

**POLICIES AND REGULATIONS
TO COMBAT PRECARIOUS
EMPLOYMENT**

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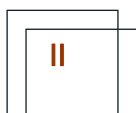


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1. INTRODUCTION

One of the most important trends over the past decades is undeniably the growth of insecurity in the world of work. Worldwide, unimaginable numbers of workers suffer from precarious, insecure, uncertain, and unpredictable working conditions. Unemployment figures alone are cause for concern, but even these fail to capture the larger majority of people who work, but who do not have a decent job, with a decent wage, a secure future, social protection, and access to rights. The universality and dimension of the problem call for coordinated and comprehensive action at the international level.

I. A Symposium on Precarious Work

By far not a new issue, precarious work has drawn attention from international and national actors for years. At least since the mid 1990s, trade unions have consistently requested that the ILO conduct research and take further action to address more seriously the challenge of widespread precariousness in the world of work. Though the term precarious was not in use at the time, the defining characteristics of what we now call precarious work were discussed in 1997 and 1998, when the ILC examined an item on contract labour. The category of “contract worker”, although contested, was largely understood to include workers with temporary contracts, in triangular relationships (those hired through agencies and subcontractors), and workers who are labelled as self-employed when they are in fact dependent on or integrated into the firm for which they perform the work; in other words, workers working under a disguised, ambiguous or triangular employment relationship.¹

The discussion at the time was held with a view to adopt a Convention and Recommendation to regulate *de facto* dependent workers who lacked labour protections. Negotiations stalled however, as employers argued that the category was too broad, that an instrument would adversely affect economic activity, and resolved that only disguised employment relationships should be up for discussion.² What remained on the table for discussion was an agreement to develop a defining framework of the “employment relationship”, which would encompass a portion of those workers that the contract labour discussion sought to protect.

Instead of yielding an instrument on contract labour, the discussion therefore morphed into the discussion on the employment relationship, which, in 2006, finally produced Recommendation 198 on the Employment Relationship. Useful though the instrument is, temporary, agency, subcontracted and bogus self-employed workers who were initially included in the scope of discussion remain without adequate labour protection. The ILO Committee of Experts has suggested that a variety of ILO instruments do provide some protection for precarious workers. However, they also identified gaps in the current body of

¹ The scope of the employment relationship, Report V, 91st session ILC, 2003.

² *Ibid.*

international labour standards, indicating that existing standards do not effectively and comprehensively address precarious work.³

The efforts of the past decades, though helpful, have evidently proved insufficient to curb the growth of precarious work. Trade union initiatives against precarious work however continue to spread around the world, and rather than seeing a decrease in precarity, workers and societies seem to suffer ever more from precarious conditions. A space for trade union experts, legal specialists and academics to share their work and knowledge on the issue of precarious work would provide an opportunity to identify common challenges, possible collaborations and effective strategies, and to reduce and even eliminate the precarious conditions of work.

From this assessment, shared by trade unions around the world, the ILO Bureau for Workers' Activities (ACTRAV) chose for its 2011 biannual Symposium the title "Policies and Regulations to Combat Precarious Work". Taking as inspiration the global unrest the world is currently witnessing, the ACTRAV Symposium aspires to channel the voices of struggling workers and citizens whose working and living conditions have taken a sharp turn for the worst in these times of economic crisis and austerity measures.

Youth led social uprisings are spreading at considerable speed, with people of all ages demonstrating in Northern Africa and the Middle East, Ecuador, Spain, Italy, Greece, and most recently Chile, the UK and Israel to express their deep frustration with economic policy and labour conditions today. In this emerging context, the ACTRAV Symposium will be bringing together trade union leaders and experts from around the world in an attempt to collaboratively create a pathway to a world where decent work is no longer a goal, but a reality. The integral components to such a vision are familiar to all: a wage that enables workers to support their household, basic social security protection, contractual stability, protection from unjustified termination of employment, and effective access to freedom of association and collective bargaining. Yet these are precisely the rights and protections that workers are losing at a striking speed. The Decent Work Agenda therefore draws a useful conceptual framework for describing and understanding precarious work – and placing limits on the types of employment practices that create precarious societies.

As precarious work is a multifaceted and complex issue, the ACTRAV Symposium has taken an equally multifaceted approach to discussing the problems of precarious work. The agenda provides ample opportunity for discussion on the economic underpinnings and drivers of precarious work, the legal frameworks that have allowed it to take root, and the relationship between precarious work and trade union rights. As such, the 2011 ACTRAV Symposium follows closely in the footsteps of the last ACTRAV Symposium, when we celebrated the 60th anniversary of convention 98 and discussed the right to organize and collective bargaining. At its conclusion, the symposium emphasized the important link

³ *Ibid.*

between collective bargaining rights and precarious work. The symposium found that “while more countries formally guarantee core labour rights, less workers can exercise these rights due to the rise of precarious work.” And indeed, that “the erosion of the employment relationship is fundamentally denying workers the possibility to exercise their rights and constitutes a key reason for the difficulties to extend collective bargaining coverage.”⁴ In conclusion there came a call to the ILO to consider the need for new international standards which address issues such as the legal protection and extension of collective bargaining coverage, including wages, for workers in precarious situations and atypical forms of work.

This call provided an entry point for thinking about the rights and needs of precarious workers generally, with the ultimate decision of adopting precarious work as the topic for this year’s Symposium. In setting the agenda, preliminary research was conducted on definitions of precarious work to limit the discussion to an appropriate and manageable scope. Consultations were held with trade unions throughout the research phase to gain a global picture of the conditions of precarious workers, the economic and legal situations that encourage or prevent the evolution of precarious work, the international legal gaps, the effect of attacks on trade union rights, and the strategies trade unions have adopted to fight back the abusive use of precarious contracts. The research was finally compiled into this background document, which should serve as the basis of discussion for the symposium.

II. Symposium goals

The goals of the symposium are to:

- analyse the economic drivers that have perpetuated precarious work
- identify the legislative gaps and weaknesses that allow precarious work
- clarify the relationship between trade union rights and precarious work
- exchange strategies and approaches to combating precarious work
- identify key areas of intervention, in practice, law and policy, to combat precarious work both nationally and internationally
- develop a common agenda to combat precarious work

⁴ International Workers’ Symposium – Celebration of the 60th Anniversary of Convention No. 98: The right to organize and collective bargaining in the 21st century” – Geneva, 12–15 Oct. 2009.

Symposium website available at:

http://www.ilo.org/actrav/what/events/lang--en/WCMS_112409/index.htm

III. Paper roadmap

The following document provides the background and basis for discussion for the agenda for the Symposium. Based on research conducted at ACTRAV in consultation with trade unions, the document starts with a brief elaboration of the defining characteristics of precarious work, providing a working definition for use during the symposium, and describing the social impacts and the quantitative picture of precarious work worldwide. Completing the context in which precarious work takes place, the document then provides an analysis of the economic and legislative trends that have allowed precarious work to evolve. A significant section is dedicated to the content and challenges of national and international legal frameworks of both labour and trade union rights, with the aim of identifying weaknesses, omissions and gaps to be addressed. Finally, on the basis of existing trade union activities, the document concludes with some ideas as to a way forward. Ultimately, this document should provide a framework in which Symposium participants can begin to respond to three key questions: what policies, laws and practices must change to end precarious work and achieve decent work for all? How do we coordinate our efforts to make those changes? And what role could the ILO play in this process?

2. DEFINING PRECARIOUS WORK

I. Scope

Although the term precarious work is coming into more common use at the international level, its definition remains vague and multifaceted. Complicating matters is the fact that the state of precarity takes somewhat different forms depending on the country, region, and the economic and social structure of the political systems and labour markets. Thus a variety of terms have emerged from particular national contexts, such as contingent, atypical or non-standard work. Moreover, the forms of precarity seem to be ever expanding, as employers constantly uncover new ways to circumvent regulations or find loopholes in regulations to increase the profitability of their business at the expense of their employees.

Despite this variety of rather context-specific ways of referring to precarious work, some common characteristics can be identified. In the most general sense, precarious work is a means for employers to shift risks and responsibilities on to workers. It is work performed in the formal and informal economy and is characterized by variable levels and degrees of objective (legal status) and subjective (feeling) characteristics of uncertainty and insecurity. Although a precarious job can have many faces, it is usually defined by uncertainty as to the duration of employment, multiple possible employers or a disguised or ambiguous employment relationship, a lack of access to social protection and benefits usually associated with employment, low pay, and substantial legal and practical obstacles to joining a trade union and bargaining collectively.

Workers on temporary contracts of various durations, be they directly employed or hired through an agency, may benefit from a job in the short term, but live with uncertainty as to whether their contract will be extended. Temporary contracts often also provide a lower wage, and do not always confer the same benefits, which often accrue with time and are directly linked to the length and status of the employment relationship. The result is a condition in which workers cannot plan for their future, and lack the security of certain forms of social protection.

Another core aspect of precarious work is the lack of clarity as to the identity of the employer. Recent decades have seen the fragmentation of what was once the vertically-integrated enterprise into more horizontal arrangements involving other entities such as subcontractors, franchisers and agencies. Legislation in general has not kept pace with these organizational changes, failing to differentiate between these complex multilateral relationships and the traditional simple bilateral relationship between a worker and an employer.⁵ Workers who are hired by an agency or subcontractor but who perform their duties in or for a separate user enterprise are in a precarious situation when it is unclear who of the

⁵ See J. FUDGE. 2006. "The Legal Boundaries of the Employer. Precarious Workers, and Labour Protection", in *Boundaries and Frontiers of Labour Law*, (Hart Publishing: Portland, OR).

two parties should be held responsible and accountable for the rights and benefits of a worker. Weak legislative frameworks and impotent enforcement mechanisms create a situation in which workers in triangular or disguised employment relationships have virtually no means of protecting their rights.

Precarious work is also characterized by insufficient or even a total absence of trade union rights. Access to collective bargaining rights and weak legislative frameworks present an important legislative challenge to precarious workers and trade unions alike. As described later in this report, laws in some countries forbid workers employed through a third party from joining unions of permanent workers. So while the user enterprise determines the pay and conditions under which these workers are employed, workers hired through agencies or subcontractors either cannot join the union of permanent workers, or they are excluded from the bargaining unit, and thus denied the right to bargain collectively with the user enterprise. Temporary and subcontracted workers therefore have limited ability to join trade unions, resulting in declining trade union membership and further weakening the collective power of trade unions.

Many national and global trade unions have launched campaigns against precarious work in recent years, developing their own, mostly coinciding definitions of precarious work. The International Metalworkers' Federation (IMF) proposes the following definition: "*precarious work* is the result of employment practices by employers designed to limit or reduce their permanent workforce to a minimum, to maximize their flexibility and to shift risks onto workers. The resulting jobs typically are non-permanent, temporary, casual, insecure and contingent. Workers in such jobs often are not covered by labour law and social security protections". The European Metalworkers' Federation (EMF) uses the term in a broader sense: "*Precarious work* is a term used to describe non-standard employment which is poorly paid, insecure, unprotected, and cannot support a household". PSI holds that "*precarious work* is characterized by uncertainty and insecurity through the use of stand-by, temporary, employment-agency, casual, part-time, and seasonal contracts, pseudo self-employment, and no direct or an unclear employer/employee relationship". The International Metalworkers' Federation also argues that in Africa *precarious work* is the norm: "We could therefore say that there are four dimensions when determining if *employment* is precarious in nature: 1. the degree of certainty of continuing employment; 2. control over the labour process, which is linked to the presence or absence of trade unions and relates to control over working conditions, wages, and the pace of work; 3. the degree of regulatory protection; and 4. income level".

These various characterizations point to the need to identify key elements of a possible definition on the basis of which universal standards could be established. The variety of precarious situations that exist would demand a flexible definition for a most accurate reflection of the realities on the ground. However, a more precise definition may also be required when discussing policy initiatives and regulatory responses so that these can effectively address the forms of precariousness. More concrete definitions are also more useful for trade union

campaigns to make specific demands, such as advocating for secure, direct employment, rather than considering all employment as subject to different degrees of precariousness.

Given the breadth of possibilities in defining precarious work, the ACTRAV Symposium has attempted to limit the scope to a few categories that encompass the majority of the workers who are the most adversely affected by precarious work arrangements. Concretely, the Symposium will focus on two categories of contractual arrangements characterized by four precarious working conditions:

Contractual arrangements:

- i. **The limited duration of the contract** (fixed-term, short-term, temporary, seasonal, day-labour and casual labour)
- ii. **The nature of the employment relationship** (triangular and disguised employment relationships, bogus self-employment, subcontracting and agency contracts)

Precarious conditions:

- i. Low wage
- ii. Poor protection from termination of employment
- iii. Lack of access to social protection and benefits usually associated with full-time standard employment
- iv. Lack of or limited access of workers to exercise their rights at work.

II. The growth of precarious work

While the increase in insecurity in employment is ubiquitous, its extent, meaning and impacts remain subject to much debate as there are no agreed official definitions of what constitutes precarious employment. Definitions vary from study to study under different labels such as non-standard, contingent, atypical, vulnerable, low wage, etc. The problem is made worse by the state of labour statistics collection and classification, which acts as an objective barrier to carrying out exhaustive surveys, making comparative data in particular unattainable to date.

