DLRI*, 2014, 143, p. 427; Bianco A., "Apprendistato, formazione e politiche attive del lavoro. Osservazioni sulla legge n. 78 del 2014", in *LD*, 2014, 4, p.

through a reduction of employment rights for young people.¹³³

In view of the European strategy to increase labour market participation for people aged 50 and over, several articles published in 2014 also paid attention to policies adopted for senior workers in view of life-long learning and professional education in later working life.¹³⁴ In particular, the 2014 French reform on life-long vocational education and training has been assessed critically. Scholars concluded that despite some improvements the reform would not solve the major problem of access inequalities that have characterized the French system ever since its inception in 1971.¹³⁵

V HEALTH AND SAFETY AT WORK

Many legal scholars who published contributions in the IALLJ journals in 2014 analysed the theme of health and safety at the workplace.

Since this is a classic area of labour law, the attention paid to it should come as no surprise. The essays in question, most of which have appeared in non-European journals, have looked at the most novel and at the same time the most problematic aspects of this field: the impact of organisational changes within enterprises - which originate essentially from economic globalization, the growth of the service sector and the practice of outsourcing part of the production process - on laws governing health and safety at work that must adapt to these changes in order to maintain their effectiveness.

These considerations apply above all to those who are responsible for ensuring enforcement of these laws within the enterprise, and to those who are to be protected by them. For the rest, the changes in the structural organization of enterprises do not impact only on the production systems as such, but also on the persons who work there, as well as on the legal relations created between them. The traditional framework of health and safety law was based on the bilateral and exclusive relationship between employers and traditional employees, and these were historically the only individuals contemplated by this body of law. But now this legal framework must be reviewed and adapted to the new organisational setting. The essays in question have analysed the process adjusting health and safety legislation to the changed context in several jurisdictions, mainly from the perspective of the entities and individuals involved.

One of the studies provided a comparative analysis of health and safety legislation in Great Britain and Australia.¹³⁶ After considering briefly the international labour law standards in this field, the authors examined the relevant

647; D'Onghia M., "L'ennesimo [inutile] intervento del legislatore sul contratto di apprendistato", in *RGL*, 2014, I, p. 745. For Spain: Moreno I Gené J., "El contrato a tiempo parcial con vinculación formativa: un sucedáneo de contrato formativo", in *TL*, 2014, 127, p. 13.

¹³³ For the life course risks linked to promoting youth employment through reduced social protection see also Votinius, J. J., "Young Employees: Securities, Risk Distribution and Fundamental Social Rights", in *ELLJ*, 2014, 5, 3-4, p. 367; Suárez Corujo B., "Crisis and Labour Market in Spain", *op. cit.*

¹³⁴ Professional re-qualification has been an essential feature of the German policy of employment protection during the economic crisis, in the framework of short-time work; see Brecht-Heitzmann H., Röns B., "Labour and social welfare measures to combat the crisis in Germany", *op. cit.*

¹³⁵ Cf. Issehnane S., "Ce que la loi du 5 mars 2014 sur la formation professionnelle ne va pas changer: l'inégalité", in *RDT*, 2014, 6, 380; Dubar C., Nasser C., "Le système français de formation professionnelle continue a-t-il été durablement réformé?", in *RDT*, 2014, 6, p. 383; on the difficult genesis of this reform project see Géa F., Fabre A., "La formation professionnelle pensée autrement", in *RDT*, 2014, 2, 112.

¹³⁶ Harpur P., James P., "The shift in regulatory focus from employment to work relationships: critiquing reforms to Australian and U.K. occupational safety and health laws", in *CLLPJ*, 2014, 36, 1, p. 111.

national legislation, explaining how each legal system adapted to the organizational changes under way, or even anticipated such adjustments. In fact, the British and Australian legislation started to depart from the traditional model under which the only individuals enjoying the protection of health and safety legislation were employed workers since the 1970s, when Fordism was still completely dominant. At the same time, both jurisdictions have extended protection to other individuals who, although not falling under a scheme of subordinate employment, still needed protection for their intensive interactions with the enterprises for whom they operate. In this way both legal systems have extended the guarantees provided under the health and safety legislation to numerous individuals other than standard employees, such as independent contractors, sub-contractors and workers under flexible schemes in general.

