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## Migrating from Stage to Screen: Challenges and Prospects

By Ola- Koyi & S. Joseph Ban Kola

*Olabisi Onabanjo University Ago Iwoye, Nigeria*

**Abstract-** It is on record that theatre arts had survived over the ages due to its capacity to reinvent by embracing, new tool and languages, new style and form. It is a fact that when a discipline reinvent its techniques of impartation and training in line with modern demands, the standard of performances is enhanced and the quality of the practitioner is tremendously improved.

Over the years, Nigerian theatrical performances had gone through many stages (i.e. ritual, court/church, traditional travelling theatre, professional travelling theatre, academic drama, radio drama, television drama, celluloid film, and video film), reinventing itself in order to keep up with the requirement of each era.

In reviewing the essence/spirit of the 50 years of Theatre in the African academy through the University of Ibadan experience, one could not but to wonder why a film school has not developed out of the old Ibadan school of drama. Or question why the central mode of training the theatre artistes in academia stocked to the stage despite the various innovations that had taken place over the years.

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# Migrating from Stage to Screen: Challenges and Prospects

Ola- Koyi <sup>α</sup> & S. Joseph Ban Kola<sup>σ</sup>

**Abstract-** It is on record that theatre arts had survived over the ages due to its capacity to reinvent by embracing, new tool and languages, new style and form. It is a fact that when a discipline reinvent its techniques of impartation and training in line with modern demands, the standard of performances is enhanced and the quality of the practitioner is tremendously improved.

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Using a post modernist theory within an historical perspective and participatory observation approach, the paper explored the challenges and prospects of migrating from stage to video screen in academic training cum practices and offers plausible solutions to some of the identified problems.

## I. INTRODUCTION

University system anywhere in the world is expected to carry out research, training and other extension services as may be required by the society. In other word University is meant to service as the arrow head of research and new discovery; provide highly trained human capacity for societal growth and development; provide training facilities and other extension services for interested individuals and organisations within a given society (and these may include technological inventions, equipment maintenance and hiring etc.)

In reviewing the essence of the 50 years of Theatre in the African academy through the University of Ibadan experience, one could see that, the first school of drama in Africa which was officially established in October 1963 was designed to provide the above functions. This was why Geoffrey Ax worthy, the pioneering head of the school, preferred the running of a diploma programme instead of a degree course. According to him.

I got the first intakes to read a diploma instead of a degree course because I wanted them to discover what things are all about by doing them. I was more concerned with professionalism than with academic accumulation. (LACE Publications Vol 1 No.9, 1984:8)

One could see that as soon as the goal of the school was established and directed towards developing human capacity, serving and making impart on the society, the financial needs of the school was naturally supplied by private commitments, Nongovernmental organisations (NGOs) and other international bodies. On meeting the needs of the school, Ax worthy again observed that:

The major assistance which came in terms of finance also helped tremendously the activities of furthering and developing the theatre school. In 1960 from the Cocoa funds we obtained money for the alterations and repair, and by 1962 the Rockefeller Foundation gave funds for the running of the school for five years. In 1965, the Ford Foundation gave funds for the teaching of film and other activities at the Theatre School. (LACE Pub., 1984:6)

From the foregoing, one could detect that fund was even made available for the then School of drama at the University Collage Ibadan for the teaching of film related studies. Thus, one could not stop but to speculate: "why has film school not develop out of the Department of Theatre Arts 50 years after?"

The aim of this paper is to provide a theoretical framework and an historical perspective through which it will propose the establishment a program me on film studies as well as ruminating on the challenges and prospects of this migration from stage to video screen productions in term of academic training and practice. In providing plausible answers to a set of questions raised in this paper, the researcher was guided by postmodernism theory, and the discoveries in this study were acquired through historical exploration and participatory observation. The observation so employed was of two-folds: personal experiences as student of this great institution and personal experiences as a media arts tutor in another University.

## II. THEORETICAL FRAMEWORK

In order to a have a better focus on the study, and in applying postmodernism theory to this work, the

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concept of postmodernism as defined by James Morley within the context of pre-modernism, modernism and postmodernism will serve as a good premise of distinctions:

1. Premodernism: Original meaning is possessed by authority (for example, the Catholic Church). The individual is dominated by tradition.
2. Modernism: The enlightenment humanist rejection of tradition and authority in favour of reason and natural science. This is founded upon the assumption of the autonomous individual as the sole source of meaning and truth – the Cartesian Cogito. Progress and novelty are valorized within a linear conception of history – a history of a “real” world that becomes increasingly real or objectified. One could view this as a protestant mode of consciousness.
3. Postmodernism: Arejection of the sovereign autonomous individual with an emphasis upon anarchic, collage, diversity, the mystically unrepresentable, Dionysian passion are the foci of attention. Most importantly we see the dissolution of distinctions. The merging of subject and object, self and other. This is a sarcastic playful parody of western modernity and the “John Wayne” individual and radical, anarchist rejection of all attempts to define, reify or represent the human subject. (Postmodernism in *the Electronic Libyinth* elab.eserver.org/hfl0242.html, (7/8/2013))

It could be recalled that, postmodernism was a movement started in architectural field but with time, the movement was embraced in arts and humanity. The emphasis of this movement was on rejection of the modernist theory, avant garde concept or the passion for the new. Modernism according to the above web-source is to “understand in art and architecture as the project of rejecting tradition in favour of going “where no man has gone before” or “to create forms for no other purpose than novelty [i.e. art for art sake].”

Postmodernism movement in the 50's and 60's rejected modernism's exploration of possibilities and a perpetual search for uniqueness and its cognate individuality. Even modernism's valorization of the new was rejected for conservative reasons.

Fundamentally, postmodernism wanted to maintain elements of modern utility while returning to the reassuring classical forms of the past. “The result of this was an ironic brick a brick or collage approach to construction that combines several traditional styles into one structure. As collage, meaning found in combination of already created patterns.”

Following this, the modern romantic image of the line creative artist was abandoned for the playful technical (perhaps computer hacker) who could retrieve and recombine creations from the past - data alone becomes necessary. This synthetic approach has been

taken up, in a politically radical way, by the visual, musical, and literary arts where collage is used to startle viewers into reflection upon the meaning of reproduction (robin.escalation@ACM.org).

For example the current trend in pop music in the country where musician combined both the traditional beat with modern elements could be seen as postmodernism influence on indigenous pop music in Nigeria.

In summary, postmodernism is seen as a general and wide – ranging term which could be applied to literature, art, philosophy, architecture, fiction, and cultural/literary criticism, among others. Postmodernism is largely a reaction to the assumed certainty of scientific knowledge or objective or any other effort deployed to explain reality. In essence, it stems from a recognition that reality is not simply mirrored in human understanding of it, but rather, is constructed as the mind tries to understand its own particular and personal reality. (A Glossary Definition on [www.pbs.org./postmodern-body.html](http://www.pbs.org./postmodern-body.html))

### III. AN HISTORICAL PERSPECTIVE

From Yemi Ogunbiyi's (1981) edited resource book: *Drama and Theatre in Nigeria...*, and other available texts, one would agree with Ola-Koyi (1997) that between the pre-historical period and now theatrical performances in the country had gone through many stages starting from the ritual drama, (Ola Rotimi, Dapo Adelugba,) moving through the traditional travelling theatre (J. A. Adedeji), through the church cantata, school musical concert/performance, (Echeruo), through the popular/ professional travelling theatre (Ebun Clark, Uli Beier, Wale Ogunbiyi, Akinwunmi Isola), through the academic drama (Biodun Jayifo, Demas Nwoko), through the radio drama (S. A. Shaibu), through the television drama (Segun Olusola), to the celluloid film age (Hyginus Ekuazi), and pausing on the current video film era (Foluke Ogunleye).

Right from the time Hubert Ogunde and his contemporaries Duro Ladipo, Kola Ogunmola etc. took to professional acting in the 40s down to the period 1956 when Axworthy was invited by Molly Mahood, a professor in the Department of English, University of Ibadan, there were flourishing Student Dramatic Societies and other voluntary performing arts groups in Ibadan and Lagos.

For instance, there were so many Dramatic Societies in secondary schools, Teacher Training colleges, and the then University College, Ibadan. In the 50s and 60s, there existed along with other Yoruba operatic/dramatic travelling troupes, the University College Ibadan Dramatic Society (UCIDS); the Arts Theatre Production Group, The Players of the Down, the Mari Club and the Ibadan Operatic Society. All these groups were made up of theatrically minded people,

students, clergymen, teachers, civil-servants, and business men, who engaged in the organisation of concerts, cantata, and other dramatic entertainment in a *British tradition format*. (LACE Pub., Vol.1 No.9, 1984:4)

With the establishment of the first African school of drama in Ibadan, a new door of cooperation in theatrical experiment between the town and the gown was opened. In upholding the tenet of postmodernism which strived to maintain elements of modern utility while returning to the reassuring classical forms of the past, one could identify a positive result of this collage approach to dramatic construction that combined several traditional approaches and modern styles into one amalgamated structure in academic training and practice.

With a postmodernist analysis, one could see that in the 60s through to the 80s, the University of Ibadan was able to perform the following functions:

1. Serve as the arrow head in discovering new methods and techniques, in scripting, designing and the staging theatrical productions (for instance, most of the current great African plays text and stage productions were written and performed during this period.)
2. Provide highly trained human capacity for societal growth and development (for example, in the country today, most members of staff and students of the then school of drama are now leading theatre scholars and performing artists in academia.
3. Provide training facilities and other extension services for interested individual and organisation within and outside the country. (That is, between 1963 and 1964, Kola Ogunmola's theatre troupe was invited to the University as Artist in Residence. With his cooperation, an experimental production "Palm Wine Drinkard" was carried as a masterpiece for his one year stay on campus. After this, many other great productions had emerged from the Arts Theatre, University of Ibadan.

In furtherance of the above objectives, when Wole Soyinka became the director of the School of Drama Acting Company, the school provided extension services and training facilities for selected group of talents. It is on record that the School of Drama Acting Company was the first theatre company formed by any Nigerian University and it produced most of the plays of the then emergent Nigerian writers such as Wole Soyinka, and J. P. Clark etc.

In term of celluloid film productions, it is on Ekwuazi's account that the first nongovernment feature film produced in this country in 1970 was *Kongi's Harvest*, a collaborative venture between staff of the Department (Wole Soyinka and others) and Calpenny Films.

Within the short time of its establishment, many of the players of *The 1960 Masks* and *Orisun Theatre of*

*1964* migrated from their Mbari Club resident in the city of Ibadan to join and become members of the then School of Drama Acting Company. With time, according to Jide Malomo (1986) this Acting Company metamorphosed to "the University Theatre Arts Company following the reconstitution of the school of Drama into a full academic Department at the University in 1970.

By 1979, the University Theatre Arts Company re-emerged as Unibadan Performing Company (UPC). But it was not inaugurated until the 8th of April 1980, when the then Vice Chancellor late Prof. Olajuwon Olayide declared the UPC as the first experiment in a viable, professional, profit oriented theatre company in any Nigerian University.

Although UPC was set up as an autonomous entity with its own board of management, however in term of play productions both for the stage and the screen, the director of UPC who was in charge of play directing, and actor training worked hand in hand with the Department of Theatre Arts. Consequently, there was a symbiotic relationship between the Department and the UPC.

Jide Malomo equally believed that, play selection for the stage was guided by concern for the well tested, successful and accessible plays by Nigerian authors. Secondly, plays were chosen based on their entertainment and simplicity values. As a result, the UPC gave accelerated popularity to some Nigerian plays such as: Ola Rotimi's *Our Husband Has Gone Mad Again*, Wale Ogunyemi's *The Divorce* and Obi Egbuna's *The Wind* etc. during 1980/81 season.

During the reign of television drama productions in the 1980s, the UPC and the Department of Theatre Arts were the main source of local drama productions for many stations in the South West. Thus as first independent producer, the Unibadan Performing Company / the Department of Theatre Arts secured TV recording contracts with NTA Ibadan, where they produced *Theatre on the Screen*; for Television Service of Oyo State (TSOS now BCOS) they produced Screen Drama; for Ogun State Television (OGTV), *Tellydrama*; while *Weekly Dramas* were produced for both Benin Television (BTV) and NTA, Ilorin.

Between 1980 and 1986, under the directorship of Jide Malomo, UPC/Theatre Arts Department produced two serials – *The Visitors* written by Femi Osofisan, a lecture in the Department and *Cloudy Horizon* written by Taiwo Adeyemi a member of the UPC. In addition to all these achievements, over sixty single one-hour dramas were produced and shown on various stations all over the country.

In commenting on the running of the UPC operation, Jide Malomo opined that, "The UPC earned the bulk of its income from television contracts. A break-down of its gross income showed about 60%



accruing from television performances, about 30% from film show, and less than 10% from stage performances." From all indications, the Department of Theatre Arts has been actively engaged in theatrical and drama productions from her inception in the 60s (which could be termed "the popular/ professional travelling theatre period) moving through 70s (i.e. "the Nascent celluloid film era") to mid 80s (i.e. "the television drama period") but went under siege right from the beginning of the video film productions era (1988 till date.)

As a student of this great Department, the researcher could not help but to ask himself these three basic questions:

1. Why it is that, one of the most innovative Departments in this great University of Ibadan had not come to term with the latest medium of dramatic and filmic production in Nigeria?
2. Why it is that, the first Department of Theatre Arts in Africa has not develop new strategies or invent a new method of teaching or device a new means of engaging and promoting video film productions as they did in the 80s, during "the era of television drama productions"?
3. How is the Department fulfilling the two other functions of providing highly trained manpower for emerging Nigerian film industry or providing training facilities and other extension services for interested individual and organisation in the country, apart from serving as the arrow head of research and new discoveries in film study?

In providing answer to the first question, one could not but take solace in the fact that the great Department of Theatre Arts might not want to mingle with uncertainty found in an experimental, nascent or under developed industry like "Nollywood". However, one must acknowledged the fact that due to individual interest and afterschool training, some members of staff and alumina of this Department have done the University proud in the areas of directing, acting, costuming for the Nigerian film industry while many staff and students of this same Department have carried many resounding studies on this industry.

Yet, the fact remains that, up till time of writing this paper, one could not point out a production in Nollywood endorsed by or emanating from this Department as she did for Kola Ogunmola's production in the 60s or as she led in the production of the required local dramatic contents for most nascent television stations in the 80s.

On the challenge of moulding, the highly trained human capacity required for the growth of Nigerian film industry, one must come to term with the fact that, the first Department of Theatre Arts in the country has not commence any programme that will take care of the training of executive personnel/crew for the nascent film industry in Nigeria. To some operators/employers of labour in Nigerian entertainment industry, the university

graduates in the country are unemployable in the sense that most of these graduates are often retained before they could be given any executive portfolio in the industry.

For instance, the top echelons of a film production company will include director, script supervisor, dialogue coach, director of photography/cinematographer, sound designer, special effect specialist, makeup artist, costumier, production manager, supervising editor among others. Even though, some of the alumina of this Department have found their ways into some of these executive positions in Nigerian film industry, this is made possible largely due to their personal interests and after school knowledge acquisition or on the job training. Thus a full credit could not be given to their undergraduate training at the University. In our previous study on "Information and Communication Technology (ICT) and the Development of Performing Arts Programme", one wondered.

