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The right-to-manage default rule

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ABSTRACT

We critically examine the right-to-manage as a legal default rule. Identifying its deficiencies, we then assess the merits of process and content defaults and identify potentially non-waivable terms and conditions. Finally, we suggest how different options may be combined within systems.

1 INTRODUCTION

In this article, we critically examine the right-to-manage as a legal default rule. The employment relationship has been steadily de-collectivised across much of the world over the last few years. The clearest sign of this has been the decline of union density, especially rapid in the richer Anglophone countries.[1] US unions represented more than 30 per cent of the workforce in 1960 but little more than 10 per cent by 2013. UK unions have suffered a similar fate, representing about half of all employees in the late 1970s, down to about a quarter in 2013. Similar precipitous declines have occurred in Australia and New Zealand. Smaller, but still significant, falls in union density have occurred in Ireland and Canada as well. Even European unions have suffered some decline in membership levels.

One result of these changes has been a resurgence of the individual employment agreement between one employee and one employer. The evidence suggests that most of these are short, simple documents, covering a limited range of terms necessitated by statute (Brown *et al*., 2000). Pro forma contracts have become the norm, with terms and conditions typically offered on a take-it-or-leave-it basis and involving little or no actual negotiation (Briggs and Cooper, 2006; Gollan, 2004; Van Barneveld and Waring, 2002; Waring, 1999; Welch and Leighton, 1996; Wooden, 1999). Terms and conditions which might have been collectively bargained with a union, and formally written up in a lengthy collective agreement a few decades ago, are now set at management's discretion through the exercise of its common law right-to-manage or managerial prerogative (Brown *et al*., 2000). As such, the right-to-manage has assumed increasing importance to the employment relationship. Yet its existence is rarely discussed and even more rarely contested.

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[1] All union density figures are from the OECD's website: http://stats.oecd.org.

While the international trends have clearly been towards the strengthening of the default rule and in favour of management prerogative, the subject should not, we would suggest, be automatically ignored on political practicality grounds. Indeed, it is important because normative discussions of this type present possible alternatives worthy of consideration in public debate. Moreover, the trends we refer to are uneven in their international incidence and opportunities have recently arisen in some national contexts to consider them as realistic policy alternatives. In recent years, Brazil, Chile, Colombia and Costa Rica all enacted laws designed to strengthen trade unions; in 2015, the New Zealand Labour Party decided to establish a Commission of Inquiry into wages and collective bargaining (CB) while in opposition (Keifman and Maurizio, 2012; New Zealand Labour Party, 2015). The examples provide clues about the circumstances under which governments may strengthen labour law in directions consistent with those we suggest below. The Latin American examples reflect concrete governmental action radically to address severe in-work poverty and wage inequality. The New Zealand case is rather different, indicating a now unusual pro-union reforming possibility in a more developed country's social democratic party.

The article is structured as follows. Having established that the right-to-manage has several deficiencies as a default, most particularly for employees, we then explore other options and assess each of these using the same criteria. Most of our analysis focuses on alternative defaults, which we categorise as either content or process defaults. Content defaults are specific terms and conditions waivable by mutual consent. These are presumed to be in the contract, unless the parties explicitly contract for something else. Process defaults provide a means or method for establishing the terms and condition, which, again, the parties can waive if they explicitly contract for an alternative process. We also include a brief discussion of non-waivable terms and conditions, which are typically minimum terms and conditions established by statute. Finally, we make suggestions outlining when various options should be used and in what combinations.

2 INCOMPLETE CONTRACTS AND DEFAULTS

Humans have bounded rationality in their decision-making, in the sense that they cannot handle the information requirements and the infinite number of potential comparisons of alternative solutions (Jolls *et al*., 1998). Moreover, people cannot foresee their wants and needs years away or anticipate every future context. A single contract likely discussed once at the start of employment cannot be the sole, or even main, determinant of the boundaries and parameters of an employment relationship. Even complex collective agreements, negotiated by teams of experts over decades, inevitably contain omissions. Real employment contracts contain gaps or are vague with respect to terms and conditions. These gaps are filled by default rules created by courts or the legislature (Ayres and Gertner, 1989). Defaults are inevitable: the law must make an initial assignment of rights (Calabresi and Melamed, 1972; Sunstein, 2001; Sunstein and Thaler, 2003). For the employment relationship, the most important default is the (common law) right of managers to manage and its mirror in the employee's common law duty to obey (Sunstein, 2001; 2002). In practical terms, the right-to-manage confers on management the unilateral right to decide the specific content of any terms and conditions not previously established either by contract or statute (Sunstein, 2001; 2002).