This implies a legislative trend that both legal systems seem to have in common, notwithstanding the distinctions to be made in relation to the content of the respective laws and to the institutional context in which they were produced (as Great Britain is significantly influenced by EU law in this area). Nevertheless, the authors take the conclusion that the Australian system provides more protection than the British one, particularly in respect of future developments. As far as Great Britain is concerned, the authors refer to the debate taking place at government level, to exclude some independent contractors from the regime governing health and safety at work, thus taking a significant step backwards.¹³⁷

Likewise another essay examines the evolution of health and safety legislation in Italy, once again with reference to the changes occurring in the organizational structures of enterprises and in production systems, including the application of protection measures in case of outsourcing by means of tendering contracts.¹³⁸

With regard to this point, the author briefly highlights the way Italy has followed over time in order to amend the legislation governing tendering contracts and the placing of the workforce, as well as the laws concerning more specifically the health and safety of workers in the workplace. As to the first aspect concerning legislation on tendering contracts, the amendments took into account the demands for flexibility claimed by enterprises that are increasingly fragmented, and hence sought to not hamper outsourcing through tendering contracts (while nonetheless maintaining protection mechanisms for the workers). With respect to the second aspect of health and safety legislation, changes aimed at taking account of the need to protect other categories (and groups) of workers, beside the standard employees.

Although, as the essay affirms, the national legislation in Italy has moved along parallel but still separate lines for a very long time, the latest reform of Italian health and safety legislation under legislative decree no. 81 of 2008, now entails a convergent evolution, with the primary aim of granting protection to the greatest possible number of workers. This has come about in particular as a result of art. 26 of this decree, to which the author dedicates a detailed analysis. This provision has imposed a range of duties and responsibilities on the contracting employers in relation to the tendering companies, but it also establishes that these employers must facilitate coordination between the various enterprises involved (those inviting the tender, those tendering and subcontractors of the tendering company) and draft a single document dealing with risk assessment. In addition, the law provides for a joint liability of employers under the tendering contract, tendering enterprises and subcontractors for any damage incurred by workers which is not covered by the compulsory insurance for occupational accidents. According to the author, these recent legal developments are to be welcomed, since they offer the prospect of extending protection to interested parties who are outside the traditional (and formal) employer-employee relationship. However, this innovation raises some concerns, namely that the guarantees under art. 26 of legislative decree no. 81 of 2008 are limited to those working in the same physical environment, and therefore do not cover outsourcing which involves placing part of the

¹³⁷ Harpur P., James P., "The shift in regulatory focus from employment to work relationships: critiquing reforms to Australian and U.K. occupational safety and health laws", *op. cit.*

¹³⁸ Casale D., "Joint responsibility of enterprises for the health and safety of their contractors' workers: recent trends in Italian law", in *CLLPJ*, 2014, 36, 1, p. 131.

work of the enterprise in locations distinct from those which the employer owns or has access to.¹³⁹

A third contribution has examined the issue of organisational changes and the need to protect a wide range of individuals who, under various guises, offer their services to an enterprise, again in relation to health and safety legislation in the Australian legal system.¹⁴⁰ The essay takes a critical view of four judgments pronounced in 2012 that risk unravelling some of the fundamental principles underpinning this legislation, especially the principle prohibiting to delegate the general health and safety obligation placed upon the employer to others. This is a principle frequently referred to by Australian courts themselves, but which, according to the judgments under review, may not be applied where the employer had decided to tender out a service to an expert entrepreneur or rather, to a more expert one than the employer is. Following a detailed analysis of these cases, the author asks whether they presage a progressive, unstoppable unhooking of the principle of non-delegation of an employer's health and safety obligations to others or if in some way they can be 'neutralised' so that their impact remains limited.