...how many tertiary institutions in the country could claim to have included the following courses on film as part of their media arts syllabus: *Cinematography, Film Editing, Soundtrack Design, Location and Production Management* etc.? Yet the qualities of manpower produced in our tertiary institutions are seen by some practitioners as grossly incapable and inadequate for the emerging digital film industry. (Ola-Koyi, 2011:45)

Apart from areas such as script writing, dialogue coach, makeup, costume, and sometimes production management that are common positions in which knowledge and training on stage techniques could easily be applied when it come to screen production. Other areas such as cinematography/ "viedography", sound design, special effects and film editing are yet to be incorporated into the University of Ibadan undergraduate training programme/degree syllabus. In his study on "Theory, Criticism and the Nigerian Film", Tunde Onikoyi (2013:312) suggested that:

It is essential for the Nigerian university don to ensure that the Nigerian student is equipped with the various ideas of the usefulness of theories to film. They shall develop not just a critical mind but 'an active critical mind' that will question existing ideas for the purpose of developing new direction to theory. But it rests upon the shoulders of the teacher to courageously guide the student carefully, meticulously and dynamically.

From the foregoing, it shows that some of the existing programmes on performative arts and media entertainment are not specific designed to meet the peculiar need of the Nigerian film industry, therefore, there is a fresh demand for university trained human capacity for top executive positions in Nollywood. Hence there is a need for the Nigerian Universities to



develop new programmes that are specifically tailored towards meeting the demand for highly trained manpower requirement in the ever growing entertainment industry in Nigeria.

As at the time of writing this paper, a fresh high school graduate could not inspire to study any of the following modern programmes in some universities in the country not even at this great University of Ibadan: Filmmaking, Sound Design, Sound and Music for Interactive Games, Music for Moving Image, Audio Post Production, etc.

#### IV. A CONCEPT OF A B.A./B.SC. PROGRAMME IN FILM STUDIES

To be more specific, a designed B.A./B. Sc programme in film studies as it is ran by other higher institutions in foreign countries, is based on both theoretical study and practical exercises in the art of filmmaking. It involves creativity, project development and the business strategies on film production and a strong collaboration with independent production companies.

In this course, the concept of the filmmaker as auteur is emphasised and his place as a creative artiste is at the heart of teaching the process of film production. Basically this course often involves sharing on various filmmaking techniques and theories. A properly designed course on film studies often enables student to think, research, discuss and watch a lot of films. It encourages radical approach to film production, and the development of truly independent stories and ideas.

In this course, students are exposed to different genres and modes of film productions - areas such as narrative, documentary, animation and other experimental filmmaking are common grounds for workshop ensemble. At the end of this programme, each of the students is to specialize on any of the following areas: screenwriting, screen directing, creative production, cinematography, production design, sound recording technique / Design, film editing, screen performance, special effect design and animation etc. Sometimes the institution could also give financial assistance to some deserving students to pursue final year projects in film production.

In his postulation Onikoyi (2013:321), among other things recommended the establishment of a Department of Film Arts, that will develop of full time or part time undergraduate and post graduate programmes on film studies, the employment of master/PhD students in film related fields, and the setting up of film laboratory / studio for practical training.

#### V. THE CHALLENGES OF THE PROPOSED PROGRAMME

Like any other innovation, the introduction of film programme or film production courses into any

academic system could not be without any problem, confrontation or hindrance. The plausible challenges which the introduction of this proposed programme may encounter include: challenges on the retraining of manpower, problem of equipment acquisition, enlargement/introduction of new syllabus, the cumbersome process of registration with regulatory bodies.

#### VI. CHALLENGES ON RETRAINING OF MANPOWER

Naturally the introduction of a new programme/course of study will required the retraining of human resources who are the facilitators of the proposed programme/ discipline. From practical experience as tutor, one could see that most conservative lecturers are unenthusiastic about the introduction of new programme. Some tutors are not just willing to explore new frontiers or venture into new courses except to remain in their comfort zone. This unwillingness of these rigid tutors may compel them to antagonize any move to introduce any teaching on film production as a new discipline/course of study.

From all indications these conservative lecturers (both young and old) must realise that theatre or performing arts as a discipline is very dynamic in nature. It continues to reinvent itself years in, years out by adapting new media in its training, practices and manifestation. This is why the course is still very much relevant to the new age of ICT (information and communication technology). Therefore the conservative teachers must change with time and allow themselves to migrate from stage to screen. By venturing into the new frontiers or acquiring filmic knowledge and engaging in retraining programmes, both the students and the film industry will be better for it.

To be more precise, it is on record that some of the pioneering playwrights on the Nigerian stage (Akinwunmi Isola, Adebayo Falati and Femi Osofisan) have already migrated or in the process of migrating from stage to screen by acquiring new skills of writing for screen drama/movies which is not the same as writing for the stage. Some of the productions scripts written by these pioneering playwrights include *Afunsetan Aniwura*, *Saworoide*, *Agogo-Eewo*, and *Maa mi*.

Thus the conservative custodians of knowledge in the Departments of Theatre or Performing Arts, in our universities / colleges stand to gain more by cueing into new trend of performative arts and acquiring new knowledge which the new terrain demand. In addition, as Onikoyi suggested above, post graduate students/ PhD. candidates in film related fields could be injected in to the system by encouraging them to take up the teaching of the new courses on film studies.

## VII. PROBLEM OF EQUIPMENT ACQUISITION

The task of acquiring new equipment for a new programme could be very cumbersome and tiring. Administratively, the proposal for the new equipment could take donkey years before it could be approved; its execution might equally be tied to the availability of fund. If these two huddles are finally scaled through, the new challenge that one need to overcome is sticking to the specification of the standard/quality of the required equipment or else wrong or inferior equipment might be purchased and this will in long run be a disservice to the proposed programme. Therefore, sufficient capital must be made available for the purchase/importation of required apparatus for the programme and skill must be acquired on the equipment handling and maintenance. In addition, constant electricity source must be provided for the operation and preservation of these gadgets.

## VIII. ENLARGEMENT/INTRODUCTION OF NEW SYLLABUS

A model B.A./B.Sc. Programme in film studies could be obtained in any of U. S. Universities that offer film studies or other independent film Institutions. Even though most syllabi will include courses in introduction to film, mode of film studies, film analysis, history of film/media, film theory and criticism with emphasis on time/period; regional creation; genres, and creative style/auteur approaches. In attempt to enlarge or introduce new syllabus on film studies, care must be taken to incorporate indigenous components and tailored towards national inspirations.

The proposed programme operators must see to the setting up and the provision of the following practical facilities: required media laboratories, sound studio, standard theatre, green screen and other industry-standard equipments. And the programme must be designed in such a way that it will make provision for industrial attachment and other linkage-programmes with other institutions and production companies.

## IX. THE INVOLVEMENT OF REGULATORY BODIES

Even though the film industry and other performing arts fields do not have a central professional regulatory body like ICAN, Nigerian Bar Association, Nigerian Medical Board, The Guild of Editor etc. that could assist in instilling standard in the training of films practitioners, yet the involvement of related bodies in education (NUC, technical education body etc.), and other professional organisations in the industry could still go a long way in ensuring standard in training of professional for the ever expending film/entertainment industry. However, the cumbersome process of

registration with regulatory bodies must be revisited and restructured to be less cumbersome.

## X. THE PROSPECTS OF THE PROGRAMME

In order for Nigerian universities especially the great university of Ibadan, to carry out her fundamental roles of serving as the arrow head of research and teaching, providing highly trained human capacity for ever growing entertainment industry; providing training facilities and other extension services for interested individuals and organisations, this institution must be alive to her responsibilities and come up with designed programmes/courses of studies in line with required manpower needs of her immediate environment.

For instance in the 60s through to mid 80s it is fashionable to study Theatre Arts solely as a course or a standalone discipline but from 1990s till date it is no longer fashionable for any institution to train students solely on the arts of the theatre. Rather the new trend in theatre arts training is usually in combination with other disciplines such as Mass Communication, Film Arts, Psychology, or Biology

Since the proposed programme involves both human and institutional changes, the paper therefore, propose a transitional period during which existing Department of Theatre Arts will run combined courses in both Theatre Arts and Film Arts. However, a well designed Department / Programme on Film studies must aid any institution in carrying out all the identified functions a university. By training graduates for the required highly trained manpower for the Nigerian entertainment industry it is believed that the new programme will help in eradicating "the try by error approach" in filmmaking.

## XI. CONCLUSION

Having ruminated on theoretical framework, gone through an historical reflection, developed a concept on the proposed B. A. / B. Sc. programme in Film Studies and considered the challenges and prospects of such programme, one can conclude with the fact that if the quality of a tree is known by its fruits, then it is possible that by improving the quality of training given to potential filmmakers, this will rub on positively on the quality of their productions.

Secondly, negative image created for the country through movies could be changed or enhanced by improving the quality of films made in Nigeria. Thus the productions of knowledgeable directors always shown their insightful movies, and they often create better image for the country in terms of film contents and themes,

Moreover, a team of scholars/experts in the Department Theatre and Film Arts will not only benefit from rendering consultant services like their

counterparts in legal profession, medical, engineering fields who often combined profession practices with teaching and research but the adequate training facility provided for the use of the students, could also be used for extension services in the area of camera hiring, sound system and editing for individuals and private organisations requiring such services.

Once the Department or the University is attuned to the reality in the Nigeria film/entertainment industry, the institution will definitely succeed in performing her statutory duties of carrying out beneficiary researches, training advanced manpower for the overgrowing entertainment industry and providing other extension services as may be required by the society.

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# Comparative Assessment of Rural Youth Entrepreneurs in Uganda and Kenya

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**Abstract-** Youth entrepreneurship is a promising field for employment and poverty alleviation for young people who the majority in the developing world. While effort has been made to promote entrepreneurship among the youth in Kenya and Uganda, most of it has been targeting urban youth who compromise a small proportion of the overall youth population in the two countries. Using a mixed methods approach of semi structured questionnaires and in-depth interviews; this paper provides a comparative assessment of Rural Youth Entrepreneurs (RYE) in Uganda and Kenya. More specifically it examines the entrepreneurial environment in which Ugandan and Kenyan RYE operate and identifies their unique challenges with a view of making policy recommendations to support them. Findings reveal that there are differences among RYE in both countries in the demographic aspects of gender, level of education, marital status and household headship.

**Keywords:** *rural youth, entrepreneurship, environment, uganda, kenya.*

**GJMBR - G Classification :** *JEL Code: L26*



*Strictly as per the compliance and regulations of:*





# Comparative Assessment of Rural Youth Entrepreneurs in Uganda and Kenya

Celestine Katongole<sup>α</sup>, Fiona Mulira<sup>σ</sup> & Wilber Manyisa Ahebwa<sup>ρ</sup>

**Abstract-** Youth entrepreneurship is a promising field for employment and poverty alleviation for young people who the majority in the developing world. While effort has been made to promote entrepreneurship among the youth in Kenya and Uganda, most of it has been targeting urban youth who compromise a small proportion of the overall youth population in the two countries. Using a mixed methods approach of semi structured questionnaires and in-depth interviews; this paper provides a comparative assessment of Rural Youth Entrepreneurs (RYE) in Uganda and Kenya. More specifically it examines the entrepreneurial environment in which Ugandan and Kenyan RYE operate and identifies their unique challenges with a view of making policy recommendations to support them. Findings reveal that there are differences among RYE in both countries in the demographic aspects of gender, level of education, marital status and household headship. Nevertheless there are similarities when it comes to RYE perceptions of the business environment especially in terms of how they acquired their business, understanding the benefits of business registration, property rights and Justice Perceptions. Findings also revealed that both countries shared some challenges like limited access to funding and business skills training; while other challenges were country specific such as having unregistered businesses, high business closure rates and commercial injustice. Policy implications and recommendations are also provided.

**Keywords:** rural youth, entrepreneurship, environment, uganda, kenya.

## 1. INTRODUCTION AND BACKGROUND

Youth entrepreneurship is a promising field for employment and poverty alleviation for young people in the developing world. Sub-Saharan Africa (SSA) is a region in the part of the world is expected to accommodate a quarter of the global youth population by 2025 (Africa Commission, 2010). What is notable though is that in this region, more than 80% of the people live in rural areas and most of the rural residents are poor. Recent poverty studies indicate that in this region about 90% of the rural people live on less than US\$2/day and the proportion is not expected to decline until the 2040s (International Fund for population of SSA. Majority of these youth live in rural

areas and are poor, unemployed, uneducated and constitute a significant burden to the SSA governments. Without sustainable redress measures to this burden, poverty is likely to continue in this region, and political as well as social unrest is likely to remain rampant. Although several approaches have been adopted by both development partners and Sub-Saharan governments to break the poverty cycle, the incidence of rural youth poverty has persistently remained high and entrepreneurship is seen as one of the remedies to this problem (IFAD, 2011).

Different stakeholders, including scholars, civil society organisations and policy makers have identified entrepreneurship as a tool for improving livelihoods of youths in SSA (Chigunta, Schnurr, James-Wilson & Torres, 2005; Youth Business International, 2011; International Labour Organisation, 2005). It is widely believed that entrepreneurship promises jobs to the youth (Curtain, 2000); provides valuable goods and services to society (OECD, 2001d); and promotes innovation and resilience (White & Kenyon, 2000). Because youths are more likely than adults to be unemployed, entrepreneurship gives them livelihood alternatives, economic independence, and a positive socio-psychology which will integrate them into the mainstream economy (Schoof, 2006; Chingunta, 2002).

Uganda and Kenya are among the many countries in SSA where youth entrepreneurship is receiving significant attention because of its potential to avert the unemployment problem and create economic opportunities for the young people. The effort is reflected in the national development plans of both countries where specific youth development initiatives are emphasized to increase access to business enterprise funds, skills training, and business development services (Kenya Vision 2030; Uganda National Development Plan, 2010/11 – 2014/15; Uganda Vision 2040). In both these two countries youth entrepreneurship is important because more than 70% of the population is youthful but more than 78% of it is unemployed (International Youth Foundation, 2011; Uganda National Development Plan, 2010/11 – 2014/2015; Kenya Integrated Household Budget Survey, 2005/2006; Sauder Business School, 2012). Further statistics indicate that an estimated 64% and 85% of the unemployed in Kenya and Uganda respectively are youths (Daily Monitor, 2011). Although the youth

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population represents a significance demographic segment (Namara et al., 2010), the unemployment problem is increasing the dependency burden, human resource wastage, poverty deepening and is increasingly becoming a political burden to both governments. For instance, most of the youth in Uganda who fail to get jobs engage in unproductive or anti social activities such as prostitution, theft, drugs and substance abuse, robbery, and un lawful demonstrations (riots) – these crimes are reflected in the 63% of total in-mates being youths. Similarly in Kenya many of the youth remain idle even after formal education for long periods of time. As a consequence, they try their hands in all openings, legal or illegal, with some ending up with deviant behaviour (Kenya National Youth Policy, 2002). Against this background, this paper examines the entrepreneurial environment in which Ugandan and Kenyan rural youth entrepreneurs operate, identifies their challenges, and makes policy recommendations to address these challenges.