3 CHOOSING THE RIGHT DEFAULT

A good default should address the decision-making conditions which made it necessary. Sunstein and Thaler (2003) and Thaler and Sunstein (2009) argue that defaults are typically needed under four conditions. First, the decisions are cognitively difficult, and involve many different dimensions and contingencies that might affect outcomes. Second, they are made infrequently or even only once, and so the parties have little opportunity to practise and experiment to determine what works. Third, they involve little or no immediate feedback, because their outcomes are far in the future. Alternatively, the benefits may be currently evident, but the costs may only become clear years hence. Fourth, the decisions involve possibly known outcomes but unknown reactions; people know what will happen, but not whether or not they will like it.

Deciding on the parameters of an employment relation typically involves all four conditions. There is high cognitive complexity given the large number of potential terms, the complexity of some terms and their convoluted conditionality, with some terms dependent on employee (e.g. parenthood, sickness, performance, new qualifications) or employer circumstances (e.g. revenue growth, profitability, staff turnover). The decisions are infrequent, because contract terms and conditions are typically discussed/negotiated only once and only initially at the start of employment. There is often no immediate feedback to inform the parties, especially the employee, of whether they have decided wisely. For instance, employees are unlikely to know whether they have sufficient health insurance or dismissal protection until after they have been hospitalised or fired. It is often unclear, again especially to employees, whether they are going to like the decisions they have made. As an example, the essential characteristics of an unlimited gym membership may be easy enough to comprehend, but predicting whether going to the gym will be enjoyable or otherwise worthwhile may be harder to predict.

In the employment context, a good default should facilitate and/or simplify decision-making so that it is less cognitively demanding, especially on the individual employee. It should also give the parties a chance to practise through repeated decision-making encounters, allowing for the possibility of mistakes in the initial stages. Likewise, it should provide opportunities to revisit decisions, after outcomes have been experienced, new information has emerged or circumstances have shifted. Ideally, it should also contain a feedback mechanism whereby new information is obtained to inform new decisions.

4 THE RIGHT-TO-MANAGE DEFAULT

The right-to-manage performs well as a default rule only for employers. It certainly simplifies the *process* of determining residual terms and conditions by affording the employer, within the constraints of the law, a wide discretion to determine what these should be. Decisions are only easier for employees because their involvement in making them is not legally required, once a contract has been signed. The right-to-manage is a *process* default, in the sense of specifying how terms and conditions should be determined if the contract or relevant statute is unclear or fails to cover the issue in question. It therefore affords no guidance to either party concerning the *content* of the employment relationship, in terms of suggesting specific terms and conditions either or both parties might want or need. For instance, it does not make

it easier to make decisions about what sorts of pension design might work best or whether particular perks might be valued by employees.

The right-to-manage gives only the employer a relatively unrestricted authority to vary past management decisions regarding terms and conditions. Nevertheless, managers normally have the flexibility to modify the employment relationship to suit changing circumstances and/or advent of new information. In other words, they have opportunities to practise 'getting it right'. The terms and conditions management unilaterally decides do not have to be 'for all time'. They can be reconsidered, revamped and revoked. In contrast, the default does not provide any kind of process for reviewing and re-negotiating the terms and conditions in the contract itself. Contractual variations can still occur on an *ad hoc* basis, of course, but must be by mutual consent.