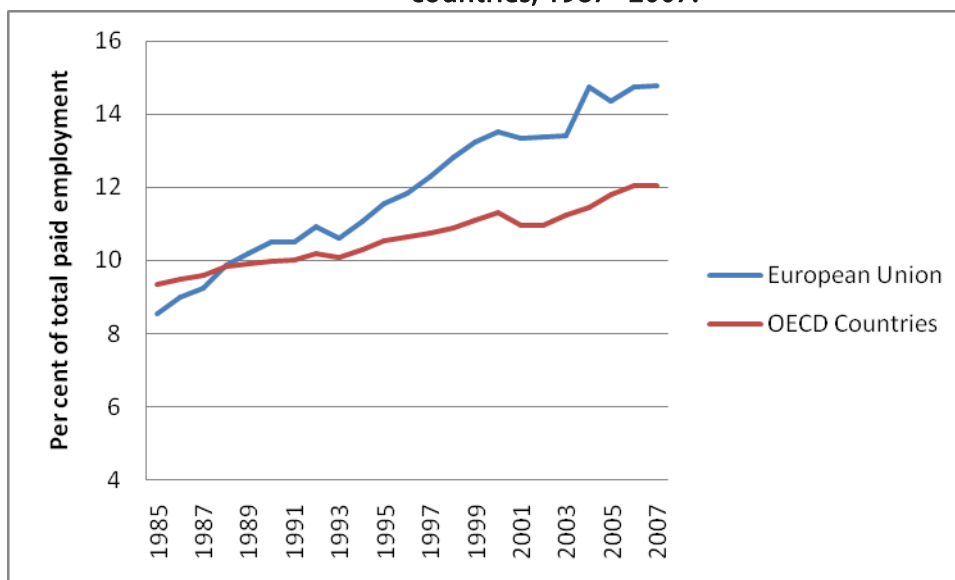
There is therefore no one-to-one correspondence between specific forms of employment and precarious work. The broad trend of the growing casualization and externalization of work manifests itself differently depending on the local labour market history and context. For the purpose of the statistical survey conducted in view of the symposium, the focus was confined to examining the trends of forms of employment that have been more closely associated with the growth of precarity: temporary employment, particularly fixed-term contracts, and agency work.⁶

⁶ In this discussion, we will conflate temporary agency work within the broad category of temporary contracts and workers. However, it should be clear that Temporary Work Agencies (TWA) and labour brokers in general introduce an important and disturbing third party element to standard

Broadly speaking, while economic insecurity has been and remains a dominant feature of predominantly informal economies, the phenomenon has now reached the heartland of industrialized countries with the spread of temporary forms of employment. The integration of formerly planned economies into the world capitalist system has also thrown millions of workers into new forms of employment. A most preoccupying trend is the fact that the growth of wage employment in developing countries, which was always the hallmark of economic development, now appears largely trumped by the fact that the jobs created are of a more precarious nature.

The expansion of temporary forms of employment has received a great deal of attention in recent years. Their development has been associated with fears that it may enshrine dual labour markets where employers would increasingly only provide permanent status to core employees, while maintaining a pool of more dispensable workers with no security, low wages, poor benefits, and little chance of professional advancement.

Figure 1 Growing prevalence of temporary work in OECD countries, 1987--2007.



Source: OECD.

Temporary employment has increased steadily in OECD countries since the 1980s. As can be seen in figure 1, the aggregate increase, if not spectacular, has been relatively constant throughout the period between 1987 and 2007⁷, reaching the

employment relationship. Moreover, the fact that many agency workers perceived themselves as having a “permanent” relationship to the TWA also greatly muddles the water when it comes to identifying the breadth of fixed-term contractual relationships. While agency work still accounts for a very small share of the workforce in most countries (1.5 per cent in Europe, 1.3 per cent in the U.S., 1.7 per cent in Japan), its importance is increasing. In some countries, such as South Africa and Columbia, it represents no less than 6.5 and 2.8 per cent of those workforces respectively. See CIETT. 2011. *The Agency Work Industry around the World*, Brussels available at www.ciett.org.

⁷ We have stopped trend at 2007 so as to not taint it with the impact of the crisis where temporary workers were disproportionately affected by layoffs.

level of 12 per cent of overall paid employment, up from 9.4 per cent in 1985. While overall permanent wage employment increased by 21 per cent in OECD countries during that period, temporary work for its part increased by 55 per cent.

This broad trend hides a variety of stories which can be captured by dividing countries into subgroups. In the European Union, for instance, the rise of temporary work was more pronounced with an increase of 115 per cent as compared to 26 per cent for overall employment. As a result, its share of overall paid employment increased from 8.3 to 14.7 per cent. All in all, temporary work represented 30 per cent of all paid jobs created during that period. As temporary work increased in Europe, its incidence was also increasingly “involuntary” in the sense that workers would have preferred more permanent employment.

Table 1 Share and voluntary character of temporary work, Europe, 2007

	Share of temporary workers	Percent that could not find permanent job
European Union 27	16,1	61,7
European Union 15	16,4	58,6
Belgium	10,7	74,5
Czech Republic	11,4	75,2
Denmark	9,4	46,7
Ireland	8,9	63,9
Greece	24,6	84,9
Spain	36,7	91,5
France	12,2	57,0
Italy	16,6	67,8
Cyprus	5,8	93,9
Luxembourg	6,3	41,4
Hungary	11,0	69,0
Netherlands	22,9	31,9
Austria	11,5	8,6
Portugal	28,4	84,2
Finland	19,2	65,1
Sweden	11,9	58,4
United Kingdom	8,4	57,2
Norway	6,3	47,2

Source: Eurostat

Anglo-Saxon countries with strong traditions of employment-at-will and low employment protection such as the United States, Australia, or the United Kingdom started off with relatively low rates of temporary employment and remained there for the whole period. In the U.S. and the U.K., the relatively greater importance of temporary agency employment should be noted.

Over the period studied, most countries in Western Continental Europe have experienced a generalized (and sometimes explosive) increase in temporary forms of employment ranging from about three per cent for Austria, Belgium, Luxembourg and Germany to sixteen per cent for Spain, with Portugal, France, Italy, the Netherlands standing between 5 and 9 per cent.

With the exception of Sweden, Scandinavian countries experienced stable or slightly declining rates over that period. The Swedish exception seems directly related to the aftermath of the financial crisis in the 1990s and the reforms that ensued.

All Central European countries reported increases over the period with proportions of temporary employment ranging from five per cent in the Slovak Republic to 28 per cent in Poland. Greece and Turkey shared a common declining trend having started at around 20 per cent in the 1980s, with shares hovering around 13 per cent in 2007.

Finally, Japan and Korea also followed a similar path, having both experienced financial crises in the 1990s and introduced labour reforms.⁸ Both saw their respective shares of temporary work increase substantially, although this phenomenon appears to have slightly reversed in recent years in Korea.

The evidence available in the literature on temporary employment makes it clear that quality of jobs associated with different forms of temporary contracts is lower than that of regular permanent jobs. Even when one corrects for the characteristics of temporary job holders (age, education, etc.), the differential, albeit smaller, remains and is not marginal. This is true for pay (an adjusted gap of about 15 per cent on average), but also for access to benefits (particularly if they are employer-provided), training, and access to union representation. So, not surprisingly, the likelihood of being in a poor household is therefore greater for temporary job holders. According to data from the European Working Conditions Survey, over half of temporary contract workers, as opposed to one-third of permanent workers, had difficulties making ends meet.⁹

Temporary work has increased over the last decade even as labour market conditions generally improved. Following the crisis of 2008, however, workers on such contracts were the first to be laid off. With the current, rather stagnant economic conditions, it would not be surprising to witness a surge in fixed-term contracts.

⁸ These two countries were not alone in introducing changes in employment protection laws regarding temporary work over the past twenty years: most notably, Italy, the Netherlands, Sweden, Portugal, Germany, Belgium, Spain, Poland and the Slovak Republic "eased" their regulations all of which translated into greater level of temporary work. However, Denmark and Norway (and Greece) also did liberalise their regulations without such an impact. Conversely, three countries (the UK, the Czech Republic and Hungary) tightened up their legislation seemingly stabilizing their rates of temporary employment. The source for changes in employment protection legislation can be found on the OECD website at <http://stats.oecd.org/>

⁹ EWCS. 2010. See <http://www.eurofound.europa.eu/surveys/ewcs/2010/index.htm>

Whereas precarity in employment has been a focus of much research interest in OECD countries since the 1980s, where its development has stood in contrast with the standard employment relationship that was prevalent in the post-war decades, developing countries have also witnessed the growth of precarious work in the formal sector of their economies as employers have increasingly resorted to using more contingent forms of employment either through the casualization of employment (hiring of workers on temporary or even no written contracts) or through the externalization of employment (through labour brokers, dispatch or temporary work agencies).

In countries where the majority of the workforce is still self-employed¹⁰, predominantly in the informal economy, the importance for the formal sector to generate good, permanent employment with access to social security cannot be understated. However, it is clear that reaching the ranks of the paid labour force in most of these countries is no longer a guarantee of getting out of precarity. Thus, if most regions of the developing world have recently experienced a substantial increase in the proportion of wage earners in their labour force, the quality the jobs being created remains an open question.

Although it is fragmentary, statistical evidence from different regions in the world points in the same direction: the growth in the last decade in the share of wage employment has generally been associated with more insecure forms such as contract and casual labour, which provide inferior conditions than more regular and permanent forms of employment.

China, the country that has been at the epicentre of the globalization of production in the past twenty years, is a case in point. While employment in the private sector grew by leaps and bounds, much of it was precarious in character as the labour market was segmented by internal migration status, but also as virtually all jobs created since 1986 were based on fixed-term contracts. Census data from 2005 on urban workers show that while 73 per cent of unofficial rural migrant workers were employees, 47 per cent had no contract, 25 per cent had short-term contracts and only one per cent had a long-term contract. The situation of local workers was somewhat better with a third having long-term contracts, 17 per cent short-term contracts and 31 per cent no contract at all. The pay differences were consequential with workers with no contract earning over 20 per cent less than those with employment contracts.¹¹

¹⁰ Work in most developing countries has always been precarious to the extent that it was (and remains) closely associated with the informal economy. The ILO has developed a crude but indicative indicator of vulnerable employment to reflect that reality. It includes both “own-account” workers as well as contributing family members. These workers are deemed more vulnerable because they are less likely to have formal work arrangements, access to benefits or social protection programmes and are more “at risk” to economic cycles. Even in regions like East Asia where wage and salaried employment has increased rapidly in recent years, the share of “own-account” workers and contributing family members remains at 53.5 per cent. That is to say that when it comes for the vast majority of workers in the developing world, access to a secure job with social protection remains an aspiration. See ILO. 2010. *Employment Trends* (Geneva: ILO).

¹¹ Gagnon, J., Xenogiani, T., and Meng, X. 2009. “Are *all* Migrants Really Worse Off in Urban Labour Markets?”, New Empirical Evidence from China, OECD Development Centre Working Paper No. 278.

In 2008, the labour law was amended to better protect workers and allow for the conversion of fixed-term contracts into permanent ones. In a country with no right to organize independent trade unions, the absence of permanent employment relationship all the more weighed heavily on the ability of workers to voice their interest. As one researcher put it:

Under such a circumstance, if the employer infringes on the rights of employees, such as not paying overtime work or social insurance premium, the employees usually choose to give up their rights in return for the chance of the renewal of the employment contract.¹²

The widespread abuse of workers' rights was the main factor behind the recent reform of labour law. It is too early to judge whether the reform has significantly improved the employment status of Chinese workers.

India also appears to have experienced an increase in the incidence of precarious work in the formal economy in recent years, mostly in the form of increased use of contract workers through labour brokers. For instance, in the organized (formal) manufacturing sector, the use of contract workers is shown to have grown from 13 to 30 per cent between 1993--94 and 2005--06. The spread of contract labour has been such that they frequently outnumber the number of permanent workers.¹³

South Africa is another country where third-party contract labour has grown significantly in recent years, in an apparent drive by South African employers to subcontract many of their activities. One researcher remarks:

The factories and mines that in the 1980s were the workplaces in which the trade union movement in South Africa rose to prominence are today a more unequal place that they were then, as a result of a proliferation of service providers, labour brokers and others that operate there. These satellites of the core business many employ up to half, or more than half, of workers on the site, sometimes at less than half the wages of workers employed by the core employer doing the equivalent work.¹⁴

The Maghreb is one region where wage employment has grown significantly over the past decade. However, statistical evidence from Algeria demonstrates that the vast majority of jobs created were in the form of fixed-term contracts. From 1997 to 2010, while the number of wage and salaried workers in Algeria increased by about 2.7 million, 2.2 million of which has been made up of workers on temporary contracts.¹⁵

¹² Li Kungang. 2010. "Practice and Problems: The Fixed-Term Employment Contract in China" in Roger Blanpain, Hiroya Nakakubo and Takashi Araki (eds), *Regulation of Fixed-term Employment Contracts: A Comparative Overview*, (Kluwer Law International BV, The Netherlands), pp. 53-54.

¹³ Shyam Sundar, K.R. 2011. *Non-regular Workers in India: Social Dialogue and Innovative Practices*, report to the ILO, forthcoming.

¹⁴ Theron, J. and Visser, M. 2011. "Non-standard workers, collective bargaining and social dialogue: The case of South Africa", report to the ILO, forthcoming.