## II. JUSTIFICATION OF THE STUDY

Whereas effort has been made to promote entrepreneurship among the youth in these two countries, most of it seems targeted to the urban youth who are a small proportion of the overall youth population. Besides, overall, the concept of youth entrepreneurship has received limited attention and in-depth analysis from researchers because youth are often treated as a general homogeneous adult group (Schoof, 2006; Chingunta, 2002). Previous studies (e.g...) have emphasized the differences between developed and developing countries but have not gone further to differentiate rural and urban youth entrepreneurs within countries. However, similar categorizations used at international levels can be applied at a sub-national level to identify unique aspects that may be associated with specific in-country rural environments. Focus on rural settings is important because previous studies (e.g??) have indicated significant differences between rural and urban areas, especially with reference to the environment of business.

The aspect of business environment is of particular interest in this study because businesses are neither independent nor completely isolated from the internal and external environment within which they operate (Fry, Stoner & Hattwick, 2001). Different environmental factors play a role in the development of entrepreneurship and these factors influence people's willingness and ability to undertake entrepreneurial activities. According to Schoof (2006), the key environmental aspects that affect youth entrepreneurs are five. These include social-cultural attitude towards youth entrepreneurship; entrepreneurship education; access to finance; administrative and regulatory framework; and business assistance and support.

Similar factors have been noted to influence operations of micro and small enterprises (Stevenson & St-Onge, 2005a; Stevenson & St-Onge, 2005b; Stevenson & St-Onge, 2003). Each of these factors is important because it will affect youth enterprise start-up, motivations and growth ambitions differently. Most studies have reported several environmental challenges that hinder youth enterprise growth. Some of the identified challenges include lack of providers of business advice, training, guidance and specialist access to finance exclusively to young people, lack of access to professional mentors, and lack of access to business networks (Schoof, 2006; YBI, 2011). These challenges highlight the unique environmental constraints to youth entrepreneurs but these constraints maybe compounded for rural youth entrepreneurs who operate in societies that are characterized by limited access to markets, information, finance and advisory services. It may be true that what is often reported in research are views of urban or semi-urban youth entrepreneurs without paying specific attention to the underprivileged and vulnerable rural youth entrepreneurs.

## III. METHODOLOGY

### a) Design

We collected the data using a survey approach that combined both quantitative and qualitative approaches. We adopted a cross sectional survey approach because of its strength to gather information that may not exist from other sources. Although we used a qualitative approach in the study, its purpose was mainly to complement the quantitative approach and scholars have indicated that the two approaches can be combined in a single study (e.g. Allen, 1995; Wildermuth, 1993; Amin, 2005; Saunders, Lewis & Thornhill, 2009; Sekaran, 2003).

### b) Population, Sample size and Procedure

The population of the study was the rural youth entrepreneurs (who are they?). A given place was rural if: its main activity was not secondary or tertiary production but primary production; it did not have district administrative headquarters; it did not have a single population with amenities such as electricity, schools, financial institutions, health centers, etc within the same specific area. The Uganda Bureau of Statistics (2002) defines a youth as young adult aged 18-30 years. However, the Kenya National Youth Policy (2002) defines a youth as one aged between 15 - 30 years. The exact population of rural youth entrepreneurs was not available from statistical records in both countries by the time of the survey. However, according to Krejcie & Morgan (1970), a sample of 384 is sufficient for any population above 100,000. In this study we used a sample of 1027 respondents split almost equally between the two countries.

To select the respondents, we used a multi stage sampling method. Each country was split into four regions (central, east, north, and west). From each region, we selected three districts based on two reasons – security situation in the district and existence of government programmes for the youth entrepreneurs. In each region we selected three districts which made a total of 24 districts in both countries. In each district we selected one sub-county and a parish using simple random sampling method, using the latest topographic maps. From each parish we selected three villages using probability proportional to size. To be able get to the specific village, we worked with the district top leadership which guided us to the local leaders who provided security clearance, additional information about the villages and played a role facilitating entry into the villages (in some villages we could not be allowed access without clearance from the local village authorities). A total of 15 rural youth entrepreneurs were then selected from each village with emphasis on gender balance and variety of trades, i.e. we made deliberate effort to include diverse business owners. In instances where a given village did not have any youth entrepreneur or the sufficient number required, we moved onto the next village with assistance from the local guides. We obtained a total of 45 rural youth entrepreneurs from each district.

#### *c) Data Collection*

We collected primary data over a period of three months, from May 2011 to August 2011. The data mainly came from primary sources where we used questionnaires with both closed and open ended questions; interview guides and checklists. We administered the questionnaires by ourselves in a such a way that each research member engaged the respondent face to face to maximize the response rate (Frankfort-Nachmias & Nachmias, 1996). We used this method to gather data on the environment of business, business activity, and challenges of the youth entrepreneurs. In addition, we conducted four in-depth interviews with youth entrepreneurs in each region, making a total of 32 in-depth interviews in both Uganda and Kenya. We identified the participants for the interview based on the nature of business activity (the diversity was a major selection criterion) they were engaged in. We also gave special consideration to size of enterprise by considering a mix of both micro and small enterprise owners. We conducted interviews to obtain detailed information about the environment of business, specific and challenges of the youth entrepreneurs. Such information could not easily be obtained with the questionnaire. We also used Focus Group Discussions to further generate ideas and collective opinions from youths in different sectors. In each region we conducted one FGD with the youth entrepreneurs. In the FGD, there were between 8-10

participants at a time. These participants represented most of the trades on the village.

To further enhance the data set we conducted interviews with experts. These were people who worked in government, non-government organizations, private enterprises, financial institutions and academia and had accumulated a vast repository of knowledge regarding rural youth entrepreneurship through directly interfacing with these entrepreneurs. We conducted expert interviews after the field survey of youth entrepreneurs to be able to share youth opinions and issues and generate meaningful conclusions and solutions. Here, we gathered more in-depth information on specific environmental aspects that affected youth entrepreneurship. .

#### *d) Operationalisation and measurement of variables*

In this study we measured the concept of environment of business using the modified version of African Development Bank (AfDB)/International Labour Organisation (ILO) integrated framework for entrepreneurship environment. Although the framework categorizes the environment into ten elements, we selected only seven elements which, after critical literature review (e.g. YBI, 2011; Schoof, 2006; Gnyawali & Fogel, 1994; Chingunta, 2002; Uganda National Development Plan, 2010/11 – 2014/2015) appeared to fundamentally influence operations of youth entrepreneurs. The AfDB/ILO integrated framework was rigorously developed by Stevenson & St-Onge (2003) and Stevenson & Lundstrom (2002) through the late 1990s in more than ten countries as a practical, integrated approach for supporting the start-up and growth of women-owned enterprises in underdeveloped regions. The same framework was used to study entrepreneurs in Uganda, Kenya, Ethiopia and Tanzania. These studies confirmed the validity of the framework (Stevenson & St-Onge, 2005). The aspects of the framework which we adopted included the regulatory and legal environment; enterprise education and training services; access to credit; Business Development Services; access to business networks; access to premises and technology; and access to markets. According to Stevenson & St-Otenge (2005), an assessment of the gaps and opportunities in these areas of the Integrated Framework enables the formulation of an informed set of policies and programme measures to remove barriers to the start-up and growth of entrepreneurs; improve access to markets; improve access to economic resources; strengthen social protection and social inclusion; and create a more favourable environment for entrepreneurs. We studied and adjusted items from the Stevenson & St-Onge (2005) study of the environment of growth oriented women entrepreneurs in Uganda. However, we also added other items which were used in other empirical studies and recommended by existing theory.

To avoid common method bias which is common in cross sectional studies (Spector, 2006), we used different scales, where some were dichotomous while others were likert and ratios (see appendix for questionnaire).

#### e) *Validity and Reliability*

Validity is one of the concepts used to determine how good an answer provided by the research is; that is, the ability of the instrument to produce findings that are in agreement with theory. To ensure validity of the instrument, we adopted and revised instruments that had been used previously in related studies in the developing world. The adjustment was further informed by theory which was complemented by expert reviews and opinions. We therefore did not have to test construct validity. Reliability deals with the ability of the instrument to generate consistent results. The instrument used had been tested for reliability in previous studies. However, we conducted a pilot study on 150 respondents and tested the results for reliability. The instrument was reliable. To ensure that we further obtained higher reliability, we hired research assistants that could competently speak most of the languages spoken in each of these countries. Most of the assistants had previously worked with the Global Entrepreneurship Monitor surveys. We however trained them for three days, and we interpreted all items into vernacular and rehearsed the instrument before actual fieldwork. We made sure that each team of research assistant was accompanied by a senior researcher who checked each questionnaire for completeness and accuracy on each enumeration area before proceeding to another enumeration area.

#### f) *Data Analysis*

##### i. *Quantitative Analysis*

All filled questionnaires were checked for completeness before they were entered into the SPSS (19) software for analysis. A filled questionnaire was entered into the software if it had over 75% of the items answered (Sekaran, 2003). A missing value analysis (MVA) was then performed to establish whether the missing values were missing at random. MVA was also performed to avoid committing Type I and Type II errors, and to increase statistical precision. The EM (Expectation-maximisation) method was used to perform MVA. All MCAR results were significant ( $p < 0.05$ ) implying that there was no need to replace the missing data. In instances where extreme values existed, we excluded them from the analysis to avoid having biased results. Because the study is a comparative, we use mostly comparative bar graphs, charts and tables to present the findings.

##### ii. *Qualitative analysis*

Given the nature of the data, the level of analysis that was deemed appropriate was thematic

analysis. Using this method, we compared and contrasted data from different participants and the process continued until the researchers were satisfied that no new issues were arising. They kept moving backwards and forwards between transcripts, memos, notes and the research literature (Tere, 2006).

## IV. KEY FINDINGS ON RYE COUNTRY COMPARISONS

### a) *Demographic factors*

#### i. *Gender*

The demographic representation of the young entrepreneurs based on the two countries shows that a total of 59% and 53% of the sample from Uganda and Kenya were male while 41% and 47% were female respectively (see table 1). In Kenya these figures come as no surprise as they are reflective of the total youth population based on gender. Of the total youth population in Kenya 51.7 percent are female youth with as high as 60% forming the total labour force. Despite this, opportunities are very scarce to absorb them in the job market (Kenya National Youth Policy). This could explain their decision to opt for self employment.

On the other hand, although the overall population in Uganda has slightly more women 51.2% than men, 48.8% (UBOS, 2003), this statistic was not reflected in the youth and gender entrepreneurial activities among the rural youth in this study. The dominance of male youth in entrepreneurship activities may imply that male youth generally could be favoured by the environment. In rural areas where this study was conducted, girl children are usually very protected by their parents and are rarely allowed to live on their own because of fear that men can easily impregnate them. Besides, girl children are culturally conditioned to provide support in the domestic work which gives them little time to participate in income generating activities. Some studies on women in Uganda have shown that women generally are restricted to domestic work and are thus restricted from participation in gainful economic activities (Munene, Schwartz and Kibanja, 2005; Snyder, 2000). The Uganda National Development Plan (2010/11-2014/15) reveals that women are generally discriminated and are not economically empowered. The current study seems to support these studies.

#### ii. *Education*

We found that only 29% of the young entrepreneurs in Uganda had completed lower secondary education as compared to as high as 65% in Kenya. This difference could be explained by the varying enrollment figures and dropout rates in both countries as described by their national policies. In Kenya by 2001, enrollment in primary school was 5.9 million, secondary school was 800,000 while university was at 620,000 (Kenya National Youth Policy, 2002). In Uganda primary school enrollment rates stood at 90% for girls

and 93% for boys in 2006 but the completion primary school rates were as low as 53% for boys and 42% for girls (NDP, 2010/11 – 2014/15). And by age 18, only 30% of girls are still in school in Uganda (Uganda Demographic Household Survey, 2006). The high dropout rate for girls is attributed to lack of sanitary facilities, early pregnancy, sexual harassment, and poor performance in class.

### iii. Marital status

Majority of the rural youth entrepreneurs in Uganda were married (62%) as compared to Kenya

(47%). We further found that 67% of the Ugandan RYE had between 1-5 children compared to 51% in Kenya. These high percentages of marriage and children among youth in Uganda may be explained by high teenage pregnancies which stand at 25 percent (NDP, 2010/11 – 2014/15). All these are partly because the youth exhibit early sexual debut averaged at 16 years for girls and 17.6 years for boys (Uganda Youth Policy, 2001). However, this study reveals that about 46% of the Ugandan RYE headed their households as compared to 59.6% of the Kenyan RYE.

*Table 1:* Demographic representation of the sample

Demographics	Uganda	Kenya
<b>Gender</b>	<b>Uganda</b>	<b>Kenya</b>
Male	59%	53%
Female	41%	47%
<b>Marital Status</b>		
Married	62%	47%
Single	32%	51%
<b>Nos. of Children</b>		
None	29%	48%
1-5	67%	51%
<b>Head of Household</b>		
Yourself	46%	59.6%
Spouse	24%	24.3%
<b>Highest level of Education</b>		
Completed primary	51%	16%
Completed O' level	29%	65%

*Source: Primary data*

## V. COMPARISON OF THE STATE AND PERCEPTIONS OF RYE BUSINESS ENVIRONMENT

### a) Age of enterprises and previous activities the entrepreneurs engaged in

There were similarities between Ugandan and Kenyan young entrepreneurs with respect to the age of their enterprises as illustrated in Table 2. Almost half of the enterprises in both countries were new businesses (1-3 years), while a third were established businesses (> 3years) and 18% were start up. These results are not surprising given the young age of the entrepreneurs.

Generally, the entrepreneurs were all engaged in some activity before starting a business. Almost a third of the youth in Uganda were originally business owners in self employment or students,

"I started with selling tomatoes that I had grown in my garden and then when I had saved up money I bought a sewing machine and I am now the only tailor in this village. Which brings in more money" (Ugandan Youth)

Some of the RYE that were interviewed went on to explain why they left the activities they were engaged in prior to starting their business

Some of the RYE that were interviewed went on to explain why they left the activities they were engaged in prior to starting their business

"Before starting this business I was a student but after my secondary exams my parents could not afford to pay for my university education. Given that my education level was very low I could not find employment so I started this brick making business." (UgandanYouth). Education constrains entrepreneurship in rural areas? Someone would want to know whether the educated are more of entrepreneurs or mere job seekers, and where the problem could be. And could there be a difference between the two countries? What lessons to learn.

The failure of some of the RYE to get into employment even after receiving basic secondary education could be explained by an acute lack of information on available employment opportunities especially for less educated or youth without specific skills (Namara et al., 2010). This is coupled with the fact that even for those who are more educated employment is limited. MGSLD (2006) noted that Youth unemployment is still unacceptably high whereby 380,000 youth are released in the job market each year to compete for the estimated 90,000 jobs available.



Similarly, in Kenya one third of the RYE were previous students. As is the case for Uganda, the economic growth rate in Kenya has not been sufficient enough to create productive employment opportunities to absorb the increasing labour force of about 500,000

annually. Most of these are the youth and only about 25% are absorbed, leaving 75% to bear the burden of unemployment. Further, some of those absorbed are doing jobs that do not match their qualifications and specialization (Kenya National Youth Policy, 2002).