There is no feedback process inherent to the right-to-manage. The default grants management the right to collect information for employment-related decisions, subject to privacy, anti-discrimination and other relevant laws, but there is generally no corresponding general duty to share this information with employees.[2] The right-to-manage does not provide individual employees with an effective and legally protected feedback channel for raising new issues, criticising current policies and practices, and/or demanding changes unpopular with management. Any employee can always informally complain to management, but risks being ignored, being branded a whinger, or, worse still, becoming the victim of retribution (Freeman and Medoff, 1984).

5 ALTERNATIVES TO THE RIGHT-TO-MANAGE DEFAULT

Three broad alternatives could play a role in replacing or modifying the right-to-manage default: non-waivable terms and conditions, waivable terms and conditions, and non-waivable or waivable decision-making processes for determining terms and conditions. The first option involves prescribing, by statute or regulation, mandatory terms and conditions the parties cannot contract around. This option is most appropriate in preventing parties from bargaining for terms contravening fundamental human rights or the public interest, or not conducive to the parties' longer-term welfare (Sunstein, 2001). Ayres and Gertner (1989: 88) suggest that imposing non-waivable terms is justified if unregulated contracting leads to 'socially deleterious' outcomes because parties are incapable of 'adequately protecting themselves'. It is also suitable for addressing market realities where individual employees are unlikely to arrive at desired outcomes on their own, despite common preferences, because of the lack of incentives for individuals to bargain for them such as in the case of public goods. These appear best left for others to obtain, as once available they are available to all (Freeman and Medoff, 1984).

Non-waivable, mandatory terms and conditions are already a conventional part of employment contracts. Well-known examples internationally include minimum wages and health and safety standards, which exist in most countries of the world even if enforcement is frequently a major concern. In the developed world, further

[2] There may be statutory exceptions where, for instance, employees have a 'right to know' about hazards in the workplace or good faith requires employers to be honest and transparent with information about bargaining or redundancies.

examples include parental leave and overtime pay. Non-waivable terms do have drawbacks. They can eliminate the parties' freedom to contract, and thus freedom of choice, over the issue affected (Sunstein, 2001). A single, standard term, embodying a particular approach and outcome, is never going to fulfil every employer and employee's wants and needs. The regulators may have a poor understanding of what even a majority of parties wants and need, because of either insufficient research or obsolete information. In addition, the regulators may be particularly susceptible to co-optation by business, when they lack 'the willingness or ability even to recognize, much less protect, the communal interest in employee welfare' (Jones, 2012: 669).

The second option, as a replacement for the right-to-manage default, involves prescribing specific terms and conditions waivable by mutual consent. These comprise the various types of content defaults: tailored, untailored and penalty defaults (Ayres and Gertner, 1989). Tailored defaults are deliberately designed to suit the interests and needs of one industry or occupation. For example, an hours of work default for all café and restaurant staff, or a default establishing the funding and structure of carpenter training in the construction industry. The presumption here is that the inherent appeal of the default and a desire to minimise transaction costs will encourage the majority of parties to settle on the default as their contract term. Untailored defaults work in a similar way, but are designed to suit broader interests and needs across most, if not the whole, economy. For example, Canadian labour relations legislation typically provides a default grievance procedure which automatically applies to all collective agreements, unless the parties explicitly contract around it.

Penalty defaults are designed to be unappealing to one or both parties, providing them with an incentive to devise their own mutually acceptable terms and conditions (Ayres and Gertner, 1989). The default is not expected to be the term or condition the parties would agree. An example provided by Ayres (2006) was the default interest rate in Wisconsin, United States, which was not consistent with the going market rate; parties were thus motivated to negotiate their preferred rate. In France, the government introduced penalties in 2009 for employers who did not open wage negotiations, leading in subsequent years to a significant increase in the proportion of enterprise collective agreements mentioning wages (Eurofound, 2015). Penalty defaults discourage strategic opportunistic behaviour, where contract silence or limited coverage of a particular issue enables the better informed party to take advantage of the other's ignorance (Ayres and Gertner, 1989).