¹⁵ Office national des statistiques, Algérie, available at <http://www.ons.dz/>

Latin America and the Caribbean, a region that has experienced some improvement in the prevalence of low wage employment in many countries, also appears to have witnessed a shift towards more precarious form of wage employment. Recent research from CEPAL¹⁶ on employment quality for the region gives us a partial glimpse of the situation and its evolution. While it reveals an improvement in the proportion of wage earners with a written contract in the early 2000s, the proportion of which went from 54.6 to 57.6 per cent between 2002 and 2007, it also shows that the share of workers with temporary contracts went up from 19 to 26.5 per cent. Again, apparent improvements in the share of wage earners in the labour force are trumped by the growing precarisation of the employment relationship.

i. Thinking forward

Given the importance of the issue, the current problem in compiling reliable statistical indicators regarding precarious work cannot be over-emphasized. While some of this is due to the varying definitions and terms used to describe precarious working arrangements vary from country to country, some of it is also caused by lack of data collection. To move forward, it would be important for the ILO to help countries in the task of streamlining workable common definitions so as to help future data collection to get a real picture in various regions and sectors. Where available, the ILO should also start compiling data on temporary types of employment.

III. Precarious work, precarious lives, precarious societies

Precarious work has a deep impact on individuals and on societies. Over the past years, economic crises and turbulences on the financial markets have lead to wide spread anxiety among workers. Increasing rates of unemployment and precarious work arrangements deteriorate the quality of working and living conditions.

From the first days of 2011, social unrest has spread from Egypt, across Northern Africa and the Middle East, in town squares from Madrid to Athens, and, most recently, in London, Jerusalem and Tel Aviv. Each place maintaining its particular instigators, the message from all seems to be clear: the current conditions of work and life are untenable.

The normalization of precarious work is already showing its deeply damaging impacts on society at large. In general, it leaves workers and communities in unstable and insecure situations, disrupting their life planning options. More concretely, precarious workers are found to suffer a higher rate of occupational safety and health issues. Such impacts fortify gender divisions and worsen the already precarious situation of migrant workers. The general condition of fear and insecurity also dissuade workers from joining trade unions, leaving them even more vulnerable to precarious work arrangements.

¹⁶Weller, J. and Roethlisberger, C. 2011. "La calidad del empleo en América Latina", Research Paper Series, CEPAL, Santiago de Chile.

i. Secure, predictable and stable work-life balance

Precarious work deprives people of the stability required to take long-term decisions and plan their lives. Temporary workers in particular find themselves unable to plan to get married, have children, or purchase homes because of the uncertain continuity of their contracts, and usually low wages. Studies show that the longing for a “coherent life plan” is especially high among temporary agency workers and fixed term workers.¹⁷ Even those who once voluntarily chose flexible employment often find cause for regret in the longer. In the context of the need for consistent career paths, one could argue that when faced with the alternatives of unemployment and atypical work, atypical work is preferable. However, research has also found that within four years, much of the perceived “benefit” of atypical work, e.g. a career path without gaps, dissipates.¹⁸

In fact, “flexibility at the workplace” often enough means less regular and less reliable working hours, often determined at very short notice. Casual workers seem to be disproportionately affected. A study on Canadian hotel workers shows important differences in work organisation and working hours between casual and full-time employees at the same workplace. While full-time employees reported a satisfactory level of control and a good work-life balance, casual employees doing the same jobs have much less desirable work schedules and were additionally exposed to unpredictable variations in both daily and weekly working hours.¹⁹

Unemployment and precarious jobs have left a young generation hard pressed to see a bright future. In EU-27 countries, for example, youth unemployment sky rocketed from 15 to just over 21 per cent between 2008 and 2010, reaching as high as 45.7 per cent in Spain.²⁰ And these figures do not even include those young people with precarious jobs. A study on Europe found that “the number of young workers with temporary contracts or who are employed through temporary agencies has increased along with the overall use of such flexible contracts. In some Member States – the Czech Republic, Hungary, Ireland, Latvia and Luxembourg – the proportion of young workers on temporary contracts (out of the entire young labour force) rose by more than 6 per cent between the third quarter of 2008 and the third quarter of 2010.”²¹

The precarious nature of these contracts also leave young people excluded from benefits systems, either because they have not been contributing for long enough or because the systems are based on voluntary contributions. The risk of losing financial independence and having to rely on lower social welfare payouts

¹⁷ Dörre, K. 2006. *Prekäre Arbeit und soziale Desintegration*, APuZ 40–41, pp. 7–14.

¹⁸ Addison, J. and Surfield, C. J. 2009. “Atypical Work and Employment Continuity”, *Industrial Relations. A Journal of Economy & Society*, vol. 48, pp. 655–683.

¹⁹ Bohle, P., Quinlan, M., Kennedy, D. and Wilson, A. 2004. “Working hours, work-life conflict and health in precarious and “permanent” employment”, *Rev Saúde Pública*, vol. 38 (S-upl), pp. 19–25.

²⁰ Eurostat, available at

http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Youth_unemployment_rates_EU.PNG&filetimestamp=20110801115617

²¹ Source: Eurostat Labour Force Survey (2010).

can lead to further social exclusion.²² It is not surprising therefore that youth are also more likely to fear losing their jobs.²³

Unpredictability in professional life translates into the unpredictability of private life. Characteristics of precarious work such as anxiety and income and employment insecurity limit long-term planning especially among the young. Many are in highly uncertain work situations at ages when they traditionally would be considering buying a house or starting a family. In the Mercosur countries, young workers very often accept bad working conditions and salaries on a subsistence level. Many of them do not even have work contracts, placing them beyond the reach of social security systems. Consequently, the population under 25 runs the risk of falling into poverty and social exclusion in those countries. At the same time, according to the flexibility ideology, they need to ensure their “employability” and have to constantly develop new skills.²⁴

It is obvious in this context that privileges of the young from “higher classes” lead to the fortification of the class divide. Hardest hit by social exclusion are the young people from the lower classes. Unemployment and material hardship in the family make insecurity part of their everyday life. For low skilled workers “Mc Jobs” without training lead to an inevitable dead end. The lack of prospects, apathy, and resignation become normal.²⁵

ii. Health

Precarious work arrangements are also associated with poor health conditions. Workers on temporary or agency contracts are often exposed to hazardous work environments, stressful psychosocial working conditions, increased workload and disproportional travel time between multiple jobs at multiple sites. Research in the field has also found that precarious workers are less likely to receive adequate training for the tasks they are required to perform and that their occupational safety and health is poorly monitored by inspection systems.²⁶

²² Foundation Findings: Youth and work: European Foundation for the Improvement of Living and Working Conditions, 2011.

²³ *Ibid.*

²⁴ Schier, M. and Szymenderski, P. 2007. “Blurring the Boundaries – the Shift in Working and Family Life”, available at <http://www.goethe.de/ges/soz/dos/arb/alw/en2800431.htm>; Sennett, R. 2006. *The Culture of the New Capitalism*, New Haven/London; Díez de Medina, R. 2000. “Calificación, empleo y desempleo en los jóvenes del MERCOSUR”, *Boletín Cinterfor*, pp. 43–72; Smithson J. and Lewis, S. 2000. “Is job insecurity changing the psychological contract?”, *Personnel Review*, vol. 29, pp. 680–702, available at <http://proquest.umi.com/pqdlink?index=4&sid=1&srchmode>.

²⁵ Mansel, J. and Heitmeyer W. 2010. “Precarity, Segregation, and Poverty in the Social Space – Overview of the Research Status”, available at <http://www.difu.de/publikationen/precariety-segregation-and-poverty-in-the-social-space.html>;

Bohle, P., Quinlan, M., Kennedy, D. and Wilson, A. 2004. “Working hours, work-life conflict and health in precarious and “permanent” employment”, in *Rev Saúde Pública*, vol. 38 (Supl), pp. 19–25.

²⁶ Benach, J. and Muntaner, M. 2007. “Precarious employment and health: developing a research agenda”, *Journal of Epidemiology & Community Health*, vol. 61, pp. 276–277; Lewchuk, W, de Wolff, A., King, A. and Polanyi, M. 2003. “From Job Strain to Employment Strain: Health Effects of Precarious Employment”, *Just Labour*, vol. 3, pp. 23–35; Quinlan, M. 1999. “The Implication of Labour Market Restructuring in Industrialized Societies for Occupational Health and Safety”, *Economic and Industrial Democracy*, vol. 20, pp. 427–460; Bohle, P., Quinlan, D., Kennedy, D. and Wilson, A. 2004. “Working hours, work-life conflict and health in precarious and “permanent” employment”, *Rev Saúde Pública*, vol. 38 (Supl.), pp. 19–25.

The precarious nature of the employment relationship itself can cause precarious workers to experience poor emotional and mental health. As job insecurity increases and social benefits decrease, workers face increasing pressure to accept job offers that put their health and safety at risk. Subcontracting is also often used by primary employers as a means of shifting risk by outsourcing more dangerous jobs to subcontracted and agency workers, forcing precarious workers to bear the brunt of more dangerous or risky tasks. Finally, in many countries (bogus) self-employed workers do not benefit from workers compensation or health insurance, leaving them at risk of long term unemployment if injured or ill.²⁷

iii. Gender dimension

The traditional division of labour has meant that women have historically worked either in the household, or in non-standard work. To this day they remain overrepresented in traditionally precarious sectors such as domestic work, home work, food processing, electronics industries and the garment sector. Women are also overrepresented in part-time work, and therefore rarely earn enough to be financially independent.²⁸

Figures show that women around the world are more highly affected by precarious work arrangements. In Spain, one third of women are employed on fixed-term contracts. In Korea, two thirds of women workers are on precarious contracts, with their salaries reaching about 40 per cent of the regular male worker's pay.²⁹

Sectors in which women are overrepresented also tend to expose women workers to highly exploitative working conditions, largely employing young female migrant workers, often from rural areas, with low level skills and poorly educated. As they have little bargaining power and face almost insurmountable obstacles to organizing and bargaining collectively, these workers are most in need of protection.³⁰

iv. Social/collective impacts

Perhaps the most disconcerting element of precarious work is its influence on societies. A high proportion of precarious work in a community seems to coincide with a lower than average level of neighbourhood cooperation and cohesion, and a disproportionate decline in group memberships and associations among poorer communities.³¹ A quick read of the day's news is enough to show how precarious work, crisis and austerity measures create conditions of deprivation and a lack of social cohesion that often lead to social unrest and resentment.

²⁷ Quinlan, M. 1999. "The Implication of Labour Market Restructuring in Industrialized Societies for Occupational Health and Safety", *Economic and Industrial Democracy*, vol. 20, pp. 427-460.

²⁸ ITUC 2011. *Living with economic insecurity: women in precarious work*, Brussels.

²⁹ Menéndez, M., Benach, J., Muntaner, C., Amable, C. and O'Campo, P. 2007. "Is precarious employment more damaging to women's health than men's?", *Social Science & Medicine*, vol. 64, pp. 776-781.

³⁰ ITUC 2011. *Living with economic insecurity: women in precarious work*, Brussels.

³¹ Stone, W. 2000. "Social capital, social cohesion and social security, paper presented at the Year 2000 International Research Conference on Social Security, 25--27 Sep., Helsinki, available at <http://www.aifs.gov.au/institute/pubs/papers/stone2.html>

A crisis in democratic representation has left people in marginalized societies in particular feeling politically powerless, with little they can do to change things in their own life. The point cannot be understated: a feeling of “absolute lack of power means ceasing to be a human agent”. The perceived restriction of the individual’s scope for action then stokes collective frustration. The “banlieus” of French cities or more recent examples from across Europe serve as distinct examples of the experience of youth today. The frustration of young people living in poor urban areas in particular, who lack decent jobs and therefore have little optimism for the future, their lives, their existence, and their careers, leads again and again to flaming riots.³²

Precarious work also threatens trade union membership. Precarious workers are by definition in an unstable position, so that even if they are being exploited, few feel confident enough to organize and bargain collectively at the risk of losing their jobs.³³ As such, the precarisation of the workforce has implied not only the removal of an important form of civic participation, but also can be seen as a strategic way of weakening the labour movement.

In sum, precarious work has significantly weakened the platform on which society currently stands. A feeling of powerlessness and fear of demanding change discourage people from participating in trade unions and community organizations and institutions. When placed in context of a greater economic crisis and a state’s response to this crisis with austerity measures and rolling back of social rights, it is no wonder that there is increasing social unrest throughout the world. Democratic channels will be of crucial importance to raise the collective voice of these populations. The more “precarious” political processes appear, the more important are intermediary organisations like trade unions aggregating the interests of the unprivileged and articulating their demands. Participation is the key to social inclusion which means that politics must create sustainable mechanisms for the (self-) organisation of the “precariat”³⁴ combined with politics of “de-precarisation”³⁵.

³² Mansel, J. and Heitmeyer, W. 2010. “Precarity, Segregation, and Poverty in the Social Space – Overview of the Research Status”, available at

<http://www.difu.de/publikationen/precariety-segregation-and-poverty-in-the-social-space.html>

³³ Brophy, E. 2006. “System Error: Labour Precarity and Collective Organising at Microsoft”, *Canadian Journal of Communication*, vol. 31, available at

<http://www.cjc-online.ca/index.php/journal/article/viewArticle/1767/1885>

³⁴ Standing, G. 2011. *The Precariat. The New Dangerous Class*, Bloomsbury, London.

³⁵ Dörre, K. 2006. “Prekäre Arbeit und soziale Desintegration”, *APuZ* 40-41, pp. 7–14.

3. ECONOMIC AND LEGAL DRIVERS OF PRECARIOUS WORK

The making of the ‘precariat’ is a multilevel process. It is an interaction between abuse of economic power, economic liberalization, global capital mobility, fierce lobbying against protective labour laws, and a whole range of state policies guided by economic thinking that believes in the efficiency of free markets. It is this interconnectedness that creates the impression of inevitability, where each single measure looks like an adaptation and reaction to forces deemed beyond control of any actor. In this context, precarious employment is as much a consequence of increased competition as it is a powerful driver of increasing competition.