*Table 2 :* Country representation of the age of enterprise and the previous activities the owners were engaged in

Nature Of business	UGANDA	KENYA
<b>Age of business</b>	<b>%</b>	<b>%</b>
Start up ( < 1 year)	18	18
New business (1-3 years)	48	49.7
Established business ( > 3 years)	34	33
<b>Former activity before entrepreneurship</b>	<b>%</b>	<b>%</b>
Self employment	29	17
Employed in informal sector	14	22
Student	28	33

#### *b) Method of business acquisition*

Findings reveal that 92% of the youth in Uganda as compared to 86% in Kenya started their own enterprises, with 72% and 75% respectively for both Uganda and Kenya saying that this was their first business. The fact that for both countries an alarming percentage of RYE had started the business on their own rather than buying or inheriting it, lends credence to research findings on most developing countries having necessity driven entrepreneurs than opportunity driven entrepreneurs (GEM Uganda Executive Report, 2003 & 2004; Acs et al, 2005). Although these studies have looked at the entrepreneurial population in general and not Youth in particular, given that majority of the overall population in both countries is young, it can still be assumed that most youth are necessity entrepreneurs. This is also supported by the fact that in Kenya there are many young women and men that are engaged in casual or temporary terms of employment with poor salaries and low, if any, social protection (ILO, 2007). Similarly, there are many factors holding the youth back in Uganda, notably lack of a standard minimum wage and favourable terms and conditions of service at work places. Although this affects the entire working population, the youth are more affected partly because they lack experience and therefore the confidence to negotiate better terms and without adequate legal protection they are taken advantage of by employers who exploit them (Namara et al., 2010). These challenges coupled with low tertiary enrolment force the RYE to start their own businesses in both countries.

#### *c) Business closures*

This study reveals that 48% in Uganda as compared to 20% in Kenya of those who previously owned businesses had closed them. The main reason for closure in Uganda was loss of interest (46%) in the business as compared to (44%) in Kenya because it

was not profitable. The high business closure rates among Youth in Uganda are not much different from the closure rates for the rest of the population. In a 2003 study Uganda was ranked first among all GEM countries in business closures (30%).

#### *d) Employee Status*

Findings in Table 3 revealed that, 81% of the RYE in Uganda did not employ anybody in their enterprises as compared to 66% in Kenya. And of those who employed, only 20% of the Ugandan RYE employed family members in their businesses and 16% and 19% employed at least 3 full time and part time employees respectively. In comparison, only 2% of the Kenyan RYE employed family members in their businesses and 15% and 5% employed at least 3 full time and part time employees respectively. We may make two inferences from these statistics. First that the high percentage of RYE in Uganda that do not employ anyone in their enterprises is representative of the size and nature of their business. These findings are similar to Bagonza (2003) who found that majority of the businesses owned by Youth in Uganda are micro enterprises. Secondly, that despite Kenya and Uganda having similar social and cultural backgrounds (Okabe, 2010), Ugandans have stronger family ties and attachments than Kenyans as is seen in their willingness to hire family members.

Table 3 : Employment Status

Employment		UGANDA	KENYA
Employ someone		%	%
Yes		81	66
No		19	34
Number of employees they have		%	%
Full time	None	84	85
	1-5	16	15
Part time	None	81	95
	1-5	19	5
Family members	None	80	98
	1-5	20	2

## VI. REGISTRATION

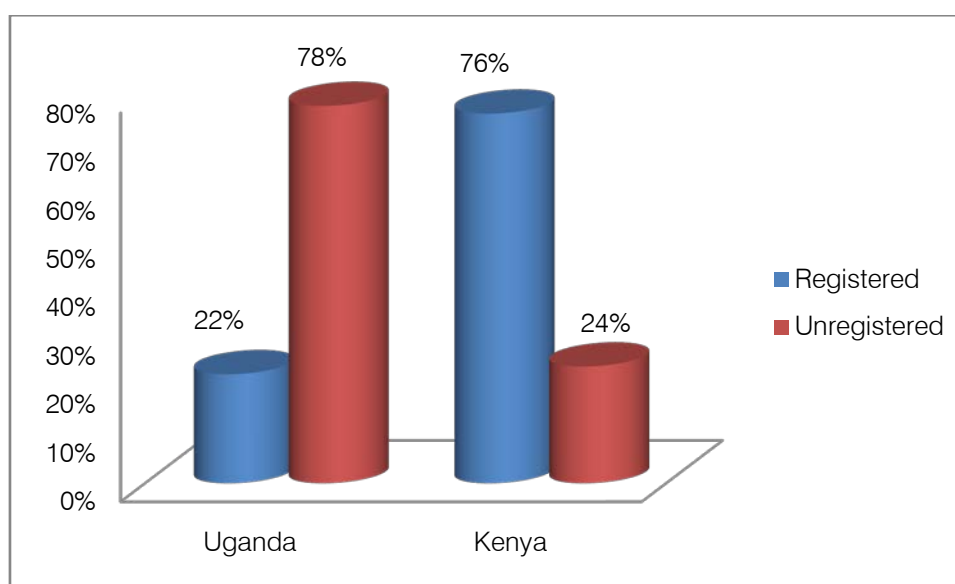


Figure 1 : Business registration among RYE in Uganda and Kenya

Figure 1 shows that while in Uganda majority of rural youth entrepreneurs (78%) operated unregistered businesses, in Kenya most rural youth entrepreneurs (76%) owned registered businesses. This difference is possibly accounted for by variations in customer perceptions. Whereas in Kenya operation of unregistered businesses is commonly associated with trick-stars and fraudulent people, and therefore customers often avoid dealing with such businesses, in Uganda society does not seem to mind much about registration. Other research in Kenya (Stevenson & St-Onge, 2005) indicates that two thirds of MSEs in Kenya are located in rural areas and only 11.7 percent of MSEs are registered. However, the current study gives a different proportion of registered enterprises, suggesting an improvement in policy environment. In Uganda, there are excessive bureaucratic procedures and expenses associated with formal registration (International Youth Foundation, 2011) which discourage youth from registering their businesses. Such bureaucracy

increases the total time it takes to complete the procedures to start a business and it is worse for entrepreneurs outside of Kampala where it takes 40 - 61 days to register a business compared to 25 days inside Kampala (Private Sector Foundation of Uganda, 2010). There are 254 different regulatory approvals including licenses, permits, registrations and regulatory certificates required for businesses in different sectors to operate. Some businesses have to obtain up to 10 regulatory approvals, visit up to 5 different institutions or obtain up to six different approvals from the same institution (Private Sector Foundation of Uganda, 2010). Although the statistics between the two countries differ, there is evidence that in Kenya issues have to do with complexities and costs involved in registering business names, obtaining licenses, and obtaining legal title to business sites are still rampant (Stevenson & St-Onge, 2005).

In relation to benefits of registration, figure 2 shows that in both Uganda and Kenya most youths did



not perceive any benefits accruing to business registration (25% and 35% respectively). However, among the youths who perceived some benefits, majority were from Kenya (27%) while most of the youths who did not know whether registration had

benefits were Ugandans (27%). These findings, especially the last one suggest some degree of ignorance among Ugandan youths regarding business registration.

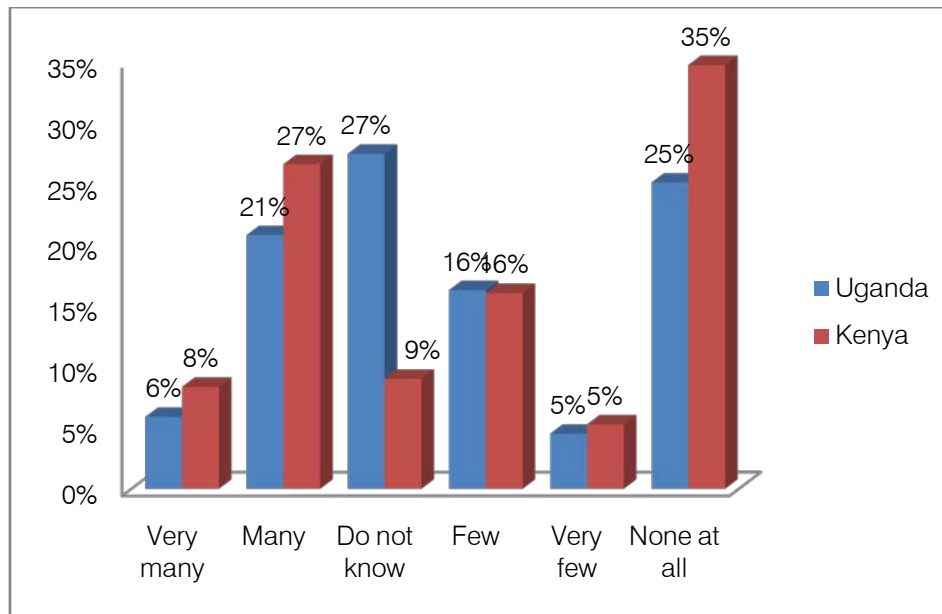


Figure 2 : Benefits of registration

#### a) Rights

The study also aimed at comparing the perceptions of both Ugandan and Kenyan youth entrepreneurs regarding rights to own property compared to urban youth. The results summarized in figure 3 show that generally in Uganda up to 77% of the

youth felt had equal rights as the urban youth. Compared with the Kenyan youth who largely felt did not have equal rights as the urban youth, the perceptions of Ugandan youth were positive. These differences could reflect the extent of information dissemination about property rights in both countries.

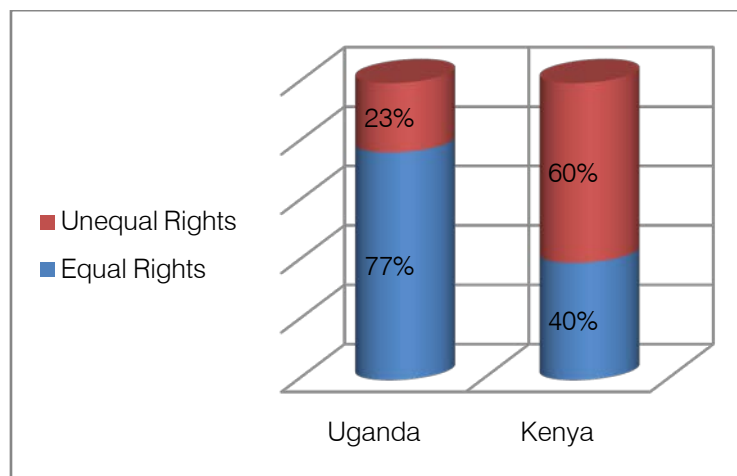


Figure 3 : Rural youth perception of equality in property rights with urban youth

However, whereas the rural differed in opinion about property rights in the countries, they did not differ in opinion about the equality in sharing opportunities with the urban youth. They both felt opportunities were skewed in favor of urban youth. More than 54% of youth in both countries did not imagine any opportunity equally shared with the urban youth. The views given in

support of this opinion ranged from lack of resources, exposure to differences in education and skills. The rural youth perceived themselves as fairly disfavored in the areas of access to resources such as capital, business development services, training and business information.

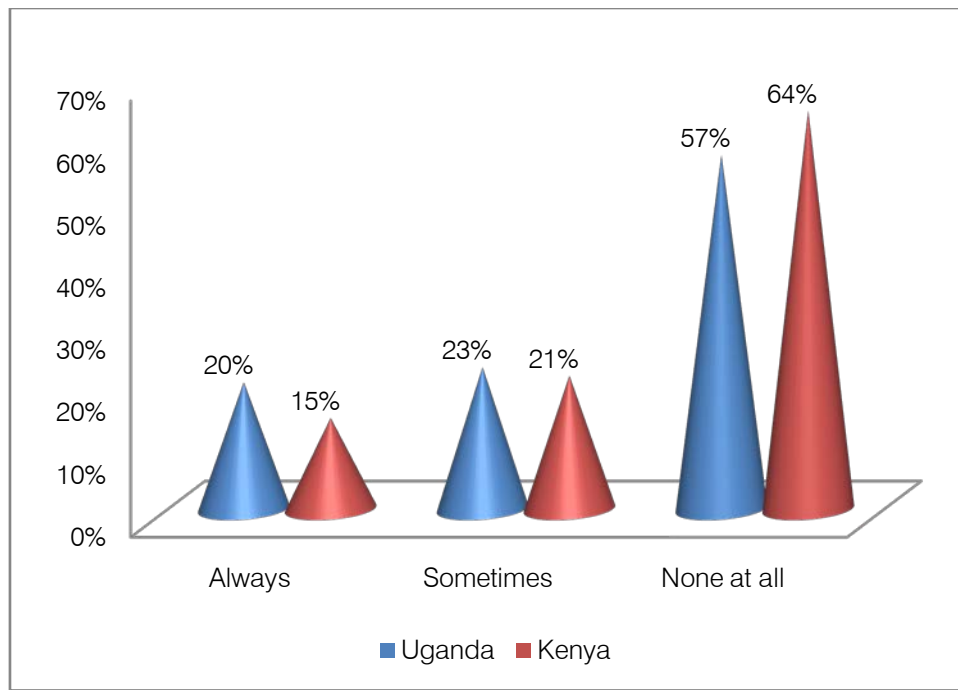


Figure 4 : Rural youth perception of equality in property rights with urban youth

#### b) Justice perceptions

The study further aimed at comparing rural youth perception of commercial justice. Figure 5 reveals

that there were marked differences in both countries regarding this aspect of business.

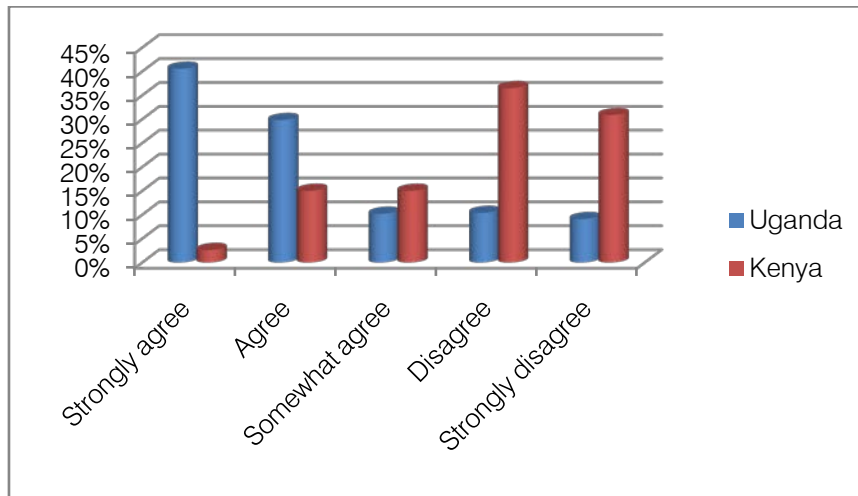


Figure 5 : Commercial Justice perceptions among Ugandan and Kenyan rural youth entrepreneurs

Whereas majority of Ugandan rural youth believed that commercial justice existed in Uganda and favored youth in times of business disputes (about 80%), in Kenya there were very few rural youth that believed justice existed. Up to almost 65% of the rural youth in Kenya perceived existence of commercial injustice which disfavored the youth. These differences may reflect differences in reforming of justice systems in both countries.