The third option involves prescribing bilateral processes for the parties to periodically negotiate and/or decide terms and conditions. These processes could be designed for one aspect of the employment relationship, or a range of potential issues. Thus, a default procedure, embodying due process principles, could be developed for just-cause dismissals, with an initial meeting between employer and employee to alert the employee to the potential for dismissal, a second meeting (a *de facto* hearing) to present evidence and receive the employee's response and a third to announce a decision and explain a dismissal (Harcourt *et al.*, 2013). An internationally widespread example of prescribed bilateral processes is in legal requirements in many countries which require employers and employee representatives to establish committees to regulate occupational safety and health at workplaces. In high hazard industries internationally, these often assume quite stringent forms especially in the developed world (Quinlan, 2014).

6 CONTENT DEFAULTS

Content defaults could be devised for a range of terms and conditions either for all employers or those in a given industry. For instance, state agencies could assume primary responsibility for developing untailored defaults, applicable to all or almost all of the economy. Industry councils, potentially comprised of employer and union representatives, could assume primary responsibility for developing tailored defaults for particular sectors. In either case, the defaults could be designed to cater to what most parties prefer or what research evidence indicates best serves parties' interests. At national level, the defaults might cover issues like leave entitlements, pension benefits and overtime pay. At sector level, they might cover issues like training, qualifications and career ladders. Sectoral level content defaults or 'opening clauses' have become increasingly common in German industry-wide collective bargains, allowing enterprise-based works councillors to negotiate local deviations on issues specified in national agreements (Eichhorst and Marx, 2011).

Content defaults have the potential to greatly improve employees' terms and conditions. Where parties lack self-control or foresight, such defaults may avoid the adoption of short-sighted terms with some benefits now but unacceptably high offsetting costs later (Sunstein and Thaler, 2003). In drawing the employee's attention to important issues, defaults help to ensure that they are not overlooked in discussions. Raising awareness about particular terms also makes it more obvious that employees do not have certain rights and entitlements already (Sunstein, 2002). Perhaps most importantly, content defaults help to legitimise what could be socially and economically desirable terms and conditions beneficial to a majority of employees and/or employers (Sunstein and Thaler, 2003; Thaler and Sunstein, 2009).

Tailored and untailored content defaults, in providing easy options for employees and employers to choose, simplify the contracting process, making it less cognitively demanding (Korobkin, 1998). They make it easier for employees to observe and evaluate employer offers, because these must be stated explicitly in the contract to avoid application of the default (Sunstein, 2002). In particular, any employer that negotiates around a default for inferior terms and/or conditions is much more likely to be accurately identified as ungenerous before employment has commenced. Clearer messages are sent and received about the employer's true intentions for the employment relationship (Sunstein, 2002). Greater transparency, especially at the hiring stage, can only improve both the efficiency and equity of the relationship. If defaults are carefully chosen to suit parties' interests, they are less likely to want changes in their terms and conditions at a later date.

Content defaults have three major drawbacks. First, there is no process for the parties to regularly review defaults and promptly change those that might have become outmoded; state agencies or industry bodies typically set defaults only after extensive research and wide consultation. In other words, they offer no chance to practise to 'get it right'. Second, it is impossible to devise defaults for all potentially relevant terms and conditions. There are simply too many terms and variations of these terms across industries and occupations. So, the potential to simplify the contracting process is limited to the issues covered by the defaults. Third, other than occasional public hearings, they generally provide no channel for providing timely feedback, especially once defaults have become obsolete.

7 PROCESS DEFAULTS

Process defaults do not specify substantive terms, but prescribe ways in which substantive terms or other outcomes can be established and/or modified. Process defaults in the employment context include: forced contractualisation, collective bargaining (CB) and codetermination. These options each have their own merits and limitations, which are critically evaluated using the criteria discussed earlier.