Moreover, the rise in precariousness is more pronounced in those places where there is a weak social floor, pressing people to accept low quality jobs and driving down wages. Ambiguous and pliable legal frameworks in many cases enabled employers to mischaracterize the status of the workers they hired to reduce the benefits and rights of these workers in the name of flexibility and competitiveness. Finally, lowering social standards and circumventing legal protection required a weakening of trade unions and affronts on trade union rights to reduce their collective bargaining power.

I. The Political Economy of Precarity

The paradox of the last decades has been that GDP and productivity growth was not followed by a similar growth in wages and living standards. For many workers, wages are stagnating or even declining³⁶ and low pay is on the rise.³⁷ Societies are getting richer, but it is mostly concentrated at the top.³⁸ The gap between rich and poor countries has reached unprecedented levels and the global Gini coefficient is at its highest in the last two hundred years.³⁹ Underlying these trends is a growth in precarious work, an explosion in financial profits and a decline in real investment.⁴⁰

³⁶ Between 1979 and 2007, the richest 10 per cent of US citizens accounted for a full 91 per cent of average income growth.” Economic Policy Institute (EPI). 2011. “When income grows, who gains?” available at <http://www.stateofworkingamerica.org/>.

³⁷ ILO. 2011. *Global Wage Report 2011*, Geneva.

³⁸ Buffet, W. 2011. “Stop Coddling the Super-Rich” in *New York Times*, 14 Aug. 2011.

³⁹ Milanovic B. 2009. “Global inequality and global inequality extraction ratio: The story of the last two centuries”, Policy Research Working Paper 5044, World Bank, Washington available at (http://econ.worldbank.org/external/default/main?pagePK=64165259&theSitePK=469372&piPK=64165421&menuPK=64166322&entityID=000158349_20090909092401)

⁴⁰ Stockhammer E. 2011. “Neoliberalism, Income Distribution and the Causes of the Crisis”, *Research on Money and Finance*, Discussion Paper no. 19, London, available at <http://ideas.repec.org/p/rmf/dpaper/19.html>

i. Precarious employment – an old phenomenon, re-emerging

Although the term precarious may be relatively new, the labour movement has always had the implicit objective of making labour less precarious, or in other words to de-commodify labour. Organized labour in industrialized countries has historically been successful in this respect: non precarious employment became the standard employment relationship, based on labour rights, social security, rising wages and collective representation. The propagation of this standard employment relationship created the broad middle class, and upward social mobility became possible for many. From the strongholds of the labour movement, standards were extended to a growing number of workers through coordinated or centralized collective bargaining, legal extension, or sometimes by collective bargaining agreements that set the reference wage for the rest of the economy.

Let us be clear though, that the standard employment relationship did not imply any kind of universality; even in wealthy countries, the standard employment relationship covered men at the core of the labour market. In particular women were not seen as primary breadwinners, and even as they entered the mainstream labour market, they frequently had low-paying, part-time, casual jobs with limited access to social security.

Welfare state provisions and collective bargaining changed the lives of working people. Both comprehensive welfare state and wide spread collective bargaining were achieved simultaneously – and now they are under threat simultaneously. These two great innovations of the 20th century made capitalism bearable. The new factories of mass production at once allowed for unprecedented economics of scale and productivity gains, and also created the huge workforces that replaced craft based trade unionism with the collective power of industrial workers. Collective bargaining and the welfare state then both came about because the working poor organized, showing mass sympathy for radical and sometimes even revolutionary uprisings, and the rich were sufficiently afraid that the former might even be able to succeed.

The post World War II compromise basically boiled down to a triple promise: capital shared some of the wealth produced, workers in return no longer challenged the system, and the State corrected market outcomes through progressive taxation and welfare provisions. The progressive extension of rights and protection allowed for an “insider/outsider” alliance among the broad working class, as the former had the power, the political will and the success to be the vanguard for extension to the other. Organized labour was the driving force for universalizing social rights

While this regime allowed for rapid economic growth, and rapid growth of profit in absolute terms, it came at the ‘price’ of equality, higher taxes, a rising wage share and restricted freedom of capital. Under globalization, capital started to reverse the institutional and distributional trends of the long post war period. Employers used precarious employment to lower costs and employment

standards, and to undermine the strongholds of organized labour. A *divide et impera* strategy has been applied to reduce trade union resistance against precarious employment. Maintaining quality employment for the core is often offered in return for accepting a dual labour market even within companies.

ii. Restructuring and flexibilization

Contrary to neoliberal doctrine, precarious work is not the inevitable consequence of globalization; it is the outcome of deliberate policies to use the opportunities of globalization to change the rules of the game. Institutional changes and new technological opportunities went hand in hand to create and impose the new economic model. Global capital mobility, global sourcing and comparatively easy options for relocation meant that the “successes” of lowering labour costs in one country transferred the structural pressures of the world market onto others.

A rapid decline in transport and communication costs, highly sophisticated computer based logistic networks, internet based work-sharing, and much improved public infrastructure (roads, communication, energy supply, law enforcement etc.) provided the technical opportunities for new production network models that allowed for the downsizing of big companies, simultaneously increasing company flexibility and undermining the strongholds of worker resistance. New business models like just-in-time production, global supply chains, local economic clusters, call centers, or offshore back offices located in low cost countries became economically attractive options.

These technological changes were complemented by institutional changes towards freer trade, flexible exchange rates and global capital mobility. This increased not only the possibilities for companies to use the new global distribution of labour, but also reduced government’s ability to pursue a national economic policy geared towards protecting its citizens against social dumping, as well as its ability to tax capital. Over the last 30 years “statutory corporate tax rates have gone down in the majority of the OECD countries from around 45 per cent to 30 per cent.”⁴¹ The result has been intensified pressure on public investment⁴² and the welfare state as the tax base eroded. This pressure on public budgets increased in the grips of the financial crisis, draining the government of its ability to maintain public expenditure levels.

The abandonment of macroeconomic policies geared to achieving full-employment was also central. Henceforth, it was determined that macroeconomic activism on the part of governments could only lead to inflation, and that the only way to achieve full-employment was through deregulating labour markets and making work “more flexible”. From a neoliberal perspective, the precarisation of employment is not an accidental byproduct; on the contrary, it is the alleged solution to the employment problem.

⁴¹ ITUC 2006, *Having their cake and eating it too*, Brussels, available at http://www.taxjustice.net/cms/upload/pdf/tax_break_EN.pdf

⁴² Gomes P., Pouget F. 2008. *Corporate Tax Competition and the Decline of Public Investment*, available at <http://www.eco.uc3m.es/~pgomes/1-Academia/TaxCompetition.pdf>

What started at the fringes of the labour market and extended to low skill services is now a nearly ubiquitous phenomenon. From the high end software developer to the cleaner, from the high-skilled intern to the security guard and right down to factory floors and fields, temporary and precarious workers work alongside and replace regular employees. These arrangements create an army of casual workers living in a permanent status of insecurity and deprived of their employment rights in any meaningful sense. Their precarity is also instrumental in frightening the remaining standard employees into concessions and subordination. Producing a large group of 21st century proletarians injects a level of fear and insecurity in the labour market not seen for decades in the industrialized countries.

The economic mainstream presents this development as inevitable and largely positive: global open markets for capital, trade and labour allow all countries to develop their comparative advantages. Countries that do not participate are likely to be left behind. Fierce competition and in particular global financial markets weed out inefficiencies, channel capital towards the most productive investment, and lead to rapid innovation as they demand high rates of return and low prices at the same time. Only flexible enterprises can adapt and survive. There might be some losers in this process, but this is the inevitable price of a dynamic, high growth global economy. Finally, as the tide lifts all boats, even the losers will gain, provided they prove to be sufficiently flexible and invest in their employability.

To realize this vision of prosperity though, the neoliberal doctrine was contingent on the active role of the State in creating the regulatory environment to spur the promised growth. Governments should switch from passive social transfers to activation policies to support and force the unemployed to be employable. Reducing social transfers and making them conditional on accepting any kind of work was a key component of creating the collapsing bottom of low pay, another key to maintaining competitive advantage. Changes in legislation to allow for easy termination of employment, to exclude vulnerable groups like youth, women or the elderly from employment protection, and the simultaneous promotion of agency work and reliance on temporary workers became instrumental in creating the precariat. Outsourcing public services to low cost private providers largely increased the opportunities for precarious low quality employment.

In reality the neoliberal promises did not materialize. Global growth rates in the neoliberal era have on average been comparatively low⁴³, and would have been even lower without the high growth performance of China that resisted capital market liberalization, got prices systematically wrong, used state interference to create an industrial base, and repressed individual and collective freedom of workers through an authoritarian labour market regime. There is also no correlation between tax levels and competitiveness; or if there is any, it seems that high tax countries on average are doing rather well. Instead of ensuring

⁴³ Crotty J. 2000, "Structural Contradictions of the Global Neoliberal Regime", Amherst online at <http://people.umass.edu/crotty/assa-final-jan00.pdf>.

efficient resource allocation, capital markets channeled billions into wasteful financial bubbles or caused overinvestment in real estate. Between 2007 and 2009 in the US alone, the crisis wiped out \$US 17 trillion, a quarter of private wealth.⁴⁴ Rather than bringing unemployment down, self-activation and state activation policies resulted in hordes of unpaid interns, workfare programs and millions of working poor. Where the new regime generated employment, these jobs often did not provide a decent income.

However, a recognition of the facts that the promised benefits of the current globalization system did not materialize does not change the equally plain fact that these structural forces are now firmly in place. Today, policy makers, entrepreneurs, trade unions and other social actors are forced to reckon with the structural power of a disembedded market that has been created over the last decades and seems to be beyond anyone's control.

While overall coordinated global regulation might be theoretically imaginable and desirable, the protagonists of the failed model are still arguing that as long as this is not achieved, TINA (There Is No Alternative) reigns and adaptation and subordination under the market imperative of increasing competitiveness is the only option. The need for global policy coordination faces the typical 'prisoners dilemma.' Everybody would be better off when cooperating, but no one does because if the others do not follow, the well-intentioned will lose out vis-à-vis those pursuing a 'beggar thy neighbor' policy.

Let us assume that dynamic market economies based on competition and constant innovation are impossible without permanent adaptation, risk, change, and restructuring. The problematic that arises in this scenario is the question of how such flexibility is shared between enterprises, the state and the worker. In the past, the standard employment relationship, providing a bundle of labour and social rights, ensured that employers shared some of the responsibility by offering job security despite market volatility, and reduced individual risk through collective social security provisions. In the precarious world of today, however, the flexibility burden has shifted from the enterprise or the state to the largely unprotected individual worker, resulting in precarious employment and increasingly precarious societies.

Reversing the vicious cycle of the mutual reinforcing elements of the current globalization regime, in which precarious employment is a key element, will require a comprehensive set of policy responses that reach far beyond labour market policies. Monetary, fiscal, social, economic, labour, gender and environmental policies need to be geared towards the objective of reducing inequality, strengthening democracy in society and at the workplace, providing income security and employment opportunities. Now more than ever, we need labour policies that allow for stable and predictable employment, balance between the demands of work, life and family for men and women, and that

⁴⁴ Krueger. A. 2010. Statement for the Treasury Borrowing Advisory Committee of the Securities Industry and Financial Markets Association, available at <http://www.treasury.gov/press-center/press-releases/Pages/tg683.aspx>.

direct private and public investment towards building inclusive and environmentally sustainable societies.

iii. Thinking Forward

Labour market regulation to reduce precarious employment needs to be embedded in a wider bundle of policies to be effective. While many policies would be most effective when implemented in a coordinated fashion globally, the broad variety of policy regimes and the remarkable successes of countries like Brazil to improve social economic outcomes show the existence of policy space even under the current globalization regime. Following are some key elements to prevent the evolution of precarious work through economic and social policy.

- **Re-establish full-employment as the central objective of economic policy.** Along with policies geared to market liberalization, the abandonment of full-employment as a policy goal for governments as been a central element in creating an economic context propitious to the development of precarious work. Ensuring that monetary, fiscal and industrial policies converge to ensure quality employment for all is a sine qua non condition of success for any strategy to combat precarious work. The ILO Employment Policy Convention (No. 122) can serve as a useful point of reference here. As mentioned above, in the new globalized context, such pro-employment policies will have maximum impact if they are undertaken in a coordinated manner multilaterally.
- **Close the Casino - bring banking instead of financial market volatility.** Global capital mobility, off-balance sheet banking, opaque risk allocation through all kinds of derivatives, or in the words of Warren Buffet, new “financial weapons of mass destruction”⁴⁵, speculative exchange rate determination, and regulations forcing institutional investors to follow assessments of unaccountable rating agencies⁴⁶ allow for the disproportionate concentration of profit and power in the financial sector of the economy. It reduces the level of productive investment and imposes unsustainable profit margins on enterprises that cannot be earned through productivity gains, but only through redistribution from wages, taxes or consumer prices to profits.

The experience of the great recession and the inability of governments to counter the blackmail power of the big financial corporations demonstrate the dysfunctionality of the current regime. A financial transaction tax, separating saving banks and investment banking, higher reserve requirements, closure of offshore banking, and downsizing financial institution that are too big too fail are policy instruments that would go a long way to reduce financial market volatility.

⁴⁵ Berkshire Hathaway Inc. 2002. *Annual Report*, available at <http://www.berkshirehathaway.com/2002ar/2002ar.pdf>.

⁴⁶ Lowenstein R 2008. “Triple A Failure”, in *New York Time Magazine*, 27 Aug. 2008, available at <http://www.nytimes.com/2008/04/27/magazine/27Credit-t.html?pagewanted=2>.