## VII. COMPARISONS OF RYE SOCIAL-ECONOMIC ENVIRONMENT

#### a) Training

Further comparisons of Ugandan and Kenyan rural youth entrepreneurs revealed marked differences in levels of attainment of business skills training.

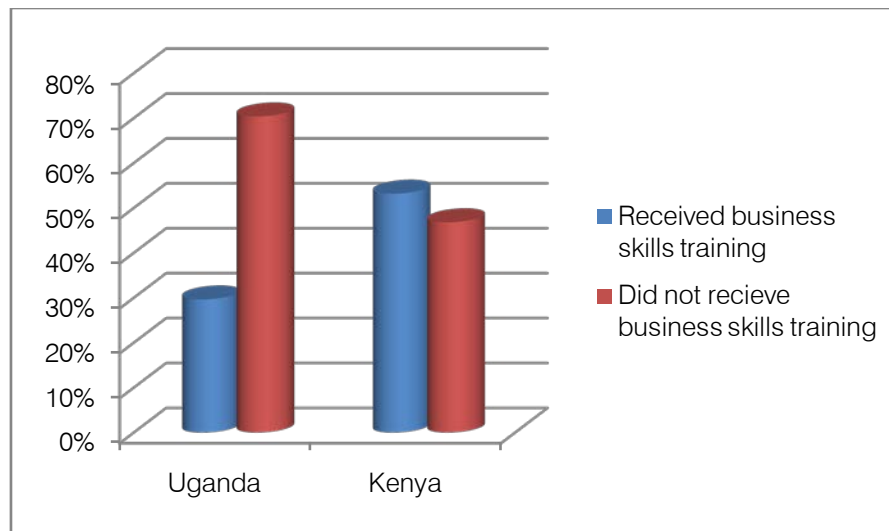


Figure 6 : Business Skills training among rural youth entrepreneurs in Uganda and Kenya

As seen from figure 6, in Uganda almost 70% of rural youth entrepreneurs had never received any business skills training. In Kenya however, the proportion of youth that had received training was almost equal to those who had not received. To some

degree therefore, Kenyan youth seemed to have received more business skills training than their Ugandan counterparts. The key question then was the kind of training they had received.

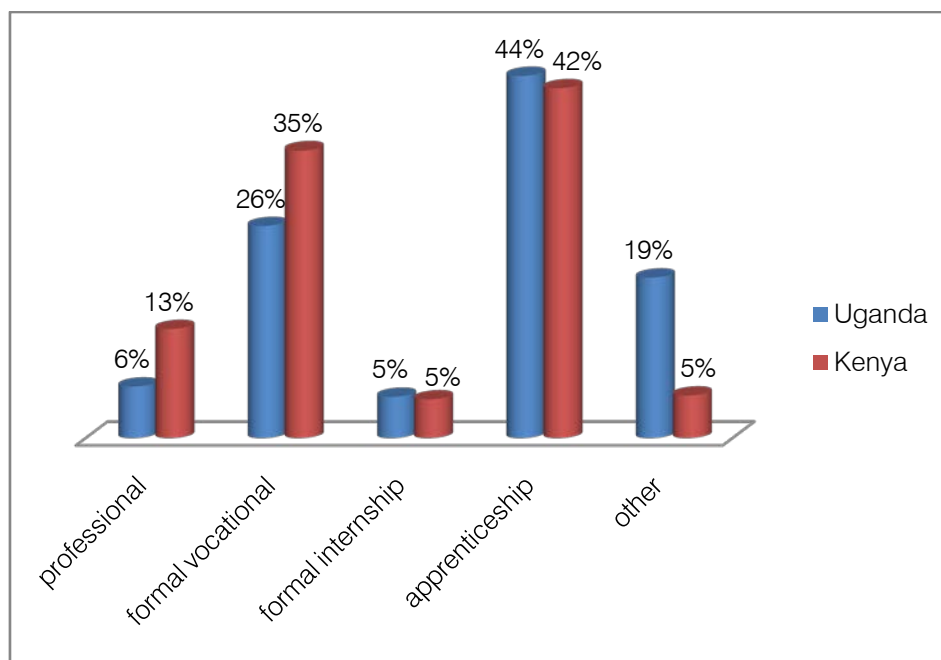


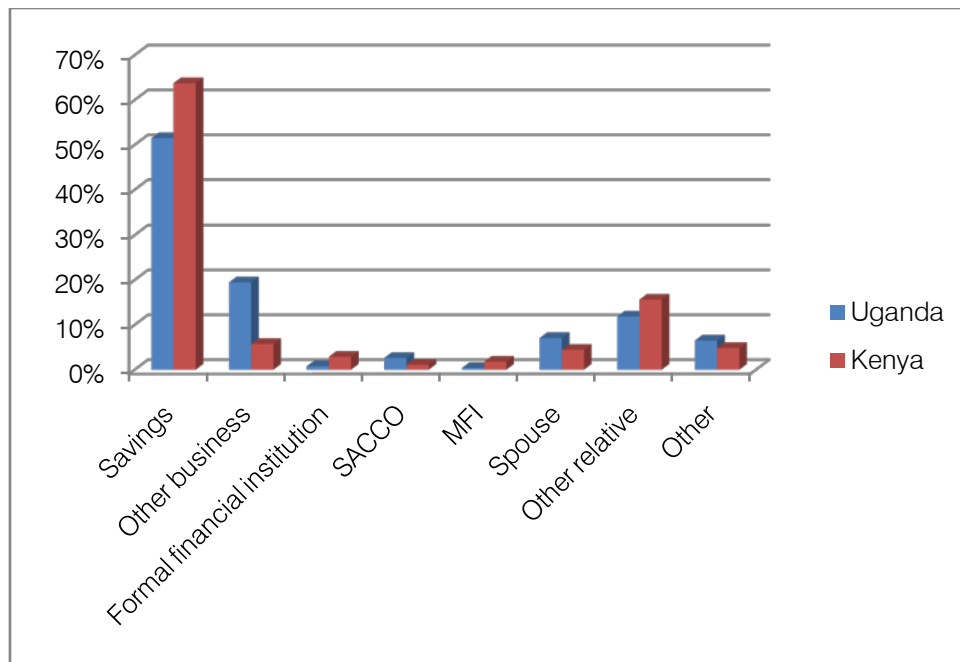
Figure 7 : Type of training received

Figure 7 reveals that in both Kenya and Uganda, apprenticeship was a predominant form of business skills training, accounting for 43% of the received training. In Kenya however, formal vocational training was greater than that of Uganda by a margin on 9%.

capital but in Kenya youths used more savings than in Uganda. The figure further shows that savings, other business and other relative were the three most used sources of business finance.

#### b) Source of finance

It is revealed from figure 8 that in both countries, rural youth entrepreneurs used savings for start-up



In both countries, it is revealed that rural youth did not use formal financial institutions, SACCOs and microfinance institutions to obtain finance for their businesses. This finding may be explained by the remoteness of rural youths that this study interviewed. However, the youth claimed not have the required collateral for securing financial assistance. The use of own savings and failure to borrow due to lack of collateral may suggest something negative about the profitability and growth potential of rural youth enterprises.

#### c) Social networks

A comparison on belongingness to social networks revealed that in both countries half of the rural

youth entrepreneurs belonged to associations. For non-members, reasons varied. In Kenya it was "I don't want" while in Uganda it was "I don't know where". Focusing on the benefits of social networks, figure 8 shows that more than 64% of rural youth entrepreneurs joined social networks for financial support. A few of them cited benefits relating to information and ideas as well as social support. The predominance of financial support indicates the stronger needs for finance among rural youth in both countries, suggesting a need for deliberate interventions. Such interventions are needed because financial institutions and MFIs seem less interested in lending to rural youth.

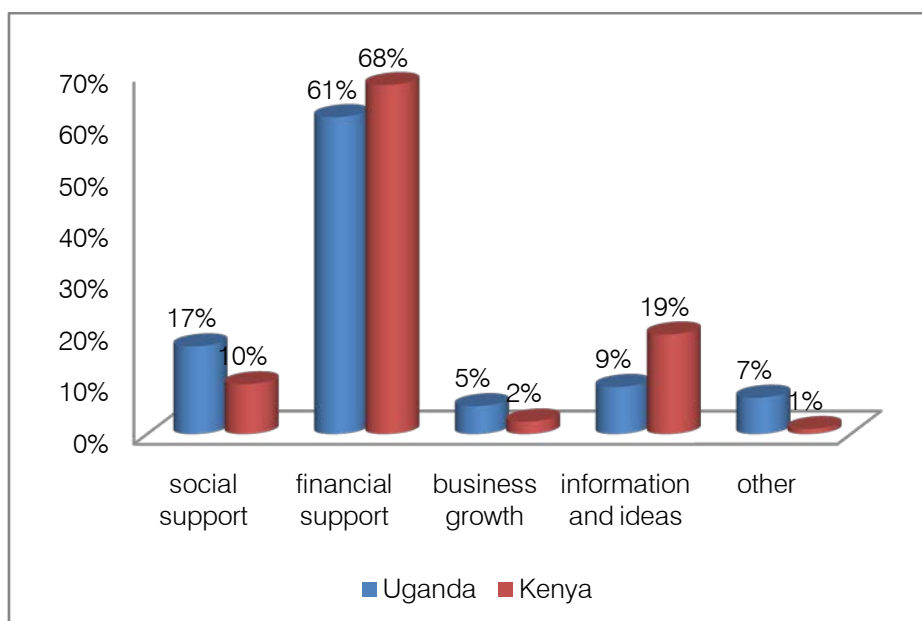


Figure 8 : Benefits of belonging to social networks among rural youth in Uganda and Kenya

## VIII. CONCLUSION AND RECOMMENDATIONS

Findings reveal that there are differences among RYE in both countries in the demographic aspects of gender, level of education, marital status and household headship. Nevertheless there are similarities when it comes to RYE perceptions of the business environment especially in terms of how they acquired their business, understanding the benefits of business registration, property rights and Justice perceptions. Findings also revealed that both countries shared some challenges like high business closure rates, limited access to funding and business skills training; while other challenges were country specific such as having unregistered businesses in Uganda which may be attributed to the bureaucratic procedures associated with registering a business and the ignorance of registration benefits. There is also limited representation of women low levels of education among the RYE in Uganda. Whereas, in Kenya RYE challenges include high business closure rates and commercial injustice.

This research therefore provides several important implications for practice. Broadly, it highlights the strategic value of viewing RYE as contributing to economic development. That is, it is neither enough for advocates of youth empowerment to focus on advancing their rights, nor is it sufficient for them to design youth policy regarding entrepreneurship based on a need to meet the millennium development goals, although both are beneficial independently. Rather, they must balance their efforts to ensure that they develop an enabling environment that will encourage business start ups and support and grow existing businesses among the rural youth. This may be done by facilitating linkages between RYEs and financial institutions, successful business mentors and providing them with the requisite soft skills training and business advisory services.

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## Entrepreneurship in the Society of Spectacle: Soccer Management in a Globalized World

By Roberto Bazanini, Ademir Antonio Ferreira & Homero Leoni Bazanini

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**Summary-** The arising of business globalization in recent decades changed the market of symbolic goods, in the soccer field, in a billionaire and complex business. These factors led to radical changes in the form of consumption of this sport, which generated a great increase in revenues to the teams, grounded in marketing models of major European leagues. Through descriptive research, ex-post-factum, using the technique of in-depth interviews with managers and project participants for subsequent content analysis, this research sought to identify the strategies employed to value the Corinthians brand (soccer team from São Paulo, Brazil) in a perspective of business strategy. The survey results, point out the importance of entrepreneurial vision to explore the valuable, rare, inimitable and irreplaceable resources present in VRIO model, as stated by the Resources Business View (RBV) theory, to achieve differentiated positioning. Limitations of the research are in proper character of the phenomenological method that favors the rescue of "original speech" of the project participants as it was done in this case. So it is not recommended one could make generalizations of the results presented, although it represents a significant and real context of soccer business in Brazil.

**Keywords:** *entrepreneurship, innovation soccer management, equity brand.*

**GJMBR - G Classification :** *JEL Code: L26*



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# Entrepreneurship in the Society of Spectacle: Soccer Management in a Globalized World

Roberto Bazanini<sup>α</sup>, Ademir Antonio Ferreira<sup>σ</sup> & Homero Leoni Bazanini<sup>ρ</sup>

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## 1. INTRODUCTION

In our contemporary society, increasingly discusses the market potential of the related segments to symbolic goods as an instrument of cultural development and expression.

Commonly, in some human activities sectors (religion, politics, entertainment, sports, etc.), the principle for the development of symbolic goods system production emerges parallel to the process of product differentiation. According to the diversity of public, the producers designed their products and the conditions for its possibilities may be found in the very nature of symbolic goods.

Symbolic goods are valued as a commodity and are loaded with meanings and if the commodity character's the cultural character remain relatively independent in one hand, on the other, are intrinsically related by its profitable character.

Concerning the homology between fields (religious, artistic and sports), artists (actors, dancers, musicians, preachers etc.) and athletes (footballers, pilots, boxers ...), they are equivalent, since there is

segment (BOURDIEU, 1997, 1999; Heinrich, 2001 and Moulin 1997).

The actions of their entrepreneurship leaders are directed to create and enhance brands in this increasingly competitive and cannibalistic market, so usually these actions are bold and combative in defense of the organizations they represent. (MARQUES, 2013).

The market of symbolic goods skyrocketed as a entertainment industry, in which, art becomes a commodity and entertainment can be considered a way to socialize people, and the audience is no longer passive, mainly due to social networks.

In recent decades, many companies arouse promoting shows related to religion, sports, pop artists, concerts, etc., in which the role of the media becomes crucial for such disclosure, since it is not only necessary to transmit information about the events, but rather, to create meanings for marketing purposes. In the words of Bourdieu:

*"To hide, showing something different than would be necessary to show, if he only did that supposedly does, that is, reporting; or showing what it takes to show, but in a way that is not shown or becomes insignificant, or building in such a way that it acquires a meaning that absolutely does not correspond to reality."* (BOURDIEU 1999, p. 25).

This discrepancy of the media, mainly facilitated by the technological advances, resulted in, with the advent of globalization in recent decades, expanding markets as a speed never imagined. Particularly the market of soccer symbolic goods became a billionaire and complex business, facilitated, among other factors, by the development of media communication, mass pay-tv (cable and satellite), creation of pay-per-view, and modernization of stadiums and arenas all over the world.

Contemporaneously, in soccer symbolic goods market, Sport Club Corinthians Paulista management is an instructive example of effective actions that provoked changes in managing the team and all symbolic goods related to brand "Corinthians".

Based on a functionalist and managerial vision, without neglecting a critical reading, the research objective is to identify the factors that allowed the appreciation of Corinthians brand in the competitive market of symbolic goods soccer.

Through descriptive research, analysis ex-post-factum, the research problem is to find answers to the

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question: what were the determining factors for valuing Corinthians brand and how these actions influenced the club itself and competitive result of the strategies employed by its management?

In strategic terms, the vision of entrepreneurial school proposed by Mintzberg (2000) and the VRIO model (Barney, 1997) accompanied by Collins and Montgomery Test (2005) provides theoretical elements to analyze the audacious vision of management which breaks the usual practices to propose actions for risks, strategic vision based on the development of rare, inimitable and irreplaceable resources as the key to organizational success.