7.1 Forced Contractualisation

Forced contractualisation requires parties to explicitly define their rights and obligations in the contract either to avoid penalties from the state or to establish their enforceability via courts. In principle, the parties set their own terms and conditions by mutual agreement. Such requirements are common in the Russian-speaking world, where enterprise-level collective agreements are required as a legacy from Soviet times that many governments have been happy to continue. Few such agreements are arrived at by any process resembling CB (for Ukraine, see Croucher, 2010: 2664). In reality, forced contractualisation often still involves unilateral dictation of terms by management, especially when individual workers lack the knowledge and skill to negotiate suitable terms in complex, difficult situations (Sunstein and Thaler, 2003), or when they are reluctant to negotiate for reasons such as fear of retaliation for demanding potentially problematic terms (e.g. protection from unjust dismissal), the so-called signalling effect (Issacharoff, 1996). Forcing parties to bargain over terms can also infringe a party's freedom not to contract: some workers, in particular, might prefer others to negotiate/decide for them to avoid stressful interactions with their superiors (Sunstein and Thaler, 2003). Thus, forced contractualisation is no panacea for achieving greater openness and information sharing.

Forced contractualisation also does not provide an automatic feedback loop through which the parties can learn from practice and re-evaluate their options. It need only occur once, providing no process for adjusting undesirable terms. Arguably, the parties can re-negotiate by mutual consent; however, this is unlikely to happen when existing terms are beneficial to one party. Unless there is a built-in contract review and renewal process, there is pressure to 'get it right' the first time, but how often do parties really have the information and expertise to do so?

Forced contractualisation does not help the parties overcome the limitations of bounded rationality in considering situations unlikely to happen or far in the future (Sunstein and Thaler, 2003). For example, workers might underestimate the potential benefits of pensions and redundancy compensation, but management might also easily underestimate such programmes' costs. Given the uncertainties, any attempt to recognise various contingencies inevitably means a long, complex hard-to-administer and inflexible contract.

7.2 Collective Bargaining

CB refers to the practice of one or more unions negotiating with one more employers over a contract that covers many workers or union members. The law in a number of countries allows, supports and even promotes CB as an alternative to individual bargaining. To the best of our knowledge, it is not legally required in any country.

Individual bargaining remains the process default (Sunstein, 2001). This need not be. CB can be enacted as either the main process default for deciding employment terms and conditions or made compulsory for all employment relationships.

CB has several informational and decision-making advantages over non-union, individual contracting between a single employer and employee. First, workers can use the confidentiality of the union collective voice to make demands and request information from the employer, without fearing retribution for any negative signalling concerning their loyalty or work ethic. As such, it provides a protected feedback channel for employees (Freeman and Medoff, 1984). Second, periodic re-negotiation of collective agreements, which are fixed-term contracts by law and convention, also offers some opportunity for the parties to learn from practice. The law in some countries such as Colombia allows for collective bargains to be simply extended without re-negotation, leading on occasions to agreements remaining in force long after the wages specified in them have become eroded by inflation (Croucher and Cotton, 2010). Normally, if the parties do not 'get it right' the first time they negotiate, they can always come back again once the agreement has expired. Third, unions (especially well-resourced developed world unions) also usually have the staff, financial resources and specialist expertise to competently negotiate a relatively broader range of potential employment issues than the typical employee acting alone (Freeman and Medoff, 1984). In particular, unions can normally draw on the pooled knowledge and collective memory of a wide spectrum of union staff and members. For instance, union experience across multiple employers over several decades is likely to equip them with broad knowledge of health and safety risks. Overall, unions are more likely to realistically assess future contingencies, especially the less foreseeable ones.

CB still suffers from serious decision-making shortcomings. It often offers no process for the parties to reopen negotiations/discussions during the contract period, possibly lasting a number of years. It does not provide the necessary flexibility to either management or labour. Perhaps most seriously, CB is also still predicated on a right-to-manage default (Godard, 1994). Even with lengthy, comprehensive agreements, there are always gaps. Even the collective cannot foresee all contingencies. In these situations, the common law default still applies, which, in Canada and the United States, is called the management residual rights doctrine. Godard (1994: 300–302) describes this doctrine as stipulating that 'anything which is not specifically included within the collective agreement remains, by default, under the sole authority of management' and that although other doctrines (e.g. fair administration, implied obligations, shared rights and job rights) have been advocated, 'the principle of residual rights continues to be predominant'.