- **Regaining fiscal space.** Inclusive societies require a solid tax base. Combating precarious employment is impossible without income security through welfare state provisions and active labour market policies. A comprehensive public sector has to be an anchor for essential universal services and quality employment. The failed tax policies of the last decades have resulted in starving societies of necessary resources and concentrating global wealth in the hands of a tiny minority. Rebalancing public budgets cannot be achieved by further impoverishing the disadvantaged. Given that 0.5 per cent of the global population holds 35 per cent of its wealth, wealth and heritage taxes must be part of rebalancing public budgets and financing inclusive societies.

Closing tax havens, increased tax progressivity, enforcing tax laws, taxing capital gains and broadening the tax base are essential in order to close the gap between lavish private wealth and impoverished societies. “Beggar thy neighbor” tax competition needs to be stopped and replaced with coordinated tax policies in particular with respect to multinational companies. Financial institutions that participate in tax evasion activities or that operate in tax havens should be excluded of managing any public funds including public bonds, pension funds etc.

- **Public Services and public investment for inclusive, productive and environmentally sustainable societies.** In the long term, public budgets need to be balanced. In the short term, central banks need to ensure that public borrowing for investment can take priority over untimely austerity measures. Given the deleveraging of indebted consumers and private investors, expansionary public investment is key to maintain aggregate demand and employment levels while orienting the economy towards equity and sustainability. High levels of employment must be a policy priority in order to reduce the downward market pressure on wages and employment conditions.

Quality public services are key for sustained productivity growth and can make a major contribution to reducing precarity as they provide universal access to education, health and care facilities as well as long-term employment opportunities.

Well regulated and sufficiently resourced care services must be a priority of public service development, as on the one hand many jobs in the care economy are currently precarious, and on the other hand because a lack of care facilities acts as a barrier for many women to take up regular employment as they are the main provider of the unpaid family care work.

Only large scale public investment and respective incentives for private investment can achieve the switch from wasteful resource allocations in deeply unequal societies towards a socially responsible low carbon economy.

Taking into account the well know deficiencies of bureaucratic state services, democratic involvement of the people as employees, as citizens and as clients in planning, decision-making and implementation is crucial.

- **Ensuring wage growth in line with productivity growth -- extending collective bargaining.** The decoupling of productivity growth and wage growth is a key factor for the lack of sustainable final demand and resulted in ever growing private debt in some countries and in aggressive export surpluses in others. In the medium and long-term, high levels of employment require stable public and private demand based on stable income and tax revenues. In order to avoid a downward spiral on wages, governments need to ensure an income floor through a living minimum wage and social security including universal access to unemployment benefits and public work opportunities. Based on these statutory income guarantees, governments need to encourage the wide application of collective bargaining and its legal extension in order to stop the abuse of market power by employers. Extending collective bargaining coverage is a public good that supports productivity growth and innovation-based competition and needs to be a public policy priority

The state is in most societies the largest procurer, investor and often provides large amount of preferential credit to business. In addition to legal extension mechanisms, public contracts should be used to promote quality employment. Companies violating their obligations as employers or who use subcontracting to undercut labour standards should be excluded from any public tender.

- **Level the playing field and avoid unfair competition in the labour market.** The use of agency work and temporary workers must be limited to legitimate needs during peak periods of labour demand. No company should be allowed to increase temporary or agency employment above a reasonable threshold, say, five per cent of their workforce. Temporary contracts must be based on valid reasons and transform automatically to a permanent contract after a three month probation period, if they are not related to a special task or project.

Cost advantage by switching towards temporary or agency workers needs to be excluded through an obligation for equal pay. The higher risks of work, accidents, and unemployment of temporary and agency workers need to be reflected in higher social security contributions.

Self-employed workers need to be fully integrated in a universal social security system and have contributory obligations similar to those of employees. Governments need to design simple and transparent criteria to define the employment relationship.

A right to part-time employment and flexible work arrangements for all employees is indispensable in order to allow for a people-centered work-life balance, including the ability to meet family responsibilities and care requirements. There is a need to provide publicly funded paid leave to meet care obligations. In order not to reinforce a gender biased distribution of care work, the allocation should be conditional on shared responsibilities within families, making the full amount of paid leave only available if it is shared among care giving family members.

II. The Legal Context of Precarious Work

As the economic policy environment evolved, businesses found increasingly creative ways to circumvent arguably ambiguous legislative frameworks. In many places, they pressured government to dismantle social legislation, orchestrating an attack on workers' protection. The nature of the legal underpinnings of precarious work indeed lie at the core of the debate on the origins of precarious work. Are the legislative frameworks still sufficient, but misapplied and poorly enforced? Or are there gaps in the framework in which precarious work has taken root? Some labour law experts argue that legislative frameworks provide little room for exclusion from protections; however, whereas the forms and types of employment have evolved over the last decades, labour laws have largely remained the same. It could therefore be said that legislative frameworks failed to keep pace with or shape the ways in which the realities of employment would evolve, allowing for substantial growth in precarious work arrangements.

Precarious work has taken root in the weaknesses, omissions and gaps in both national and international labour law. In some cases, specific categories of workers – usually agricultural and domestic workers, among others – are explicitly excluded from labour legislation. In such cases, these workers are usually excluded from all or most labour protections and are in very precarious situations. In other cases, employment practices circumvented the definitions of “employee” and “employer” provided in labour law, creating the possibility of disguised and triangular employment relationships that allow employers to avoid providing benefits usually conferred in an employment relationship. Moreover, the use of temporary and subcontracted labour is not sufficiently limited in many cases, leading to the abusive use of such contracts that leave workers vulnerable to unjustified termination of employment, low job security, low wages, and little to no access to social security benefits. Finally, a worker's access to trade union rights is limited in part by the practice of hiring temporary and subcontracted workers, and partly through the legal limitation of workers to join the trade union of their choosing or to be a part of a specific bargaining unit. As such, precarious work arrangements ultimately have the effect of eroding the collective power of

trade unions. All of this placed in a broader context of weak and under-resourced labour enforcement mechanisms, and sometimes poor implementation of international labour standards leaves a significant proportion of the workforce in relatively precarious conditions.

i. Challenges in National Law

The experience of trade unions in various countries around the world points to the possibility that national labour laws do not effectively protect against precarious work. A sampling of national labour legislation indeed suggests that national labour laws can contribute to the rise of precarious work through explicit exclusions from labour laws, implicit exclusions through the sometimes unclear definitions of employer, employee and the employment relationship, and lack of limits placed on the use of temporary contracts. However, certain countries provide illustrative examples of more protective legislation that could serve when thinking about policies and regulations to combat precarious work.

1. Explicit Exclusion from the Labour Code

Precariousness can be the result of total or partial exclusion of specific categories of workers from the labour code. Such is the case for instance for domestic workers⁴⁷, agricultural workers, workers in export processing zones, public sector workers and, in a few cases, for workers under temporary arrangements.⁴⁸ In some countries, workers in small and medium sized enterprises are also deprived from some protection⁴⁹. However, it appears that such exclusions are limited and can be remedied by special legislation regulating the activities of these categories of workers⁵⁰ or by an inclusion bill. To take the most recent example, several countries have now taken steps to include domestic workers into their labour legislation.⁵¹

2. Ambiguous Employment Relationships

A more difficult exclusion to identify is of a more implicit nature. In general, labour legislation contains a legal definition of the terms “employee” and “employer”. While these definitions may vary from country to country, depending on the context and legal framework, they all share a feature that can serve to exclude certain groups of workers implicitly: if the workers do not fit in the definition of “employee”, it is almost certain that they will not be entitled to any rights under labour legislation. The same applies in those countries where the distinction between the categories of employee and self-employed is based in case law.

⁴⁷ Currently the case in countries such as Korea, United States of America, Kuwait, Qatar, Syria, Bangladesh, Morocco, Trinidad and Tobago, Turkey, Ethiopia, Thailand.

⁴⁸ Currently the case in countries such as Bangladesh, Qatar, Syria.

⁴⁹ See for instance, UK Trade Union Congress comments to the CEACR indicating that businesses employing less than 21 workers are excluded from the statutory procedure for union recognition, the effect of which has been to deny employees of small businesses the right to be represented by a trade union (Schedule 1A, paragraph 7(1), of Trade Union and Labour Relations Act).

⁵⁰ This is usually the case of public employees, who generally are afforded the same (not very often) or some of the rights afforded to other workers through specific statutes.

⁵¹ This includes, but is not limited to, Argentina, Mexico, Jordan, and New York State (United States).

a. Employment Status

As self-employed workers rarely benefit from labour protection, the legal distinction between “self-employed” and “employee” has made it appealing to employers to disguise an employment relationship by claiming the employee is self-employed. The reality is that the recourse to “independent contractors” or misclassification of workers as “self-employed” has been widely [ab]used by employers to avoid their responsibilities and restrict workers’ rights.⁵²

As illustrated by an increasing number of cases brought before the ILO, employment status can also be disguised by transforming employment contracts into civil or commercial service contracts, as is commonly the case in the transport sector (notably in Latin America, but also in certain developed countries). In such cases, the workers concerned are no longer covered by labour legislation and therefore are no longer covered by collective agreements and other workers rights. Dismissing workers and replacing them by workers’ cooperatives is another way of disguising employment relationships, as has been the case in Colombia and Brazil for example⁵³.

Determining the employment status of a worker can become a complex issue. Some tests to determine the existence of an employment relationship are based on the assessment of the state of (economic) dependency or subordination of the worker, where “employees” are defined by the accumulation of the two factors.⁵⁴ Some governments already provide good examples of tests used to determine the existence of an employment relationship. In Germany, a person is deemed to be an employee when at least two of the following criteria are met: the person does not have employees subject to social security obligations; usually works for one contractor; performs the same work as regular employees; has performed the same work as a previous employee; does not show signs of engaging in entrepreneurial activities.⁵⁵ In South Africa, a worker is deemed to be an employee if they meet just one of the following criteria: the manner in which the person works is subject to the control or direction of another person; the person’s hours of work are subject to the control or direction of another person; in the case of a person who works for an organization, the person is a part of that organization; the person has worked for another person for an average of at least 40 hours per month over the last three months; the person is economically dependent on another person for whom they work or render services; the person is provided with tools of trade or work equipment by the other person; or the person only works for or renders services to one person.⁵⁶

⁵² See for example Stone, K.V.W. 2006. “Rethinking Labour Law: Employment Protection for Boundaryless Workers”, in *Boundaries and Frontiers of Labour Law* (Blair Publishing: Portland, OR).

⁵³ Background paper for the ACTRAV Symposium: Celebration of the 60th anniversary of Convention No. 98: The right to organize and collective bargaining in the twenty-first century, 2009, p. 17.

⁵⁴ See for example *McKee v. Reid’s Heritage Homes Ltd.*, 2009 ONCA 916.

⁵⁵ German Social Security Code (1999).

⁵⁶ South African Basic Conditions of Employment Amendment Act, 2002.

b. Definition of the employer(s) (triangular, agency, subcontract)

Beyond the problems associated with the definition of “employee” there is the issue of definition of the employer. Legislative frameworks in most countries rest on the assumption that the employment relationship is based on a traditional binary relationship between a worker and an employer. However, the “employer” has not been a unitary entity for decades, with enterprises taking on increasingly horizontal structures through franchising, subcontracting and beyond. Issues therefore arise when workers attempt to organize into effective bargaining units, and when there are abuses and responsibility must be attributed.

Legislation regulating private employment agencies presents several weaknesses that allow numerous abuses of workers’ rights. The rapid growth of agency work has led to employees facing workplaces without employers and employers without workplaces, which fragments collective bargaining structures. Primary employers free themselves from their obligation as employers through these arrangements, while agencies and labour brokers employ a dispersed workforce that often faces nearly insurmountable practical obstacles to exercise their right to bargain collectively.

Although trade unions follow varying approaches in different countries and sectors to deal with employment agencies, the Global Unions reached an agreement on key principles which include that: the primary form of employment should be permanent, open-ended and direct; agency workers should be covered under the same collective agreement as other workers in the user enterprise; agency workers should receive equal treatment in all respects; the use of temporary agencies should not increase the gender gap in wages, working conditions and social protection; temporary agencies must not be used to eliminate permanent, direct employment relationships; and agency workers should never be used to weaken trade unions or undermine workers’ rights⁵⁷.

In situations where the status of the employer is in question, the definition of ‘employer’ should be clarified to better reflect the complex horizontality of new forms of the employment relationship. Legislative fixes could be considered to define an employer as a complex entity to ensure that triangular and multiple employer relationships are taken into account and the appropriate liability is attributed.

Governments have adopted a variety of approaches to allocating responsibility in triangular employment relationships. Certain countries have established joint and several liabilities to protect workers. For instance, in the case of subcontracted workers, legislation in Quebec (Canada)⁵⁸ and Mexico⁵⁹ establish that the “user” employer is jointly and severally responsible for them with regard to pecuniary

⁵⁷ The principles are available at (<http://www.icem.org/en/73-Contract-and-Agency-Labour/3861-Global-Union-Principles-on-Temporary-Work-Agencies>).

⁵⁸ (Québec) Labour Standards Act, Section 95.

⁵⁹ (Mexico) Federal Labour Code (last amended 2006), Article 15.

obligations. Also, in the case of workers placed by temporary agencies, legislation in Croatia⁶⁰ for instance introduce a shared responsibility by providing that the temporary agency is responsible for the pecuniary obligations while the “user” employer will be considered as the employer with regard to obligations such as the protection of occupational safety and health. Brazil⁶¹ and Chile⁶² also have legislation holding the “user” employer liable for the subcontractor’s non-compliance.