Thus, the study of S. C. Corinthians management in the period 2007-2011, allows us to analyze the factors that led to radical changes in the form of "soccer consumption" and the chains of relationships that have resulted significant increase in revenues to soccer teams, grounded in marketing models of major European soccer leagues.

The contribution of the research lies in providing elements for a better understanding of entrepreneurial activities and business strategies employed in soccer symbolic goods market which is an important sector of economic activity and should greatly interest to scholars and researchers in the field of business strategy.

## II. LITERATURE REVIEW

Publications about the soccer market of symbolic goods have grown substantially in the last two decades. There is a lot of publications in the areas of physical education, sport psychology, anthropology, marketing, business management, among others.

Regarding the objective of assisting the task of answering the research question presented, were selected chronologically, among these publications, books, journals, dissertations and theses considered relevant to the research and whose were more directly related to the strategies employed by European and Brazilians soccer teams.

In the past decade, Leoncini (2001), was one of the first researchers to study deeply the professionalization of the sport by analyzing the strategies employed by European teams and discussing the transformation of the managerial model for soccer clubs that seek to professionalize its activities in the new context of the entertainment industry. He presents such results as the need for an effective strategic positioning by Brazilian clubs considering the internal and external forces, opportunities and threats in the market. He also compared strategies developed by Manchester United from Great Britain, C. R. Flamen go and São Paulo F.C. from Brazil.

In the following decade and in the same way of thinking, Jennings (2011) made a historical retrospective of the power achieved by the FIFA to market the soccer

game as a spectacle rather than competition. He concludes that business management has become more important than the rules of the game. Damo (2011) in an anthropological perspective discusses the major events and how sporting events can be thought as symbolic goods converted into commodities, specifically the control of FIFA in the World Cup, their merchandise more valuable. Matheson (2012) considers the leagues, the club owners and the mega-events promoters themselves as having a logical interest in maximizing the economic impact to justify heavy public subsidies involved. Going (2012) discusses the impact of sports in all sectors of human activity and its allure to the broad spectrum of the social sciences. Santos (2011) identifies the strategies used in the transition and formation of the club as an enterprise and describes the business strategies used in sporting organizations, showing that the source of competitive advantage comes from the synergy with partners. Associating skills, differentiation in the view of management and training for athletes in younger categories is a way to reach a sustainable goal and obtain an effective low cost for businesses, besides the use of the power of branding. Wilches (2012) emphasizes the music present on soccer stadiums that act strongly on the emotions and fantasies of fans, creating strong emotional dependence, similar to the military and nationalistic parades. Marques, Gutierrez, Ettine (2013) discusses the power of the CEOs soccer clubs that are part of professional elite by owning a symbolic capital and the managerial capability of generating profits in a club-company. Fagundes et al (2013), analyzes the main reasons, in a marketing perspective, that influence fans to attend football stadiums.

As the central aim of the research is to identify the factors that enabled the enhancement of brand Corinthians, were selected publications with two different approaches in the soccer symbolic goods: critical analysis inspired by a Marxist view and a managerial analysis vision that prioritize marketing culture character, as a way to move beyond an apocalyptic conception or integrated design of this market. (Eco, 1979).

In this view, "apocalyptic" are those critical who condemn the mediaas mass producers alienation of the people and "integrated" are those who acquit.

For the purpose of this paper, we consider that the "apocalyptic ones" are wrong because they consider the culture of alienating mass, simply, by its market character. The "integrated ones", in turn, are usually wrong because they forget that mass culture is produced by groups of economic power driven by profit. In fact, there is the attempt to maintain the interests of these groups through the media itself. Therefore, the two approaches were contemplated.

a) *The market of symbolic goods*

Bourdieu (1999) states that a symbolic good configures itself when an artistic or cultural object is assigned a market value and is raised, by the laws of the market, to a merchandise status. Due to these objects is formed a consumer group, as well as producers of symbolic goods, that are commonly seen in the same way "totems" are worshiped in native societies found on some continents of the Earth.

Durkheim (2003) made numerous comparative reflections for understanding the "totemism", from the way the French people worshiped symbols of the French Revolution, no longer different from the treatment of totemic animals by native Australians.

In this conception, the market of soccer symbolic goods, looking forward to the public receiver, operates substantially as at totemism market, justified by the way the modern fan deals with symbols representing teams which he is identified. In the manager's view that understands this context, open itself the perspective of a broad spectrum of strategies trying to become soccer a recognizable sport, through certain signs with which fans should be identified in this society of spectacle.

The term "society of the spectacle" (la société du spectacle) was created by the philosopher Guy Debord, in November 1967 to define more specifically the environment of the game (or other events), and sought to reinvigorate marxist theory and revolutionary praxis, in a context so quivering as stifling in the postwar situation.

For Debord (2003) modern conditions of production represent the accumulation of spectacles. The reality is fragmented and the show is part of society because it concentrates the entire look and all the consciousness. But, by being separate, the spectacle becomes the focus of the deceived gaze and the false consciousness. It is a social relation among people, the media disseminates through images that form a crystallized vision of the world.

*"The spectacle, understood in its totality is both the result and the project of the existing mode of production. It is not a supplement to the real world, a decorative ornament. It is the heart of the unreality of the real society. In all its particular forms of information, or advertising, or direct entertainment consumption, the spectacle is the present model of a socially dominant life. It is the omnipresent affirmation of the choice already made in production and its corollary - the consumption. The form and content of the show are total justification of the conditions and purposes of the existing system. The spectacle is also the permanent presence of this justification, as the main occupation of the time lived outside of modern production."* (Debord, 2003, p.15).

Advertising, as a tool for modeling and reforming patterns of worship and veneration (in many cases unconscious), is criticized in Marxist point of view,

as an important determinant of being and social action alienated. Yet, it represents, paradoxically, inverse faces of the same homogenizer process, filed in the supposedly civilizing march of capital, e.g., these are the new narcissistic patterns of consumption in which the masses are alienated and hypnotized by artificial needs that serve to produce the profit for capitalist and preservation and exploitation of the dominated class.

*"One cannot, abstractly, oppose the spectacle to effective social activity; this development is itself unfolded. The spectacle which inverts the real is produced so that The lived reality is materially invaded by the contemplation of the spectacle, remaking itself the spectacular order for positive adhesion. Objective reality is present on both sides. The target is to pass to the opposite side: reality emerges in the spectacle, and the spectacle becomes real. This reciprocal alienation is the essence and sustenance of existing society. In a inverted world, the true is a moment of the false. The spectacle presents itself as something great, positive, indisputable and inaccessible. Their only message is 'what appears is good, what appears is good.' The attitude which it demands in principle is passive acceptance that, in fact, it has already achieved to the extent in which appears without reply, by its monopoly of appearance."* (Debord, 2003, p. 16:17).

In the above statements referenced transpires the fetishist and aesthetic character of contemporary capitalism, where "to possess" is inflated by consumerism, and the dimensions of entertainment and consumption are directly related; leisure and entertainment have become "consumer goods".

The spectacle, considered the limited aspect of the media (mass media), provides one-way communication, in which the individual has no power of reasoning. This is a condition of alienation as an imaginary extension to the poverty of real social activity.

In this context, the spectacle is the moment when the merchandise has permeated all areas of human existence and sociability, saturating the logic of fetishism from capital. "To possess" turns in "to seem". Money and capital as social systems of historical capitalism are closely linked to the perpetuation of an alienated society, conditioned to capital and formation, reproduction and transformation processes, within the logic of circulation and consumption model.

As a result, today's society has pseudo-needs imposed by modern consumption. This is not true desire, but necessity of accumulation imposed by the spectacle. Based on the society of the spectacle, corporate business strategies guide the actions of marketing. The aim of strategic actions is alienated public, which sees in the idol the satisfaction and the realization of personal desire. It is a mirror, something that the individual aims for himself. But the impossibility



to perform what he wants, he is content to deceive and buy goods imposed as satisfaction of desires.

Contrary to the critical view of Marxism, the commercial conception of culture legitimizes the fulfillment of desires as market opportunities. In the market of soccer symbolic goods this concept can be exemplified by the purchase of the shirt of an idol, e.g., when buying a shirt Cristiano Ronaldo, fans not only buy a shirt, but the magnitude imposed by the name and fame of the player. It's not only a purchase, but the closer step in the realization of a wish. However, it is not possible to satisfy your dreams, because many do not even know the difference between what are their true needs and those imposed by the spectacle to fill the existential void. The emptiness and the search for 'something more' make the mighty spectacle.

*Celebrities do not emerge spontaneously from the common people, on the contrary, they are, to some extent, a "cultural production", created by a series of public relations officers at the fashion world and other professionals specialized in "management image". (WAGG, 2006, p.351).*

The players are transformed into 'cabaret stars' in the spectacle society and they have a role to play. Buy a shirt, watch a game and purchase products of the club or the players makes one see as an integral part of the show, giving him a feeling of 'status', which makes up the success promoted by the spectacle.

The synthesis proposed by Debord (2003, p 39) in the early 60s, remains valid: *"the root of the spectacle*

*is in the field of economics that became abundant, and then come the fruits that tend, ultimately, to dominate the market spectacular".*

The commercial character of sport has made the amateurism replaced by the professionalization of sports management that occurred all over the world. Striking and successful examples are found in USA, (NBA-National Basketball Association, NFL-National Football League, BML-Baseball Major League, etc.) and in Europe (FIA-Fédération Internationale de l'Automobile, FIFA (Fédération Internationale de Football Association, Barclay's Premier League, UEFA-Union of European Football Associations, etc.) which promote events of high profitability, that reach audiences of all socio-economic classes. In this sense, we can refer the concept proposed by Oliveira and Pozzi (1996), in which, besides sports sponsorship, sports marketing now includes different events, including testimonial athletes, alloying and media at sporting events.

Particularly, the spectacle of soccer provided within the four lines of the field gains greater coverage by the scope of marketing, surrounded by advertising and by the ones who promoted the games, generally, players comparable to the status of Hollywood celebrity.

In relation to the market producer, the competition factor becomes a zero sum game, or in other words, the gain of one means losses for the other, as presented in Chart 1.

*Chart 1 : Considerations about symbolic goods market*

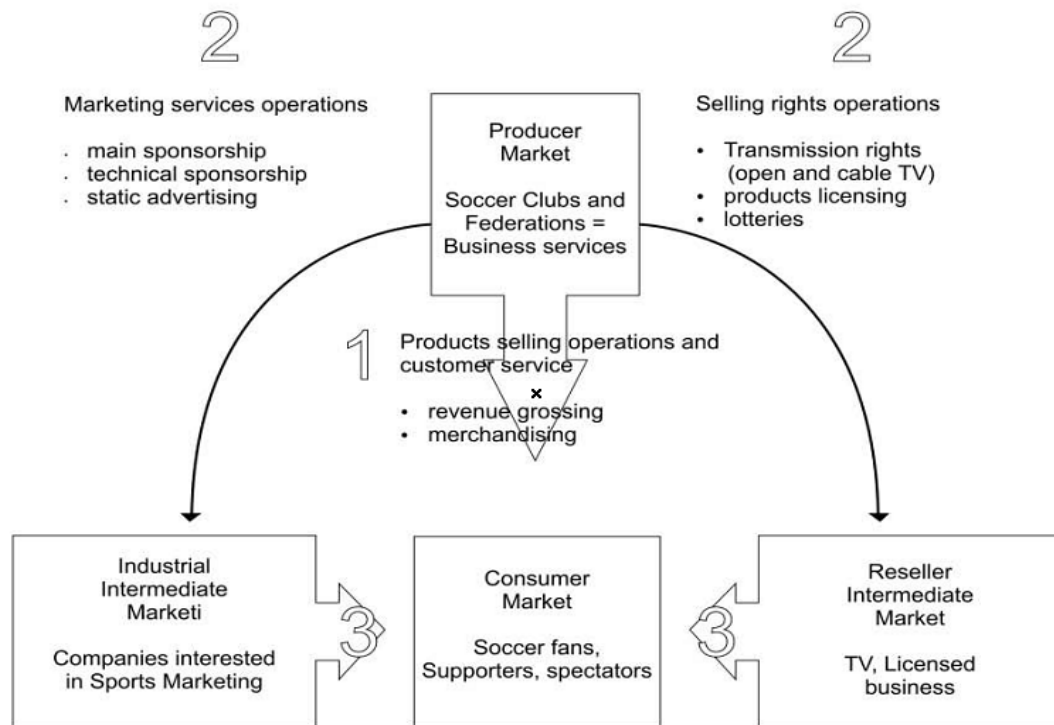
1. All organizations managing symbolic goods are in constant struggle for the mind of the consumer;
2. What an organization gains in membership represents losses for other competitors;
3. How to consumer behavior such goods tends to irrationality, it is quite common to use techniques in order to achieve psychological membership;
4. On due to the very cannibalism of the market, often the option to terminate the competition is the only way to survive.

*Source: Bazanini (2005, p. 179)*

For this reason, managers of soccer spectacle are attentive to the possibilities of profiting economically with existing links between relatively autonomous symbolic systems that make up the relationship chain of soccer.

#### *b) The networking in the world of soccer*

The networking is a special issue in the soccer business, because the element present in the production/business chain, form the main link that directs and organizes the raw material (soccer) of great value to the customers who buy several soccer-related products and services in three reference markets: industrial intermediate market, consumer market, broker resale market, as shown in Figure 1.



Source: Aidar (2000)

Figure 1 : Structure of Integrated Market in the world of soccer

As necessary support to meet the fans or admirers of soccer, the intermediate market represents the market in which customers buy exploration and broadcasting rights of games and sports marketing services, in order to resell them to the consumer market.

This resale may occur both in relation to the industrial middleman, when using any of the activities provided by the sports marketing organizations both for promotion, advertising, media exposure, etc., The resale intermediary can use the sale rights to sell a championships, or the club brand via broadcasting games or by lotteries, as well as, licensed products and even sell advertising space in the schedules of sporting events.

In the case of Brazilian soccer teams, S. C. Corinthians Paulista is instructive example using of

functional strategies in conjunction with the business strategy to achieve competitive advantage through branding equity.

c) *The brand on the market of soccer symbolic goods*

Actually, the soccer clubs participate the world economy, moving sums, often very high, either in revenue from advertising, ticket sales, marketing of products from club's brand, transmission rights to broadcast the matches and the transfer of the players.

According to research developed by BDO RCS, independent auditors commissioned by the State of São Paulo Journal News, Brazil is the sixth largest soccer market, as presented in Table 1.

Table 1 : Values busiest in the soccer world

Ranking	Country	Revenue (€)	Revenue (R\$)
1º.	Inglaterra	□ 2,48 bilhões	R\$ 5,7 bilhões
2º.	Alemanha	□ 1,65 bilhões	R\$ 3,8 bilhões
3º.	Espanha	□ 1,61 bilhões	R\$ 3,7 bilhões
4º.	Itália	□ 1,52 bilhões	R\$ 3,5 bilhões
5º.	França	□ 1,04 bilhões	R\$ 2,4 bilhões
6º.	Brasil	□ 0,65 bilhões	R\$ 1,5 bilhões

Source: Exame.com (2012)

The brand valuation of Brazilian soccer teams grew sharply in the last four years, as it showed in Table 2, in percentage terms, the brand value from the 10 major soccer teams in Brazilian League, in the period 2009 – 2012. It is expressive the growing of the E. C. Bahia brand performance, although “Corinthians” brand remains as the most valuable in the League, surpassing de mark of R\$ 1 billion in 2012.