A right-to-manage default gives the employer little impetus to consult, negotiate or otherwise engage with a union, because it can generally have its way by doing nothing (e.g. by having as little as possible in the contract), the same problem as with individual contracting (Godard, 1998). CB with a right-to-manage default also means that unions are easily cast as the natural aggressors who use their collective power to pressure for ever longer and more complicated collective agreements (Godard, 1998). A right-to-manage default also generally leaves management with sole authority over major strategic decisions involving new products or markets, business expansion or contraction, and/or technological change. Thus, although CB introduces some bilateralism to the employment relationship, it does not provide a complete alternative to the right-to-manage default.

7.3 Co-determination

Codetermination, common in Western Europe but also present in other countries such as South Korea (Kleiner and Lee, 1997), involves the institutionalisation of workers' participation in decisions at the company and workplace levels, through works councils, for example, whose powers and authorities vary. They generally have a right to information or consultation on most matters, with some having 'consent' rights or 'veto' rights as well (Addison *et al.*, 2010; Weiss, 2004). Full codetermination rights are more common with respect to social and human resource issues, with worker and management representatives having similar decision-making rights (Mueller, 2012). Unions are the other main players in these codetermination systems. They periodically bargain collectively at the industry or occupational level for minimum terms and conditions. Works councils meet a lot more regularly at the plant level, negotiate additional terms (e.g. pay and benefits) better suited to local conditions, and handle more of the basic ongoing HR issues like downsizing, technological change and redundancies (Addison *et al.*, 2010; Havlovic, 1990).

The dominant view of works councils in academic research is that they are partnerships: 'a participatory process leading to high trust, co-operation and compromise which are regarded as positive outcomes and not as a selling out to management' (Frege, 2002: 225). Evidence from a number of recent studies also indicates that works councils have either neutral or positive effects on aspects of firm performance, such as productivity, innovation and staff retention (Mueller, 2012). Critics have argued that works councils co-opt worker-representatives and undermine their independence in relation to management (e.g. Clegg, 1960; Ramsay, 1997). However, research shows that works councils and unions can, and usually do, work closely together, and that this is particularly true when works council representatives are union members, as is often the case in Germany and Sweden, or when unions are afforded rights to participate directly in works council functions (Mueller, 2000; Streeck, 1995; Weiss, 2004).

Works councils are group-based decision-making structures and therefore afford many of the same decision-making advantages as CB. In particular, councils draw on the expertise and knowledge of both worker and management representatives, and the constituencies they represent and consult with. Consultations with their constituencies also provide opportunities for feedback on past decisions. Works councils provide safe, protected conduits for exchanging information, both upward and downward. Mueller (2012: 883) describes works councils as the 'ear of the workers', helping to reduce the information asymmetry between management and labour.

In contrast to some manifestations of CB, frequent, regular meetings with fellow representatives also mean more chances to practice to 'get it right'. Decision errors can be addressed in a timely fashion, without having to wait until the next CB round or until it is in both parties' mutual interests to act. Decisions can be revisited after poor outcomes have been experienced, circumstances have changed or new information has come to light. Jirjahn *et al.* (2011), in a study of codetermination dynamics, found that learning played a significant role in works council outcomes, with the quality of intra-organisational industrial relations and firm performance both improving with the age of the council, at least up to about 30 years.

Unlike CB, works councils also anchor decisions to a bilateral and relatively democratic process rather than to the unilateral right-to-manage, at least in those areas where they have jurisdiction (Renaud, 2007). Frege (2002: 222) comments that

'interest representation through CB does not in itself challenge the managerial right-to-manage. It is based on the manifestation of power and . . . not on legislative rights. Interest representation through codetermination, on the other hand, requires the limitation of managerial discretion to manage'.

8 POLICY RECOMMENDATIONS

We have discussed various alternatives to the right-to-manage default rule. In this section, we focus on how these alternatives interact and what combinations of alternatives might be best suited to different circumstances.