3. Precarity within an Employment Relationship

a. Temporary Work

Even when directly employed, temporary workers typically receive fewer benefits and labour protections than permanent workers. While a considerable number of countries provide safeguards - sometimes in detail - against recourse to contracts for a specified period, other countries place little, if any, restriction on these types of contracts⁶³. At the drafting of this report, Spain introduced a measure to allow employers to hire workers on temporary basis for an unlimited duration or number of assignments until December 2013. Many countries also do not prohibit the rotational use of temporary contracts. Enterprises can therefore easily hire workers on temporary contracts and dismiss them before they have access to certain rights.

Some countries have adopted legislation to prevent the abusive use of temporary workers in a number of ways, namely 1) according to specific reasons or circumstances under which an employer can make recourse to temporary workers, 2) limiting the proportion of these workers that can be hired by a given employer, 3) prohibiting the use of temporary workers in given sectors, 4) limiting the duration or number of temporary assignments for a given worker.⁶⁴ Some specific good examples in this regard are: Belgium only allows the use of temporary workers: (i) to replace a permanent worker; (ii) to cover temporary and exceptional peaks of work; (iii) work of unusual nature; (iv) and for artistic performance.⁶⁵ France’s legislation is perhaps more restrictive, as temporary workers can only be used to (i) replace absent employees; (ii) meet the needs of a temporary increase of activity; and (iii) fill intrinsically time-limited posts. The duration of temporary work is also limited to 18–24 months, after which the contract must become permanent.⁶⁶ This is an improvement compared to most other European countries, where the limit is set between 24–36 months, such as in Poland, Romania and Italy.⁶⁷

⁶⁰ (Croatia) Labour Act 2009, Articles 29(5) and 30(1), respectively.

⁶¹ (Brazil) Labour Code, Article 455.

⁶² (Chile) Labour Code, Article 63.

⁶³ ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations. Protection against Unjustified Dismissal. Report III (Part 4B)*, International Labour Conference, 82nd Session, Geneva, 1995, para. 52. Available at: <http://www.ilo.org/ilolex/english/>.

⁶⁴ <http://www.eurofound.europa.eu/publications/htmlfiles/ef0899.htm>

⁶⁵ <http://www.eurofound.europa.eu/publications/htmlfiles/ef0899.htm>

⁶⁶ <http://www.eurofound.europa.eu/publications/htmlfiles/ef0899.htm>

⁶⁷ <http://www.eurofound.europa.eu/publications/htmlfiles/ef0899.htm>

b. Income Security

Precarious work has been a key driver for the growing low pay sector. In countries without comprehensive collective bargaining coverage and without statutory minimum wages, the downward pressure on wages is very strong, in particular during periods of high unemployment. Germany is a case in point: as collective bargaining coverage declined and in the absence of a statutory minimum wage, low pay incidence rose by 2.3 million workers between 1998–2008.

In countries where access to social security benefits is restricted or absent, people are forced to take on any precarious jobs for mere survival. Recent large scale programmes, like the National Rural Employment Guarantee Act in India or the *Bolsa Familia* in Brazil, that were created in combination with statutory minimum wages helped to establish at least a partial income floor that extended beyond formal employment, helping to reduce the pressure on workers to accept precarious conditions.

c. Weak enforcement

Weak enforcement of labour law implies that even those workers who are protected may feel precarious. In fact, in many countries the responsibility of regulating, implementing and enforcing labour law has been fractured across ministries. The effect of redistributing the mandate of the traditional labour ministry or department is that labour as such no longer has a clear and specific venue to voice its concerns and influence policy.⁶⁸ Moreover, labour law enforcement mechanisms have been deflated through resource reduction. This is seen most acutely in the typically under resourced labour inspectorates.⁶⁹

ii. International Law

A review of international labour law revealed that most international labour standards in principle protect all workers. Most of the categories of workers particularly affected by precarious work and disguised or triangular employment relationships have received normative attention. However, overarching problems emerge that limit access to labour rights. First, there seems to be an absence of protection against precariousness as such. Second, the use of temporary work and agency work in particular have not been effectively limited and regulated. Finally, poor ratification rates and weak implementation drain some existing instruments of their protective potential. Without doubt, in practice, precarious employment creates huge barriers for workers to exercise freedom of association and collective bargaining, as discussed in more detail in the following chapter.

⁶⁸ Arthurs, H. 2006. "Who Will Redraw the Boundaries?" in *Boundaries and Frontiers of Labour Law* (Blair Publishing, Portland, OR).

⁶⁹ For a detailed overview of traditional and new challenges for labour inspection, see ILC 100th Session, Report V Labour administration and labour inspection, ILO, 2011.

1. Universal Protection for All Workers

Many of the new forms of employment discussed in this paper have emerged over the last two or three decades and therefore did not exist when most of the existing ILO instruments were adopted. However, the ILO Committee of Experts (CEACR)⁷⁰ has repeatedly insisted that the conventions and recommendations adopted by the International Labour Conference are of general application; that is, they cover all workers, unless otherwise specified.⁷¹ This is particularly the case for ILO fundamental labour conventions on freedom of association, the right to collective bargaining, non-discrimination in occupation and employment, equal pay for men and women workers, the abolition of forced labour, and the elimination of child labour, as well as for priority conventions⁷².

2. Employment Relationship

While all workers independently of their employment status should enjoy their fundamental rights at work, without a defined employment relationship, it is often difficult for them to access these rights. Furthermore, many specific labour rights are conferred on the basis of the existence of an employment relationship. Such a dependency places a lot of emphasis on the importance of fairly establishing when an employment relationship exists in fact.

The ILO Employment Relationship Recommendation (No. 198) of 2006 provides valuable guidance to Member States in determining the existence of the employment relationship. It was drafted to provide policy guidance to Member States in deciding whether an employment relationship exists when the respective rights and obligations of the parties concerned are not clear or where there has been an attempt to disguise the employment relationship. In general, it seeks to combat disguised employment relationships to ensure that employed workers have the protection they are due. Indeed, as a general guideline, the Recommendation states that the existence of an employment relationship should be determined primarily *“by the facts relating to the performance of work and the*

⁷⁰ Once a country has ratified an ILO Convention, it is obliged to report regularly on measures it has taken to implement it. Every two years governments must submit reports detailing the steps they have taken in law and practice to apply any of the eight fundamental and four priority Conventions they may have ratified. For all other Conventions, reports must be submitted every five years, except for Conventions that have been shelved (no longer supervised on a regular basis). Reports on the application of Conventions may be requested at shorter intervals. Governments are required to submit copies of their reports to employers' and workers' organizations. These organizations may comment on the governments' reports; they may also send comments on the application of Conventions directly to the ILO. The Committee of Experts was set up in 1926 to examine the growing number of government reports on ratified Conventions. Today it is composed of 20 eminent jurists appointed by the Governing Body for three-year terms. The experts come from different geographic regions, legal systems, and cultures. The Committee's role is to provide an impartial and technical evaluation of the state of application of international labour standards.

⁷¹ ILO: *General Survey of Committee of Experts on the Application of Convention and Recommendation on the Migration for Work Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 1975*, para. 37. Report III (1B) 87th Session of the International Labour Conference, Geneva, 1999.

⁷² ILO priority or governance conventions are Labour Inspection Convention, 1947 (No. 81), Employment Policy Convention, 1964 (No. 122), Labour Inspection (Agriculture) Convention, 1969 (No. 129) and Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144).

*remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.*⁷³ An effective employment relationship test should therefore protect the rights and social security benefits of *de facto* employees, even where their employers have devised models to disguise the relationship.

The Recommendation also clearly reaffirms that labour legislation should seek to protect the weaker party to the employment relationship, i.e. the worker, and that there should be a legal presumption that an employment relationship exists when a number of specific indicators, such as subordination, are present, shifting the burden of proof onto the presumed employer. Moreover, it calls on governments to *"take particular account in national policy to ensure effective protection to workers especially affected by the uncertainty as to the existence of an employment relationship, including women workers, as well as the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities"*⁷⁴.

While the provisions of Recommendation No. 198 are essentially strong, its primary weakness is that it is not a binding instrument. It therefore does not have the relative strength of a convention and cannot hold Member States accountable for their employment practices. Consideration could therefore be given to lifting some of the key provisions of the Recommendation into a new, binding instrument.

3. Reaffirming Fundamental Rights and Extending Labour Standard Coverage to Specially Vulnerable Groups

(a) Excluded workers

While precarity is increasingly threatening all types of workers, some categories of workers are more frequently affected by precarious working conditions: involuntary part-time (women workers), temporary and "McDonalds jobs" (young workers), low-pay work (youth, disabled workers), seasonal and domestic work (migrant and women workers), to name a few, are usually disproportionately affected by precarious work arrangements.

Regarding some conventions, their scope of application can be limited by a Member State through "flexibility clauses", permitting the exclusion of certain categories of workers from its provisions. A review of the use of these clauses revealed that ratifying Member States have not used flexibility clauses to exclude subcontracted, agency or temporary workers *per se*. Rather, these clauses have been used to exclude specific sectors, such as workers in agriculture, domestic workers, home workers, workers in the informal economy, and workers in export processing zones.

⁷³ ILO Employment Relationship Recommendation (No. 198), para. 9.

⁷⁴ *Ibid.* para. 5.

However, the ILO has extended labour protections through standards that address the specific situations of most of these more vulnerable workers. Without claiming exhaustiveness, efforts to protect these frequently precarious workers can be strengthened through the promotion, monitoring, and effective implementation of Conventions such as:

- the Migration for Employment Convention (Revised), 1949 (No. 97); and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143); (ratifications: 49 and 23, respectively);
- the Workers with Family Responsibilities Convention, 1981 (No. 156) (ratifications: 41);
- the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159) (ratifications: 82);
- the Maternity Protection Convention, 2000 (No. 183) (ratifications: 22).
- the Home Work Convention, 1996 (No. 177) (ratifications: 7)
- the Domestic Workers Convention, 2011 (No. 189), not yet in force.

(b) The principle of equal treatment

A common feature of the above-mentioned ILO instruments is that they are all based on the principle of equal treatment. This principle applies in different ways. First, it implies that workers should not be discriminated against *“on the basis of race, colour, sex, religion, political opinion, national extraction social origin, or any other form of discrimination covered by national law and practice”*, discrimination being defined as any distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation⁷⁵. Second, it ensures that the category of workers referred to in a particular convention enjoy treatment that is no less favourable than that of workers generally in respect of a number of identified matters⁷⁶. Third, some instruments recognize that the mere requirement of equal treatment may not suffice to ensure that the workers concerned enjoy conditions that are not less favourable and therefore provide for additional measures to aim at effective equality of treatment⁷⁷. Convention No. 143, for instance, requires not only the repeal of statutory provisions and the modification of discriminatory administrative practices, but also positive action by the public authorities to promote equality of opportunity for migrant workers in practice.

⁷⁵ See the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Articles 1 and 2.

⁷⁶ For instance, Convention No. 175 on part-time work require measures to ensure that “part-time workers receive conditions equivalent to those of comparable full-time workers” in a number of specific fields.

⁷⁷ See Article 4 of Convention No. 159 which reads as follows: The said policy shall be based on the principle of equal opportunity between disabled workers and workers generally. (...) Special positive measures aimed at effective equality of opportunity and treatment between disabled workers and other workers shall not be regarded as discriminating against other workers.

The principle of equal treatment is central to ensure precarious workers enjoy no less favourable conditions than workers generally. However, to achieve this objective, additional positive measures may have to be taken to address the specific problems these workers face.

(c) Agency work / Private employment agencies

Convention No. 181 concerning private employment agencies constitutes an effort to address abuses by private employment agencies, in particular in seeking to provide agency workers with access to their fundamental rights at work and to adequate protection of their working conditions. The references to certification and to the allocation of the respective responsibilities of the agency and user enterprises vis-à-vis the workers are important elements in dealing with potential unscrupulous agencies.

Furthermore, the Convention calls for specific measures to ensure that the workers recruited by private employment agencies are not denied the right to freedom of association and the right to bargain collectively. However, the Convention does not limit the use of agency workers, as we shall see in more detail below.

(d) Low Wage Workers

Any wage earner, independently of the form of contract, faces precarious conditions if wages are below an adequate minimum. The Minimum Wage Fixing convention, (No. 131) provides a safeguard in this respect, as it obliges countries to establish a minimum wage fixing mechanism that addresses “the needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups”⁷⁸. The Convention firmly establishes the principle of a minimum wage and the role of social partners in fixing the level of minimum wages. It defines the concept of “need” in general terms and makes clear that the minimum wage should not only reflect absolute needs, but also be in a reasonable relation to the general level of wages. The ILO could provide more specific guidance in defining what should be understood as an adequate minimum wage, to help establish a living minimum wage at the country level taking into account national circumstances.

Also important to note is that the Convention covers all groups of wage earners whose terms of employment are such that coverage would be appropriate⁷⁹. To name a few examples of its application, the CEACR examined allegations from trade unions indicating that the private initiative has introduced various mechanisms to undermine the employment relationship such as professional service contracts, piecework contracts and temporary service contracts, resulting in the failure to apply labour legislation, particularly with regard to minimum wages. The Committee requested the Government to provide information on this

⁷⁸ Article 3, (a).