The beginning of the climb brand occurred in 2008 with the repercussions of hiring Ronaldo Nazario, former player from Barcelona and Brazilian National Team. Ronaldo was at the end of his career, but enjoyed enormous prestige at the Brazilian and international crowd. It must be noted that Ronaldo was one of the athletes employed by Nike, more than a decade ago, as its “ambassador” around the world.

*Table 2:* Evolution of the Brand Equity of Major Brazilian soccer clubs

Soccer Team	2009	2010	2011	2012	% Growth (2009-2012)
Corinthians	562,6	749,8	867,0	1005,5	78,72%
Flamengo	568,1	625,3	689,5	792,0	39,41%
São Paulo	551,9	659,8	664,2	771,0	39,69%
Palmeiras	419,6	444,1	452,9	481,9	14,84%
Internacional	230,9	268,7	277,9	392,7	70%
Santos	135,1	153,3	227,9	341,6	153%
Vasco da Gama	121,9	156,5	162,5	316,7	160%
Grêmio	213,7	222,8	224,6	316,1	47,92%
Cruzeiro	138,9	139,6	151,3	205,0	47,59%
Atletico – MG	91,8	110,3	150,5	179,01	96,54%
Fluminense	108,5	104,2	135,7	157,4	45,06%
Botafogo	97,1	89,9	90,7	112,6	15,96%
Atlético -PR	55,9	67,7	75,6	86,9	55,45%
Curitiba	53,5	53,4	54,1	83,3	55,70%
Bahia	13,6	20,8	28,5	55,0	305%
Vitória	28,8	36,7	40,8	42,3	91%
Sport Recife	35,2	37,3	39,3	41,9	19,03%

*Source: Correa da Silva (2012, p. 77)*

#### d) Business Strategy

Returning to the theory of soccer symbolic goods market, the growth of brand value can be analyzed from the premises proposed by Thompson (2004) and Hirschman (1995) who conceive the market as numerous symbolic resources provider, through which consumers construct their identities and collective discourses, and contest competitors.

Andrews (1991) sees strategy as a decision model, influenced by culture and values, built when the company proves to be reliable. Henderson (1998) understands the vital task of the strategy to increase the scope of the competitive advantage of the organization, through the analysis of competitors. Mintzberg, Agle, Wood (2000), when referring to the “power factor”, define the strategy formation process as open to

influence, emphasizing the use of power and politics to negotiate strategies favorable to particular interests.

Considering the breadth of strategy understanding, it is possible to relate the assumptions of entrepreneurial strategy with the precepts of the RBV Model VRIO and in this way, agree with Imasato and Misoczky (2005), when they states that the power is a scarce resource and limits the possibilities of competitors.

It is generally said that the strategy is responsible for guiding the business in the environment composed of consumers, markets and competitors, and should consider the corporation of which it is part. In management terms improving the performance of organization sincreases the range of choices to define strategies.

Business strategies are formulated to find the best arrangement of these resources, seeking ways to add value to the company without necessarily losing its competitive edge over the competition.

i. *Perspective of Entrepreneurial Approach*

While cautioning that the process of strategy formation centered in a single person (usually the

visionary leader and manager of the business), can lead to a strong dependence on the leadership at the expense of a participatory process, Mintzberg, Agle, Wood (2000) states that, to be effective, the process of formation Entrepreneurial Strategy must meet six basic assumptions that are presented in Chart 2.

*Chart 2 : Assumptions of the Entrepreneurial Approach*

1) The strategy exists in the mind of the leader as a sense of direction in long-term or a future vision of the organization;
(2) The process of strategy formation is rooted in the experience and intuition of the leader whether he is the creator or not;
(3) The leader promotes the view decisively, monitors its implementation and its reformulation as needed;
(4) The strategic vision is flexible leading adaptive strategies to the global vision and resulting breakdown of the vision;
(5) The organization is also flexible and features simple structure privileging the visionary leader and leaving him free to devise and implement their ideas; and
(6) Entrepreneurial strategy tends to take a foothold position within a protected niche against competition.

*Source: elaborated by the authors. (Mintzberg, 2000)*

Therefore, entrepreneurial strategy requires general view of the whole competitive process, encompassing, logically, relation with the levels of power in the organization.

ii. *The Resource-Based View*

While the Porter's strategic model (1998 p.13-23) and generally the Positioning School, were arrested especially in the analysis of the external environment and identification of competitive forces, Prahalad and Hamel (1998) favoring the internal focus of strategy formation, with the idea of core competence.

The core competence of the organization refers to its continuous learning, the ability to integrate different technologies, the degree of communication and involvement and commitment found among the members, which is a sustainable competitive advantage as a result of 'collective learning' organization. This latter aspect occurs specially on how to coordinate diverse production skills and integrate multiple aspects of technology, requiring communication, involvement and deep commitment by working through organizational boundaries.

The main assertion of the Resource Based View (RBV) considers that the source of competitive advantage lies primarily in the resources and skills developed and controlled by companies and, only secondarily, in the structure of the industries in which they are (or try to be) positioned. (Wernerfelt, 1984; Peteraf, 1993).

Wernerfelt (1984) states that the resources and capabilities of a company can be easily acquired by their competitors, they cannot be considered a source of sustainable competitive advantage.

From the perspective of Peteraf (1993) the essential features that provide competitive advantage must be scarce, unique and superior efficiency; must have imperfect immobility, difficult to imitate or substitute and limited competition, ex ante, where the prominent position in the industry, regarding possession of their superior resources should not arouse competition for resources and ex post, once acquired or retained should be difficult to imitate, as stated in VRIO model.

The VRIO model can be conceived as a mechanism that integrates two existing theoretical models: the positioning perspective and the resource-based view. It is the primary tool to conduct an internal analysis. Encompasses questions of value, rarity, inimitability and organization.

By integrating the requirements of the external environment and the potential on the internal environment, Barney (1997) points out that for an attribute of the company become resource, should favor the exploitation of opportunities or neutralize threats from the outside environment. Explains that for this reason not all company resources are considered strategically relevant or sources of competitive advantage and sustainable competitive advantage, but only those that can be considered valuable, rare, imperfectly imitable and non-substitutable, presented in Table 3.

Chart 3 : The VRIO Model

<i>Valuable resource:</i> One that is a source of competitive advantage and sustainable competitive advantage by exploiting the opportunities and/or neutralizes threats in the enterprise environment.
<i>Rare feature:</i> One that current and potential competitors have difficulty to possess, because if a great number of companies have the same valuable resource, hardly the resource will be a source of competitive advantage and sustainable competitive advantage.
<i>Imperfectly imitable resource:</i> The resource must submit one of the following aspects: unique historical conditions; link to other resources and/or is based on a socially complex phenomenon. If you have at least one of these three aspects, the valuable and rare resource can be a source of competitive advantage only if the companies that do not have cannot really get it.
<i>Non-replaceable resource:</i> Resource that cannot be replaced by another similar or distinguishing feature, because otherwise, competitors may develop and deploy similar or substitute strategies.
<i>Valuable resource:</i> One that is a source of competitive advantage and sustainable competitive advantage by exploiting the opportunities and/or neutralizes threats in the enterprise environment.
<i>Rare feature:</i> One that current and potential competitors have difficulty to possess, because if a great number of companies have the same valuable resource, hardly the resource will be a source of competitive advantage and sustainable competitive advantage.
<i>Imperfectly imitable resource:</i> The resource must submit one of the following aspects: unique historical conditions; link to other resources and/or is based on a socially complex phenomenon. If you have at least one of these three aspects, the valuable and rare resource can be a source of competitive advantage only if the companies that do not have cannot really get it.
<i>Non-replaceable resource:</i> Resource that cannot be replaced by another similar or distinguishing feature, because otherwise, competitors may develop and deploy similar or substitute strategies.

Source: elaborated by the authors (Barney, 1997)

Thus, if the features and capabilities of a company can be easily acquired by their competitors, they cannot be considered a source of sustainable competitive advantage (WERNEFELT, 1984). The homogeneity of these features makes it impossible to generate differential competition. (HITT, IRELAND, R. D; HOSKINSSON 2001).

In the world of competitiveness, as emphasized by Henderson (1998), "the competitors that get their sustenance in the same way cannot coexist", and at that point the only advantage becomes key to the survival of the organization. Therefore, increasing the scope of competitive advantage is seen as the goal of strategy, but to propose any action without analyzing the environment and without knowing the nature of the competitors to formulate a strategy is a risky decision.

The decision about soccer symbolic goods to be effective must be related to the search of rare, valuable, non-imitable and irreplaceable resources, since these issues provide psychological support of society as a form of entertainment and pleasure seeking. This psychological public support provides the branding, which in commercial terms is reflected to the club in sponsorship, product sales, merchandising, advertising, etc.

### III. RESEARCH METHOD

The case study is an empirical inquiry that investigates a contemporary phenomenon within a real life context, mainly when the boundaries between phenomenon and context are not clearly evident and in which multiple sources of evidence are used, (Yin 2005, p.23).

The objective of this case study was to identify the determinants of brand enhancement "Corinthians", during the management period 2007/2011.

Through descriptive research, post-factum analysis in a phenomenological perspective, using the in-depth interviews, this study is fundamentally tied to the perception of managers and participants of the project in relation to the strategies employed by the club. Descriptive research seeks to find explanations of the causes and consequences of a particular phenomenon (Richardson, 1989).

According to Malhotra (1996), the in-depth interview is characterized as direct, personal and unstructured, in which a single respondent is asked by a skilled interviewer, with the goal of revealing motivations, beliefs, attitudes and feelings about a certain topic. In



the same line of reasoning, Boyd, Westfall, Stasch (1989) consider that the in-depth interviews should be conducted without formal questionnaire, but from basic script according to which the respondent is influenced to express freely on the topics covered, allowing to discover the implicit and determining factors in the phenomena studied.

The group interviewed was composed by the chief marketing officer, the director of land sports and 20 supporters of one of the fan groups accompanying the team in every game. This group of respondents was considered acceptable, since, as the recurring responses was achieved, it has been evidence that the number of people is already sufficient, because there was reached the saturation point (Duarte, 2002).

Consistent with this premise, after the transcripts of the interviews, it was possible to identify symbolic patterns, categories of analysis of reality and worldviews of the case, to satisfy the research objectives.

The technique of content analysis (Bardin, 2002) allows to extract the essence of the perceptions of the managers interviewed in relation to the research assumption. These perceptions highlighted the actions taken in relation to the situation encountered in the previous administration, in relation to internal stakeholders and external audiences.

In the content analysis, the unit record (UR), although variable size, is minor clipping semantic that is freed from the text: it can be a keyword, a theme, objects, characters etc. Likewise, unit context (UC), in short, must understand the recording unit, like the phrase for word. In line with the responses of respondents categories and determinants can be related to the URs and UCs.

#### IV. ANALYSIS AND INTERPRETATION OF RESULTS

It should be noted that the interpretation of the data there was no interest in establishing relations between the elements of demographic research for understanding that, at the sample number, this does not becomes imperative to understand the phenomenon studied.

The answers of the respondents initially submitted to the technique of Content Analysis will be now related to Entrepreneurial School (MINTZBERG, AGLE, WOOD, 2000) and the Model VRIO/RBV (Barney, 1997) accompanied by the Collis and Montgomery Test (1995), for finally be compared with the strategic positioning declared by the manager himself and the classic factors in the market of symbolic goods (Bazanini, 2005).

##### a) *Perspective of Entrepreneurial School*

The entrepreneurial spirit is characterized by the willingness to face crises, the exploitation of

opportunities in which one realizes the ability to innovate as a specific instrument and integrated to transform situations.

Regarding the assumptions of entrepreneurial school management, the CEO of the club was characterized by holistic, daring, breakup and commitment to the goals set.

The ideas and thought of the leader led to the sense of direction through actions founded on a new positioning and radical break with the patterns present in the previous administration. The CEO had participated in the unsuccessful former administration of the club. This experience of failure and difficulties was instrumental in the innovation departments which have become professional and updated.

But the most important achievement of this administration was the construction of a modern soccer stadium. In a political move, which involved the former President of the Republic (still very influential in all areas of the current government) and declared supporter Corinthians, the president of the Brazilian Soccer Confederation (CBF), leaders of the International Soccer Federation (FIFA), a company contractor of public works, a State Financial Bank and subsidies offered by the Municipality of São Paulo, the direction of the club could celebrate the construction of its soccer stadium, ambioned for over one hundred years.

The managers pragmatically took bold positions while disguised as alliances with the federal government and the hiring of player Ronal do; those actions that may be considered risky shares calculated difficult for competitors to duplicate.

##### b) *In view of Model VRIO (RBV)*

Regarding VRIO model proposed by RBV theory, in the perception of respondents, the administration of the club knew how to work the valuable, rare, inimitable and irreplaceable resources.

The global prestige of player Ronal do and subsequently its performance in the organs of Brazilian Soccer Federation and International Soccer Federation, extended the prestige for the club. The other valuable, rare, inimitable resource is the Incomparable crowd; numerous, fanatical, always present (nicknamed the FIEL, or Faithful) is absolutely the most important feature of team.

By applying the Collis and Montgomery (1995) tests of the proposed resources to VRIO model, it is possible to conceive the durability of the features, as presented in Chart 4.

Chart 4 : Applicability Collis &amp; Montgomery Tests

1. On regarding to protection or imitation test	Hardly, any other Brazilian club will feature fans so committed as Corinthians crowd;
2. On regarding to durability test	The global prestige player Ronaldo on FIFA and CBF seems to be of long range;
3. In relation to the test of ownership and replacement	Other clubs cannot match this representation in short term.
4. Regarding the best enterprise resource	The crowd, the prestige player Ronaldo and the support of President Lula, are considered rare, irreplaceable and hard to imitate valuable resources.

Source: elaborated by the authors. Collis & Montgomery (1995)

### c) Positioning and features on the market of symbolic goods

The strategies of the business can become enlightening to establish relations with the specificities of this market factors, characteristically cannibalistic.

As previously noted this club administration was preceded by a failed management, which the CEO in question was one of the main directors. The thematic business failure is relatively unexplored in the literature on business (Fleck, 2009; Singh, Corner ePavlovich, 2007; Cardon et al 2012.). Commonly, as warns Cardon et al. (2012), most studies are focused on organizational cases "successfull", and research on failures of the projects are quite scarce.

Regarding the causes that lead to failure of the enterprise, to these behavioral aspects can be assigned as the internal aspects as well as the external aspects of the company.

In this study, we sought to privilege the behavioral causes, to analyze the skills of entrepreneurs on the failure of your business and the reversal of such skills are related to the peculiar characteristics and behaviors of entrepreneurs seeking to achieve the best performance for your business (FLEURY AND FLEURY, 2001).

Minello (2010) explains that many times in a situation of adversity perception of the manager becomes confused due to pressure from other stakeholders in the enterprise, organizational performance will be affected and may cause an interruption in business. Shepherd (2003) Shepherd and Cardon (2009), Ucbasaran et al. (2010), Cardon et al. (2012), in this same line of reasoning, understand that failure tends to trigger negative emotional responses that negatively affect the performance of the entrepreneur.