Non-waivable employment terms can be appropriate when workers lack the resources and/or power to bargain for important terms. However, by denying the two parties, employer and employee, any control over setting terms and conditions perhaps better suited to their particular circumstances, non-waivable terms are the most invasive and restrictive of the various alternatives to the right-to-manage, and therefore their use should be limited to terms involving fundamental human rights, public goods and major welfare concerns for the working class and society as a whole (Sunstein, 2001). The majority of employment terms should involve either waivable defaults or no default at all, in which case parties must negotiate their own terms.

Waivable terms are either explicit default terms established by the state or authorities, or silent default terms customarily recognised by common law (e.g. the right-to-manage, the duty to obey), which leave the parties free to waive or modify the default at their discretion and by mutual consent. There is nothing inevitable or 'natural' about defaults; they can be challenged, politically contested and changed (Sunstein, 2002). There is no reason why the right-to-manage must remain the main employment law default for the foreseeable future. In principle, more pro-employee content and/or process defaults could be adopted to afford workers added protection. As Sunstein (2001: 133–134) suggests, 'labor law reform might promote a situation in which workers, rather than employers, have more presumptive rights, to be tradable only through voluntary bargaining' and justified by the 'desirable effects on individual and social valuations of the rights at stake'. Moreover, if one of the purposes of the waivable default is information elicitation, a desirable characteristic in a democratic society, the default should favour the party, usually the employee, most likely to lack information. For example, if just cause, rather than employment-at-will, was made the dismissal default in the United States, employers that waive the default would have to disclose crucial information about their workers' long-term job security (Sunstein, 2001).

In cases where penalty defaults are used, it is essential that the parties, especially the more disadvantaged, be provided a process to negotiate alternative terms. As discussed above, individual workers may not know what they should waive (Sunstein, 2001). To overcome problems associated with the individual's bounded rationality, and counter the power imbalance, process defaults involving collective decision-making structures are good complements to waivable defaults. CB, works councils and other codetermination institutions can provide parties with a better balance or symmetry of power, knowledge and information, thereby allowing them to more meaningfully negotiate for their interests on employment matters and indeed more widely.

When it is important and relatively easy for the parties to be clear about what they expect from each other (e.g. wage rate, benefits, hours of work), forced

contractualisation may be appropriate. Forced contractualisation can be imposed on content terms, or procedures for setting those terms, irrespective of whether these are individual or collective. Thus, New Zealand law requires that all employment agreements, whether individual or collective, be in writing and include terms covering pay rates, hours of work, basic job content and work location.[3] Likewise, US labor law requires union and management to bargain collectively over particular terms.[4]

Process defaults offer freedom of contract, learning from experience and the flexibility to adjust terms when needed. In particular with codetermination, the opportunities for information exchange, learning from practice and revising terms continually to address prior errors or changing circumstances all have the potential to contribute to more positive outcomes for both sides. However, enterprise-level codetermination and CB may be less effective for smaller organisations with resource and expertise limitations. For these organisations, a mix of industry-level CB and content defaults is likely to be appropriate.

Waivable or non-waivable terms, as commonly discussed in the context of contractual content, are applicable to the processes for determining terms and conditions. For instance, with works councils, certain characteristics would be non-waivable, such as the minimum percentage or number of seats for worker representatives, the means of election, the independence of worker representatives and minimum number of meetings. Other conditions would be waivable or simply left for bargaining. Similarly, with CB, the general characteristics of the labour relations framework, such as union recognition and good faith bargaining, would be non-waivable, while others could be left to the parties to determine.

In sum, both content and process defaults have a role to play in setting employment terms. While content defaults can be used efficiently and effectively, especially in establishing terms and conditions for smaller organisations, process defaults deserve more attention as they better address parties' needs over time. A proper combination of waivable and non-waivable terms is also necessary for both content and process defaults to work well. Figure 1 summarises the various options to counter the current right-to-manage default and shows how they can be appropriately applied in combination to various situations.