⁷⁹ Article 1.

matter and in particular on the measures adopted or envisaged to ensure that minimum wage provisions are applied in practice. In other cases, concerning domestic workers, casual workers, apprentices and agricultural work, while recognizing the practical difficulties of establishing minimum wages for these groups of workers, the Committee recalled that the minimum wage system seeks in particular to protect the most vulnerable categories of workers and, in this respect, the necessary measures should be taken to extend the protection of minimum wages to the above categories.⁸⁰

(e) Part-time

According to the Part-Time Work Convention, 1994 (No. 175) measures must be taken to ensure that part-time workers receive the same protection as that accorded to comparable full-time workers in respect of the right to organize, the right to bargain collectively and the right to act as workers' representatives; occupational safety and health; and discrimination in employment and occupation. Furthermore, they should benefit from conditions equivalent to those of comparable full-time workers regarding maternity protection, termination of employment, paid annual leave and paid public holidays, and sick leave. A key provision of this Convention seeks to protect workers against involuntary part-time. In this context, the CEACR has requested ratifying governments to provide information on measures aimed at protecting working people from involuntary part-time employment, especially women, who make up the majority of part-time workers, or to report on initiatives aimed at preventing workers "from being trapped in part-time employment"⁸¹.

4. Thinking Forward: Improving Legal Protection

The fact that most precarious workers, as all workers, are, in principle, afforded some protection under the existing ILO Conventions raises two concerns: the need to examine if the protection these conventions offer is sufficient, and the need for the ILO (and for trade unions) to consider ways of improving their ratification rates and effective implementation. A convention left unratified and unimplemented bears as much potential as any tool left lying in its box – if put to its intended uses however, a more robust legal framework could surely be built.

- **Lack of proactive protection against precarious work**

Although international instruments largely provide universal coverage, it could be said that they do not protect *against* precarious work as such. First, existing international labour standards do not effectively address the specific nature of precarious work and the abusive use of temporary work, agencies and subcontracting. Second, some international labour standards fail to meet their regulatory potential due to low rates of ratification and implementation

⁸⁰ CEACR: Individual Direct Request concerning Convention No. 131, Minimum Wage Fixing, 1970 Guatemala (ratification: 1988) Submitted: 2004 and CEACR: Individual Direct Request concerning Convention No. 131, Minimum Wage Fixing, 1970 Yemen (ratification: 1976) Submitted: 1998.

⁸¹ ILO: CEACR: Individual Direct Request concerning the Part-Time Work Convention, 1994 (No. 175) Sweden (ratification: 2002) Submitted: 2010.

by governments and lack of promotion of these instruments and use of the ILO supervisory mechanisms by trade unions.

For its part, Convention No. 181 on private employment agencies fails to limit the recourse to such agencies. One of its primary shortcomings is that it does not address the conditions under which agency workers can be hired, nor does it limit the number or proportion of agency workers who may work for a user enterprise. Convention No. 181 therefore does not provide any protection against the excessive use of agency work or deliberate attempts by primary employers to use agency work in order to liberate themselves as far as possible from their obligations as employers. Nor does it provide sufficient guidance as to the “specific measures” governments should undertake to ensure that workers have the right to bargain collectively.

The omission of temporary work from international labour law in general is also worthy of note. To date, there is no international instrument on temporary work, a particularly harmful oversight as temporary work arrangements disproportionately affect youth, women and migrant workers. According to the CEACR, although contracts of indeterminate duration used to be the norm in many countries, there has been a proliferation of new types of contracts of specified duration.⁸² Some already existed, but were often of only limited character (for example, seasonal or casual work, etc.). Other types have emerged, for example, with the development of new activities or export processing zones (EPZs). The proliferation of such contracts however seems not to have been met with appropriate regulatory responses thus far.

This raises the need to more comprehensively identify the gaps in international labour conventions, and campaign for the adoption (and later ratification) of a new ILO Convention and Recommendation. Any new instrument should seek, in a first instance, to limit, restrict and reduce the resort to precarious forms of employment by establishing clear conditions under which an employer can hire temporary and agency workers, limiting the proportion of workers at a given enterprise on precarious contracts, and limiting the amount of time a worker can be on a temporary contract, after which they must be given a permanent contract.

Second, an instrument could seek to prevent the abusive use of precarious forms of employment by establishing clear criteria to determine the existence of an employment relationship. Recommendation No. 198 on the employment relationship could provide guidance on how to formulate provisions in a binding instrument. Moreover, the instrument should establish effective remedies for workers who are victims of abuse, to discourage such practices.

⁸² ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations. Protection against Unjustified Dismissal. Report III (Part 4B)*, International Labour Conference, 82nd Session, Geneva, 1995. Available at: <http://www.ilo.org/ilolex/english/>.

Third, in the remaining cases when non-standard employment prevails, an instrument should ensure that specific protections are extended to these workers so that they are provided with at least equal treatment to that of workers generally, which may require providing higher protections that take into account of the specific needs of precarious workers. In this regard, the instrument should pay particular attention to social security, occupational safety and health, and trade union rights, ensuring that Member States take specific measures to ensure coverage of and access to collective bargaining.

Finally, to discourage employers from hiring precarious workers, regulations could be established so that employers would have to pay salary bonuses to precarious workers, pay higher taxes, or make an additional contribution to the worker's social security fund.

- **Ratification, implementation, promotion, jurisprudence**

Existing conventions could be seen as a reservoir of legal resources that have the potential to better protect precarious workers. The trade union answer lies in identifying a number of ILO conventions that are particularly relevant to precarious workers and campaign for their ratification and implementation (and call on the ILO to do the same). These activities could conceivably be carried out under the banner of an international precarious work campaign designed to highlight the relevance and application of existing ILO standards of particular importance to precarious work.

Having ratified a convention, an ILO Member State is legally bound to implement it in good faith⁸³, both in law and practice. It is true that many of the conventions that would be of particular use to precarious workers have low rates of ratification, leaving workers in most countries outside their scope of application. However, even where such Conventions are not ratified, they can still be used to frame campaigns, and provide legitimacy to campaign demands and cases brought to national jurisdictions.

Concerning recommendations and ratified conventions, trade unions must also continue to bring cases to the ILO supervisory mechanisms in order to build the body of jurisprudence around precarious work. The CEACR and the CFA are the more frequently used ILO supervisory bodies, reviewing cases of alleged non-observance of conventions. Relatively few cases involving non-observance of conventions that may have directly affected precarious workers in particular have been brought to the attention of the ILO supervisory bodies, with the notable exception of a number of complaints alleging violation of freedom of association lodged with the CFA. However, it should be pointed out that the few reports provided by trade unions have enabled the CEACR to repeatedly draw the attention of a number of governments to the increased precariousness faced by workers and have called on measures to address this issue. From 1991 to 2011, the CEACR has issued more than 20 observations to individual governments questioning

⁸³ Article 26 of the Vienna Convention on the Law of Treaties, 1969.

their application of the instruments as a means of addressing the problems of precarious work. This is particularly the case with reports concerning the Employment Policy Convention 1964), (No. 122).

Finally, until there is an instrument addressing the rights of temporary workers, priority should also be given to the use and promotion of Convention No. 158 on termination of employment, which calls on ratifying States to adopt adequate safeguards against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention⁸⁴. Recommendation No. 166 accompanying this Convention gives examples of provisions that could be made in this regard: (a) limiting recourse to contracts for a specified period of time to cases in which, owing either to the nature of the work to be effected or to the circumstances under which it is to be effected or to the interests of the worker, the employment relationship cannot be of indeterminate duration; (b) deeming contracts for a specified period of time, other than in the cases referred to in clause (a) to be contracts of employment of indeterminate duration; (c) deeming contracts for a specified period of time, when renewed on one or more occasions, other than in the cases mentioned in clause (a), to be contracts of employment of indeterminate duration.

iii **ILO Jurisprudence on Collective Bargaining and Freedom of Association**

Freedom of association and collective bargaining have been the main point of access to decent working conditions and other benefits, and in many places is the most common way to determine wages.⁸⁵ As they are enabling rights, a worker's access to trade union rights constitutes the passage to the improvement and actual application of all other labour rights, and is therefore critical to preventing precarious work arrangements and ensuring better working conditions for workers in that situation. The legal frameworks for freedom of association and collective bargaining are therefore of foundational importance to understanding the existing and potential legal protection of precarious workers. This section provides a look at the application of the four key elements of trade union rights that all play a role in a worker's access to collective bargaining. It observes examples of national practice through the lens of ILO jurisprudence, so as to see at once issues in national implementation, as well as the ILO's assessment of such practices.

It is widely acknowledged that the rights and principles concerning freedom of association and collective bargaining are at the heart of the ILO. The ILO Constitution promotes the effective recognition of these rights as a means of improving the conditions of labour. These principles are further developed and

⁸⁴ Article 2, para. 3.

⁸⁵ See European Parliament, *Report on atypical, contracts, secured professional paths, flexibility and new forms of social dialogue (2009/2220(INI))*, 2010, para Q. Available at (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2010-0193+0+DOC+PDF+V0//EN>).

elaborated through various conventions and recommendations adopted by the International Labour Conference, mainly Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise of 1948, and Convention No. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively of 1949. As these two Conventions only allow the exclusion of members of the armed forces and the police, and public servants engaged in the administration of the state in the case of Convention No. 98⁸⁶, and the principles they contain apply to all Member States regardless of ratification, all workers, including precarious workers, are covered by their protection.

Nonetheless, the trade union rights of workers in general and precarious workers in particular are violated around the world. According to the 2009 symposium's conclusions, the erosion of the employment relationship is fundamentally denying workers the possibility of exercising their rights, and constitutes a key reason for the difficulties in extending collective bargaining coverage⁸⁷. Global Union Federations claim that in practice agency workers are totally deprived from the right to collective bargaining, as both the agency and the user enterprise refuse to assume the role of the employer. The CEACR and CFA have noted that a number of Member States have applied criteria that differ or depart from Convention Nos. 87 and 98 when adopting or applying labour legislation, excluding workers who should be afforded such guarantees. Indeed, access to freedom of association and collective bargaining is full of obstacles, both in law and in practice, which prevent workers from effectively exercising these rights. It should be noted in this regard that the ILO supervisory bodies have produced sound jurisprudence on the issue of precarious work and trade union rights. Trade unions could also use the ILO mechanisms to further expand this jurisprudence to cover other key problematic areas of the exercise of freedom of association and collective bargaining by precarious workers.

1. Right to establish and join organizations of their own choosing

Concerning the *right to organize*, Article 2 of Convention No. 87 provides that workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation. The CFA has emphasized that this right applies to all workers including those that we have considered precarious in the context of this paper: those employed on a permanent basis, for a fixed term, or as contract employees; workers undergoing a period of work probation; part-time and casual workers; persons hired under training agreements as apprentices or otherwise; persons working under

⁸⁶ It has to be noted that Conventions No. 151 on Labour Relations (Public Service), 1978 and No. 154 on Collective Bargaining, 1981 extended the scope of application of Convention No. 98 to cover practically all workers in the public sector.

⁸⁷ International Workers' Symposium – Celebration of the 60th Anniversary of Convention No. 98: The right to organize and collective bargaining in the 21st century" – Geneva, 12–15 October 2009. Symposium website available at: http://www.ilo.org/actrav/what/events/lang--en/WCMS_112409/index.htm

community participation programmes intended to combat unemployment; workers in cooperatives; workers in export processing zones; agency workers; self-employed and domestic workers.

The CFA has reviewed a number of cases regarding the application of this right. In Peru, the complainant organization objected to Article 32 of Act No. 22342, applicable to industrial companies subject to the non-traditional export scheme, which authorized them to conclude *very short-term casual contracts which are renewed indefinitely for years and which have prejudicial effects on the exercise of trade union rights*, as workers are afraid that their contracts will not be renewed, and on conditions of work. The Government stated in the context of the case that in general, in the sector in question “temporary contracts have been used repeatedly as a means of discouraging trade union membership”. The CFA invited the Government to examine, with the most representative workers’ and employers’ organizations, a way of *ensuring that the systematic use of short-term temporary contracts in the non-traditional export sector does not become in practice an obstacle to the exercise of trade union rights*.⁸⁸

According to the ILO supervisory bodies, the free exercise of the right to establish and join unions implies the free determination of the structure and composition of unions. Regarding *temporary workers* in the construction sector, this right was reaffirmed by the CFA in Case No. 1615 concerning the Philippines. The allegations referred to Policy Instruction No. 20 which stipulates that “... for project employees, the appropriate collective bargaining unit is the industry, not any particular project ... Therefore the employees of a particular project cannot constitute an appropriate collective bargaining unit. They may however join the recognised industry union in the construction industry.” The complainant stated that this imposition of an industry bargaining unit, denying workers the choice of forming enterprise level or company level bargaining units, is a clear violation of the right to organise and to bargain collectively. The CFA recalled that workers without distinction whatsoever should enjoy the right to establish and join organisations of their own choosing, *be they employed on a permanent basis or for a definite period or project*.

CFA Case No. 2556 regarding Colombia is also of particular interest in this regard. The allegations presented by the union referred to the refusal by the administrative authority to register the Union of Chemical and Pharmaceutical Industry Workers (UNITRAQUIFA), its statutes and its executive committee on the grounds that, among other things, *its membership included workers from the temporary employment agencies serving the industries of the sector*. The Government explained that in order for registration to be able to take place the workers have to be providing their services within companies belonging to the same industry and to be bound to those companies through contracts of employment. *The CFA recalled in this regard that the status under which workers are engaged with the employer should not have any effect on their right to join workers’ organizations and participate in their activities*. The CFA requested the

⁸⁸ CFA Case No. 2675.

Government to take the necessary measures, without delay, to register UNITRAQUIFA, its statutes and its executive committee.