In addressing these issues, the author first criticises the Australian courts for having placed such importance on the experience of the tendering contractor as to transform it into an instrument suitable for consenting to the delegability of safety obligations; then he asserts that the relevant Australian legislation contains some general principles, which can significantly weaken the case law trend. These principles establish that all entrepreneurs involved in the production process (or rather, to use the quite broad concept adopted by Australian lawmakers, «a person conducting a business or undertaking») have a duty to consult, cooperate and coordinate with one another. Contrary to the opinion expressed in the case law this obligation is not reconcilable with the possibility of delegating the health and safety obligation *in toto*. Thus, despite the reinforcement of these principles, the case law has produced considerable difficulties of interpretation. Johnstone therefore proposed to develop codes of conduct designed to share the fulfilment of safety obligations in a better way, however, without allowing the contracting employer to completely delegate safety obligations to the tendering contractor or sub-contractor, not even to expert ones.¹⁴¹

Among the articles published in 2014 by IALL journals on health and safety at work, we have to recall not only those concerning the impact of organisational changes on this discipline, but also those dealing with more specific health and safety issues. A first example refers to the abolition of the right to refrain from self-incrimination in the context of legislation on health and safety in the workplace in the Australian legal system,¹⁴² a second one deals with the current state of the art when the use of asbestos is at stake, with reference to the so-called Turin "Eternit" case,¹⁴³ and a third one contemplates the right to health from a human rights perspective.¹⁴⁴

Finally, we draw attention to a contribution dedicated to health and safety in the workplace in China. Its authors, taking the high number of accidents at work over the last ten years in that country as their starting point, undertook an empirical study on working conditions, interviewing injured workers from different provinces, asking questions about health and safety practices adopted by the employer enterprises, the causes of the accident and the indemnity procedures which were followed to compensate for the loss incurred.¹⁴⁵

¹³⁹ Casale D., "Joint responsibility of enterprises for the health and safety of their contractors' workers: recent trends in Italian law", *op.cit.*

¹⁴⁰ Johnstone R., "Engaging expert contractors: The work health and safety obligations of the business or undertaking", in *AJLL*, 2014, 27, 1, p. 57.

¹⁴¹ Johnstone R., "Engaging expert contractors: The work health and safety obligations of the business or undertaking", *op. cit.*

¹⁴² Gold S., "Bulwark of liberty or impunity for the wicked? The abrogation of the privilege against self-incrimination in the National Model Work Health and Safety Bill", in *AJLL*, 2014, 27, 1, p. 1.

¹⁴³ D'Ambrosio L., "Amiante et droit pénal: quelques réflexions sur l'affaire "Eternit" de Turin", in *RDT*, 2014, 6, p. 418.

¹⁴⁴ Monereo Pérez J. L., "La salud como derecho humano fundamental", in *RL*, 2014, 9, p. 53.

¹⁴⁵ Zhu Y., Chen P. Y., Zhao W., "Injured workers in China: Injustice, conflict and social unrest", in *ILR*, 2014, 153, 4, p. 635.

LIST OF ABBREVIATIONS OF IALL JOURNALS

- Análisis Laboral = AL
Arbeit und Recht = AuR
Australian Journal of Labour Law = AJLL
Bulletin of Comparative Labour Relations = BCLR
Canadian Labour & Employment Law Journal = CLELJ
Comparative Labor Law & Policy Journal = CLLPJ
Diritti Lavori Mercati = DLM
Europäische Zeitschrift für Arbeitsrecht = EuZA
European Labour Law Journal = ELLJ
Giornale di Diritto del Lavoro e delle Relazioni Industriali = DLRI
Industrial Law Journal (UK) = ILJ
International Journal of Comparative Labour Law & Industrial Relations = IJCLLIR
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Japan Law Review = JLR
Lavoro e Diritto = LD
Pécsi Munkajogi Közlemények (Pecs Labour Law Journal) = PMJK
Relaciones Laborales = RL
Revista de Derecho Social = RDS
Revue de Droit Comparé du Travail et de la Sécurité Sociale = RDCTSS
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