9 CONCLUSIONS

Various policy alternatives to the right-to-manage default were considered in our analysis. Waivable and non-waivable terms and conditions have some role to play, especially in smaller organisations, in establishing basic benchmark terms and conditions across the economy or particular industries. Waivable and non-waivable processes, involving mainly collective institutional structures, provide a channel for direct negotiation between the parties and allow for an iterative process to achieve desired outcomes through practice, learning and re-negotiating. However, these processes might not be suitable for smaller organisations lacking resources and expertise. Hence, a combination of defaults is needed to address different situations, with due consideration given to what should be waivable and non-waivable. A careful selection of default terms can protect workers against unfavourable outcomes caused by employer opportunism and individuals' negotiation limitations

[3] Section 65, 2000 Employment Relations Act (New Zealand).
[4] Section 8, 1935 National Labor Relations Act (United States).

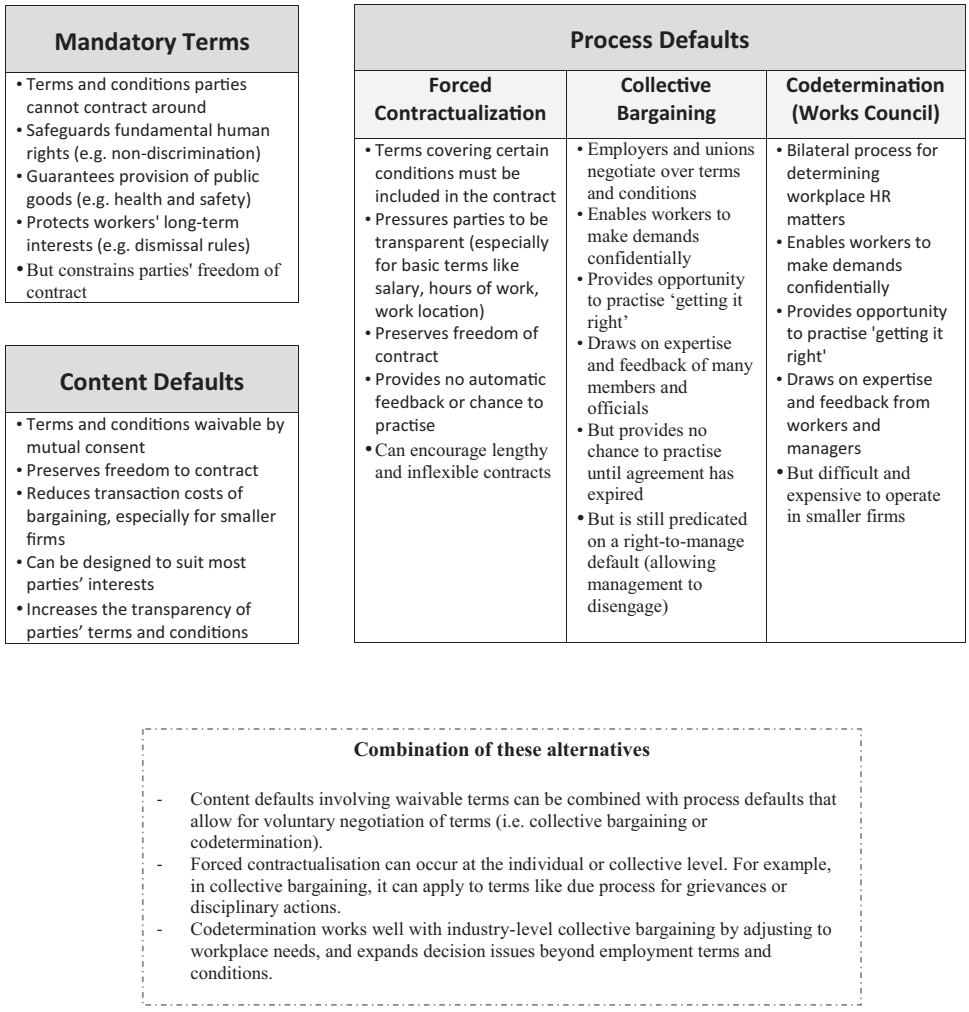

Figure 1: Alternatives to the right-to-manage default

associated, for example, with cognitive capacities and power imbalance. Future research should examine how best to achieve a balance between waivable and non-waivable rights in different countries, especially in well-entrenched and institutionalised highly individualistic, employer-oriented systems.

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