2. Right to bargain collectively

Access to collective bargaining is one of the biggest challenges for precarious workers across the spectrum. Article 4 of Convention 98 stipulates that measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements. According to the supervisory bodies, the right to collective bargaining applies to all the workers that we have considered precarious in the context of this paper, in particular to staff having the status of contract employee; temporary and casual workers; part-time workers; self-employed workers; apprentices and workers engaged for a specific task or for a specified period; workers in the informal economy; domestic workers and subcontracted workers.

CFA Case No. 2083 on Canada is relevant in this context, regarding the denial of collective bargaining rights to *casual workers in the public service*. The CFA recalled in this regard that all public service workers, other than those engaged in the administration of the State, should enjoy collective bargaining rights. It requested the Government to take appropriate measures in the near future to ensure that casual and other workers, currently excluded from the definition of employees, be granted the right to bargain collectively, in conformity with principles of freedom of association.

The situation of workers in triangular employment relationships is more complicated, as in many cases, these workers cannot join the same organizations as those workers employed on permanent basis, or cannot negotiate together with the workers of the “user” employer on the basis that employers can avoid the application of the law by shifting the inherent responsibilities derived from the employment relationship to third parties. One example of how legislation prevents workers employed by temporary work agencies from accessing collective bargaining rights is the case of the United States of America, where these workers are able to organize in the same bargaining unit with the permanent workers of the “user” employer, but only subject to the consent of both the “user” employer and temporary work agency providing the workers.⁸⁹ To the trade unions, this poses significant practical obstacles to bargaining, as it is unlikely that the user employer and the temporary work agency would come to agreement on such a question. In fact, the CEACR, referring to Article 12 of Convention No. 181 indicated that any differential allocation of collective

⁸⁹ *Oakwood Care Center and N&W Agency*, 343 NLRB No. 76 (2004). For an overview on how atypical workers are protected (or not) under different employment laws in the United States of America, see Stone, K.V.W. 2006. “Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers”, in *Berkeley Journal of Employment and Labour Law*, Vol. 27.

bargaining responsibilities between employment agencies and user enterprises must ensure that employees of employment agencies are able to exercise the right to bargain collectively in practice⁹⁰.

In the United Kingdom, the UK Trade Union Congress expressed concerns to the CEACR regarding the collective bargaining rights of “workers” as opposed to “employees”. The CEACR noted the fact that most workers in temporary agencies in the United Kingdom are not able to benefit from full freedom of association rights due to their uncertain employment status, which results in their classification as “workers” who are not considered part of the workforce for this purpose, in contrast with “employees”, who are engaged under a contract of employment and are regarded as part of the workforce. Consequently, they fail to qualify for many trade union rights⁹¹.

CFA Case No. 1865 on the Republic of Korea concerned *precarious and particularly vulnerable construction workers* exercising their right to organize and bargain collectively in a complex bargaining context, involving several layers of subcontractors over which only the main contractor has a dominant position. The CFA deeply regretted to note that some courts had taken decisions concluding that collective agreements signed by the construction union and the main construction company were only applicable to employees of the main company and did not apply to workers hired by subcontractors. The CFA requested the Government to undertake further efforts *for the promotion of free and voluntary collective bargaining over terms and conditions of employment in the construction sector covering, in particular, the vulnerable “daily” workers*.

In Case No. 2602, also on the Republic of Korea, the CFA addressed the situation of *subcontracted workers* in the metal sector and urged the Government to take all necessary measures to promote collective bargaining over the terms and conditions of employment of these workers, including through building negotiating capacities, so that subcontracted workers may effectively exercise their right to seek to improve the living and working conditions of their members through negotiations in good faith.

3. Right to be protected from anti-union discrimination

Protection against anti-union discrimination is one of the pillars of Convention 98⁹² and it is crucial to guarantee the effective access to other trade union rights. While being important for all workers, this protection is fundamental for workers in more vulnerable situations like those in precarious forms of employment.

⁹⁰ ILO. *Report of the Committee of Experts on the Application of Conventions and Recommendations*. General Survey concerning employment instruments, 2010, para. 311.

⁹¹ *Ibid.* para. 352.

⁹² Article 1 of Convention No. 98 provides that such protection shall apply particularly in the case of acts calculated to (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Regarding the particular situation of workers under short-term contracts the CFA has pointed out that *the non-renewal of a contract for anti-union reasons* constitutes a prejudicial act within the meaning of Article 1 of Convention No. 98. It has also considered that *subcontracting* accompanied by dismissals of union leaders can constitute a violation of the principle that no one should be prejudiced in his or her employment on the grounds of union membership or activities.

According to the CFA, legislation should lay down *explicitly remedies and penalties against acts of anti-union discrimination* in order to ensure the effective application of Article 1 of Convention No. 98. In this regard, the basic regulations that exist in the national legislation prohibiting acts of anti-union discrimination are *inadequate* when they are not accompanied by procedures to ensure that effective protection against such acts is guaranteed.

CFA Case No. 2602 on the Republic of Korea is particularly relevant regarding anti-union discrimination. The case concerned the situation of “illegal dispatch workers”, a form of false subcontracting which functions to disguise what is in reality an employment relationship in the metalworking sector where the workers in practice have no legal protection under the terms of the law and, in particular, are left unprotected as regards numerous acts of anti-union discrimination. The CFA requested the Government to develop, in consultation with the social partners concerned, **specific mechanisms**, aimed at strengthening the protection of subcontracted (“dispatch”) workers’ rights to freedom of association and collective bargaining *and at preventing any abuse of subcontracting as a way to evade in practice the exercise by these workers of their fundamental rights.*

4. Right to strike

According to ILO principles, the right to strike may only be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population); or (3) in case of acute national emergency and for a limited period of time.

Outside these specific situations, precarious workers should be entitled to the right to strike including the right to solidarity strike. In a case published in 1997 on workers wishing to go on strike in the UK, the CEACR decided that *workers should be able to take industrial action in relation to matters which affect them even though, in certain cases, the direct employer may not be party to the dispute*, and that workers should be able to participate in sympathy strikes provided the initial strike they are supporting is itself lawful. This is a particularly important right to uphold in the face of multinational companies hiring temporary agency workers and fragmenting their shop floors around the world, eroding the collective power of trade unions in a single location, to which trade unions have often responded with solidarity strikes.

5. Thinking Forward

In sum, the CEACR and the CFA have developed sound jurisprudence to emphasize that precarious workers should benefit from the same access to freedom of association and collective bargaining as all other workers. They are mechanisms that trade unions must continue to use to pressure Member States to comply with these rights.

As indicated, under ILO principles, governments have an obligation to *promote collective bargaining* for all workers and employers. Specific guidance in this regard is provided by Convention No. 154 on collective bargaining, 1981. Trade unions must also continue to pressure their governments to fulfil their duty to promote and develop *specific* collective bargaining mechanisms that are relevant to the particularities of precarious workers as has been requested by the ILO supervisory bodies for example for self-employed and subcontractors.

Adequate and effective *protection against acts of anti-union discrimination* is crucial for the categories of workers under examination. The ILO supervisory mechanisms' request to develop "specific mechanisms" to ensure the effective protection of workers in a more vulnerable situation could be further explored by the trade union movement in its quest to protect precarious workers through regulation.

No specific restrictions could be applied on the *right to strike*, including solidarity strike, of the examined categories of workers beyond those admitted for any worker in relation to matters which affect them even though, in certain cases, the direct employer may not be a party to the dispute.

Finally, according to the ILO supervisory bodies, employers' and workers' organizations should be *consulted* as to the scope and form of measures adopted by the authorities regarding *employment flexibility* since these changes have significant consequences in the social and trade union spheres, particularly in view of the increased job insecurity to which they can give rise.

Beyond the analysis of ILO jurisprudence, a full assessment of the realities of collective bargaining will be necessary to identify how to fill the gap between national law and actual practices. To this end, a law and practice report regarding access to collective bargaining in the context of precarious work would help to identify ways of securing every effective access of workers to the right to organize and bargain collectively.

4. A WAY FORWARD

Precarious work arrangements, the erosion of the traditional employment relationship, and the fragmentation of collective bargaining units have posed a critical challenge to trade unions. Organizing and meeting the needs of the growing precariously employed workforce has required a revitalization of the traditional organizing model, as well as new strategies and new thinking to consolidate and maintain the power of the workforce.

Already, trade unions have taken many initiatives to organize precarious workers, demanding to either eliminate or limit precarious and indirect work arrangements to cases of legitimate need, and when workers on precarious contracts are provided with equal rights. Trade unions have articulated these demands in campaigns of increasing visibility over the last years, at both the international and national levels. The strategies they have adopted bear striking points in common: building solidarity for precarious workers among regular workers, building international solidarity and alliances, using international framework agreements and the ILO supervisory mechanisms, campaigning for government rules and regulation to stop the abuse of temporary, part time, agency work and dubious contractual arrangements to deprive workers of their employment rights, and of course improving and extending collective bargaining agreements to allow for enterprise-based, industry-wide and multiple employer based bargaining.

The Global Union campaign “Precarious Work Affects us All” demands to stop the rise of precarious work around the world. For its part, the International Union of Food, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations has run successful campaigns against Nestlé and Unilever, two major food transnational companies that have famously reduced their directly employed staff to numbers so small that collective bargaining is a total impossibility.

Many national trade union centres have also mobilized against precarious work. To name just a few, the Australian Confederation of Trade Unions has launched a national, comprehensive campaign against precarious work, and the AFL-CIO in the US has recently signed historic partnership agreements with the Excluded Worker Congress, a network of worker organizations who have been excluded from the right to organize under federal law, working in some of the most precarious sectors. The German IG Metall achieved a landmark collective bargaining agreement for the entire steel industry, establishing that the primary employer has the responsibility to ensure equal pay for agency workers. In Peru, the CGTP has made efforts to organize the employees of small, medium and micro enterprises and launched a campaign to ensure these workers are protected by labour laws. In Malaysia, the MTUC opposed and forced the withdrawal of a bill that would legalise the operation of labour outsourcing companies. And in Algeria the UGTA was successful in its efforts to reintegrate within its unit over a thousand posts that had been initially outsourced at the

Arcelor-Mittal plant in Annaba. Indeed, there is no shortage of examples of trade union activity from around the world.

The challenge, however, remains complex. Precarious work was born as a result of a whole web of economic and social policies, poor employment practices condoned by ill-equipped labour legislation, and a resulting weakening of the labour movement, which has been forced to operate in an increasingly unfriendly regulatory environment and in conditions of high unemployment. Trade union, legal and policy experts from around the world have contributed valuable years of experience and research into the present document, providing some initial ideas for how to achieve decent work for precarious workers. Regulating precarious work will require interventions in economic and social policy, including a solid social floor, a living wage, reducing financial market volatility, strengthening the tax base, public services and public investment for inclusive, productive and environmentally sustainable societies, keeping wage growth in line with productivity growth, and preventing unfair competition in the labour market. Comprehensive social security systems in particular strengthen the ability of workers to reject precarious jobs.

Legal frameworks must also be updated to ensure that precarious workers benefit from at least the same protection as all other workers. Given the strategies of global companies to exploit regulatory arbitrage, the need for international regulatory initiatives is urgent. This requires a targeted effort to use existing ILO instruments in a specific campaign against precarious work, and to give serious consideration to the need for a new instrument that would limit, restrict and reduce precarious work arrangements to those of legitimate need; make binding certain provisions of the employment relationship recommendation; promote equal treatment when precarious employment cannot be avoided; and make precarious work more expensive for employers. Access to collective bargaining must also be ensured by pressuring governments to establish collective bargaining mechanisms that will allow precarious workers, regardless of their employment relationship status, to effectively bargain collectively with one or multiple employers. The ILO's Declaration of Fundamental Principles and Rights at Work and other relevant Conventions call for the promotion and not only the respect of the right to collective bargaining. This calls for bold legal and political initiatives to support workers' desire to associate and bargain collectively, in particular where they currently face nearly insurmountable obstacles in practice.

Visibly, such changes will not occur without a strong movement, and with strong democratic institutional power to channel this movement. As this research was being conducted, workers rise up around the world because they can no longer secure their livelihood, their futures, or their families, while at the same time they are living on a rapidly receding social floor. In particular young people, denied the opportunities of decent employment and confronted with ever changing forms of precarious employment or no employment are raising their voices at volumes not heard in decades. From the occupation of public squares in Egypt and Madrid, to the protest in Athens, Santiago, Wisconsin and Delhi, the tent cities of Israel

and the massive strikes in South Africa and France, workers and citizens are expressing their deep dissatisfaction with the lack of social justice and opportunity in their societies.

These diverse protests have one thing in common: people want to have a say in their societies, they want justice and they want politicians who are responsive to their needs. The trade union movement is in many cases an active supporter and political ally of these broad social movements. Combining the spontaneous protest with active representation and institutional power will be crucial in order to make their voices resonate over the long term. To effect lasting social change, trade unions will have to remain at the heart and in the lead of these movements to overcome any insider/outsider divide and be the voice of the precariat as much as the regularly employed. Despite the deep economic crisis, there might be an opportunity to combine mass protest and considerable institutional power and expertise to ensure that dissatisfaction and anger is translated into real change

Achieving this will require both concentrated efforts at the national level, and a coordinated international effort that includes global union federations as well as the ILO generally and ACTRAV specifically. As a modest contribution, the ACTRAV symposium hopes to provide a space in which trade unions at the front lines of these struggles can share their challenges and successes with precarious work, and discuss a way to achieve decent work and a secure society for all. We also hope the Symposium will provide guidance what would be the most urgent and most valuable contribution of the ILO in standard setting, policy expertise, research and social dialogue to support the struggle from precarious work to decent work.