Contrary to this trend, the marked failure of the last years of the previous administration acted as a stimulus for the next managers overcome the crisis through creative and innovative actions that allowed

unite experience and calculated risk to achieve competitive advantage over competitors in terms of valuable, rare, inimitable and irreplaceable resources (Barney, 1997).

In terms of contribution to the theory of the business strategy, Fillion and Lima (2010) discusses the relevance of studies that seek to understand behavioral characteristics of the individual entrepreneur, in order to contribute to the understanding of which skills may be related to entrepreneurs on success or failure of your business.

In terms of marketing strategies, the old conception of passive and alienated consumer was replaced by participatory vision. Currently, public involvement goes beyond what Bourdieu (1999, p 45), even in decade 60s, called "cartoonish limits of militant, dedicated to an imaginary audience participation". This understanding, is no more the illusory understanding of dispossession in favor of the experts "because, currently, the dynamics of soccer symbolic goods market, fans cannot be considered caricatures, since the term imaginary participation in the sense of false reality, does not correspond the facts, his participation is established and thus have a real dimension, because the symbolism becomes tangible reality to the imagination.

## V. FINAL CONSIDERATIONS

At the end of this article, many learning occurred, many curiosities and new questions appeared, and others remained. Specifically, expectations about the locus of research is confirmed, the market of symbolic goods soccer involves a number of areas of knowledge and involvement of the various spheres of society permeated by consumption and commodification of ever more sophisticated products.

The doubts remained concerning the possibilities of generalization of entrepreneurial strategy for other clubs, since there are different characteristics in each environment, particularly the kind of involvement

and passion of the fans of the Sport Club Corinthians Paulista are hardly found in other clubs.

One of the most obvious difficulties is concerned to the large amount of publications on the subject, which made it impractical, for the purposes of the survey, to list them. So, were selected the publications, somehow deemed relevant for the study of the strategies employed in this case.

The curiosities are focused on the character of the spectacle of symbolic goods in the formation of brand image (BORDIEU, 1999; Debord, 2003;). This character, emphasized by the marketing director of Sport Club Corinthians, to highlight the level of performance created during the hiring player Ronaldinho. His celebrity status in the world of football that even taking part in a few games, his attendance at the stadium just to support the team endowed the game of charm and irreverence;. As one manager said: "competitors did not have similar resources to position their brand with such effectiveness as our club, because there was only one Ronaldinho and he played for Corinthians".

Concerning about it was presented in the course of this study, it can be stated that the term "society of the spectacle" is still relevant and the Knowledge Management in this market requires the ability to involvement of subordinates by the leader for the development of competencies related to knowledge, how to do and how to be (CARVALHO, PASSOS, SARAIVA, 2008).

The study had some limitations that deserve to be discussed. Firstly, respondents were related in some way to the Board of the club, what may represent some sort of narrowing of perception, beyond some enthusiastic praise of the interviewed about the work of managing the club. Secondly, the strategic aspects of the Entrepreneurial School and RBV tend to value the internal resources of the organization, while external aspects do not receive such attention, such as in the areas of Environmental School and School of Positioning. (MINTZBERG, AGLER e WOOD, 2000).

For these reasons, despite the obvious representation of Corinthians mark as one of the biggest clubs in Brazilian soccer world, the results and conclusions of the research can only serve as reference to other soccer clubs through a process of inference and analogy.

For future research, it is suggested that the study of other aspects not covered in this work, like the influence of organized supporters in club management or even business relationship between the players and the direction of the club from the perspective of stakeholder theory.

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# Mediation to *Enforce* Labour Rights: How Far can the European Model for ADR be Beneficial on Employment Disputes

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The globalized scenario has an inherent ambition to melt different cultures, and to pursue an increasing mutual respect amongst different people. The wider recognition of labour rights, together with the combination of economies, social models, religious cultures, leads nevertheless to an increasingly litigious society wherein labour law plays a major influence. Alternative Dispute Resolution (ADR) recall a set of procedural tools introduced to help the judiciary system to make (also) labour rights more speedily and easily recognized, and thus implemented. After a short overview on the ADR context, this paper is meant to particularly investigate weather mediation – as a specific ADR track – represents a way to move forward in labor law, and weather the European legal frame – as nowadays in force – is applicable to any work relations.

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# Mediation *to Enforce* Labour Rights: How Far can the European Model for ADR be Beneficial on Employment Disputes

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The globalized scenario has an inherent ambition to melt different cultures, and to pursue an increasing mutual respect amongst different people. The wider recognition of labour rights, together with the combination of economies, social models, religious cultures, leads nevertheless to an increasingly litigious society wherein labour law plays a major influence<sup>1</sup>. Alternative Dispute Resolution (ADR) recall a set of procedural tools introduced to help the judiciary system to make (also) labour rights more speedily and easily recognized, and thus implemented. After a short overview on the ADR context, this paper is meant to particularly investigate weather mediation – as a specific ADR track – represents a way to move forward in labor law, and weather the European legal frame – as nowadays in force – is applicable to any work relations.

## 1. WHAT EMPLOYMENT MEDIATION IS ABOUT IN EUROPE

“**D**ispute resolution may be viewed from the perspective of economics, negotiation or contract law, or game theory or even military strategy”<sup>2</sup>. Within these possible applications, when employment disputes are at stake (especially where groups of undertakings, small enterprises and self employment are concerned) the “moral” dimension of ADR, meaning morality as the sphere of involvement of the human beings’ dignity, is particularly interesting. The increment in statutory recognition of labour rights, the financial pressure provoking social dumping, while economies and social models (that are always more interconnected) are asked to stay open to a deeper integration, leads to the necessity of a serious consideration of “mediation”, meant as a route to achieve joined solutions, considered satisfactory especially if compared with the long duration of an in-court-trial, also for being more in accordance with the workers’ specific feeling of personal dignity.

Before going into details, let me recall that ADR is the name for very different procedural models aimed at avoiding formal litigation as established in the various

Nation-States, and in such a meaning, it comprehend sets of “ruling procedures”.

Member States have notified to the European Commission more than 400 ADR schemes that they deem to be in conformity with the principles set up in the European Recommendations; nevertheless, ADR mechanisms have been developed unequally across the Union, and the number of ADR bodies, the procedures (arbitration, mediation, etc.), the nature of the initiative (public or private) and the status of the decisions adopted by ADR bodies (recommendation or binding decision) differ from sector to sector and among geographical areas<sup>3</sup>. ADR can be ruled in a way that is strictly connected to the in-court-trial<sup>4</sup>, or they can work as a completely unregulated field (for example Trade Unions ADR schemes can be out from a specific statutory consideration<sup>5</sup>, and in common-law countries many grievance procedures are established just within the management<sup>6</sup>). While considering this patchwork of (procedural) norms, what should be bared in mind in order to focus on mediation, is three main points:

1. Firstly, mediation is a part of ADR as a “*constructive behaviour of both sides on questions which are not worth to fight for*”, and as such it is not like formal litigation nor arbitration; mediation implies a preliminary ability to go out from the dispute itself, the skills to lead the parties to consider the dispute from an outstanding point of view;
2. Secondly, mediation as well as any type of ADR, is ultimately coordinated with the judiciary, the Member State or International tribunals which are supposed to uniformly apply the substantive law where there is no chance to solve a dispute

<sup>3</sup> [http://www.civic-consulting.de/reports/adr\\_study.pdf](http://www.civic-consulting.de/reports/adr_study.pdf)

<sup>4</sup> For example Italian “conciliation” ex art. 412 c.p.c. was meant as a mandatory step to access the trial till 2010, and in some cases still is, while today it is generally facultative.

<sup>5</sup> This is the case of collective arbitration procedures as provided for example by the Basic Agreement for workers’ representative in the Italian biggest auto-motive industry, dated 10 January 2014.

<sup>6</sup> It is the case, for example, of Brown and Root Corporation a US private company with more than 30.000 employees that is just not unionized.

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<sup>1</sup>Jhon T. Dunlup & Arnold M. Zack Mediation of Employment Disputes at [http://www.ilr.cornell.edu/alliance/resources/Articles/med\\_emp\\_disputes.html](http://www.ilr.cornell.edu/alliance/resources/Articles/med_emp_disputes.html)

<sup>2</sup> Theodore J. St. Antoine, 2002, The once and future labour act: myths and realities, University of Michigan law School Scholarship Repository.

otherwise (art. 6 HCHR; EU Social Charter, art. 47; art. 24 Italian Constitution) <sup>7</sup>;

3. Thirdly, for the comprehension of ADR and mediation possible development in labour law, it is necessary to remind the basic characteristic of the Continental European judiciary system, which comparatively explain why ADR development is told to be endorsed differently elsewhere (in the USA).

In Europe and North America ADR in labour law development show similar trends<sup>8</sup>. Italian ADR experience finds its roots within the experience of the *Probitviri* (local committees which were given the competence by the social parties to solve labour disputes outside the judiciary) and dates itself to the establishing Act n. 295/1893; similarly the North American experience of mediation dates itself back in 1898 with the Erdman Act for railway carriers. In both the USA and Europe, Trade Unions have played a major role in development of arbitrating procedures, and in both Continents, especially since the 70's on forward, there has been a shift toward more formal litigation, deriving from increasing recognition/violation of statutory rights<sup>9</sup>. Finally, a common background can be observed also in the recent years, when in both Europe and the USA the interest on ADR refreshes in time of economic crisis, and the judicial system itself is recognizing the necessity for a subsidiary help to cope with the function of settling conflicts<sup>10</sup>.

Despite these common features, the European Continental system traditionally approaches ADR differently from the North American model because of some basic differing conceptions of the justice system as supposed to grant the enforcement of law.

The European judiciary system is "inquisitorial" and tends to provide for a shared responsibility of both the claimants, on one hand, and the State with its

agencies, on the other hand, to enforce individual rights as provided by law<sup>11</sup>; contrarily, the "adversarial system" that is operating traditionally in the USA, works insofar as the private parties are required to undertake the responsibility of fighting for their own rights<sup>12</sup>. Thereafter, the European continental model, is oriented to see the judiciary as an authoritative intervention that imposes itself over the controversy, "*an imperative power that substitutes itself with the dissenting views of the parties*" rather than a "*composition of the interests in accordance to law*"<sup>13</sup>.

In Continental Europe, development of statutory law has proceeded together with the creation of special jurisdictions becoming exclusively competent for labour relations: there has been an exclusion of arbitration in labour law in Italy and Germany<sup>14</sup>, and also some administrative agencies working rather independently from the Government, like ACAS in the UK, officials are involved in conciliation only, while mediations can only be attempted by external experts, as if it was not really part of the "conventional/orthodox" system. The American features have lead to a general consideration of ADR (which involve an active participation by the disputants to a larger extent than in formal litigation) that it is rather familiar. While it has taken, and it is still taking, hard commitment, for ADR to be conceived in Continental Europe as normal, rather than just a time consuming, expensive route toward a form of private justice; ultimately, they are felt somehow questionable.

The European Continental system has been rather indifferent to institutional support to mediation, particularly, and significantly the European Court of Strasbourg did not pronounced itself over mandatory mediation being in contrast with art. 6 of the HCHR (right to a fair trial)<sup>15</sup>; the more recent European Directives and Recommendations encourage mediation in the broader context of ADR, but some studies found that such a cultural move is not going straight far<sup>16</sup>.

In the field of European labour law, arguably labour Unions' support too, has been conceived differently because of this differing conception of the judiciary system as a whole: in Italy the major Unions in the industrial sector – the private sector with the highest

<sup>7</sup> See F.P.LUISO, *La direttiva 2013/11/UE sulla risoluzione alternativa delle controversie dei consumatori*, Riv. Trim. Dir. Proc. Civ. to be soon published, as for the connection of mediation as an agreement – following the rules on regularity of any common agreement – as different from the connection of arbitration or other independent authority decisions, asking for more stringent requirements to be considered valid within the legal system broadly meant.

<sup>8</sup> Theodore J. St. Antoine, cited above; B. GRANDI (2011) Italian Arbitration in labour disputes: a comparative perspective over the matter of inderogability, in Rivista dell'Arbitrato.

<sup>9</sup> See the a comparative analysis between Germany and the USA, the interesting overall perspective given by M. FINKIN, 2014, Workplace justice: does private judging matter?, in ZVglRWiss, 113 (2014), 166-185.

<sup>10</sup> Italian Constitutional Court on mandatory mediation in civil disputes (decision n. 272/2012) declared the "mandatory mediation" to be just beyond the legislator's mandate, and underlined that the European purposes to promote mediation to help the overload of the judiciary does not exclude mandatory provisions; see G. ABBAMONTE, *Il rebus dei tempi nella mediazione*, in Il Mezzogiornoeconomia 24 marzo 2014. Sharply, F.P.LUISO, cited above, p. 2, notes that EU Directive 2013/2011 indicates that ADR could help in reducing the judiciary load, but does not drive to that purpose anyway.

<sup>11</sup> The European jurisprudence affirms that provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECHR Judgment of 9.10.1979, Airey, Series A, Volume 32, 11).

<sup>12</sup> The European jurisprudence affirms that provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECHR Judgment of 9.10.1979, Airey, Series A, Volume 32, 11).

<sup>13</sup> G. ABBAMONTE, *Il rebus dei tempi nella mediazione*, in Il Mezzogiornoeconomia 24 marzo 2014.

<sup>14</sup> §§ 4, 101, III ArbGG (Labour Procedure Code), Italian Procedural Code of 1940 was reformed in favor of employment arbitration in 1966.

<sup>15</sup> <http://www.cpdseminars.ie/articles/mandatory-mediation-and-the-hallmark-of-democracy/> late consultation 28th March 2014.

<sup>16</sup> Skeptical on ADR substantial utility is M. FINKIN, cited above.

coverage as for unionization – uses to support employees with almost free legal advice (this means that they want to grant it as a sort of public service). While in the USA, where the recourse to a formal litigation has a higher cost, “it has remained in the province of unions and management to resolve their own disputes through reliance on ADR: with mediation of interest disputes covering the content of new collective bargaining agreements and arbitration of rights in the interpretation and application of such agreements”<sup>17</sup>.

Particularly after the famous ruling by the U.S. Supreme Court in 1991 *Gilmer vs Interstate/Johnson Lane Corporation* and the following Dunlop Report, chaired by the former Secretary of Labor John T. Dunlop (together with the increase of individual labor disputes<sup>18</sup>) it is registered a permanent progress into more mediation and ADR in the USA.

There are impressive figures about the success of “mediation” in labor law disputes: it is told to have a resolution quota of 85%<sup>19</sup>; in the railway and air traffic industry, that are significant once, comparatively more important than in Europe considering the higher mobility and longer distances, the National Mediation Board, providing for strict rules to be followed, reports that 97% of all conflict cases in its history have been settled peacefully<sup>20</sup>. Some Canadian labor Unions have argued that the reasons in favor of mediation are overwhelming:

Substantive complexities in labour law across individual and collective claims

<b>Fundamental</b>	<b>Rights</b>	<b>Rights</b>	<b>that are accessory</b>
<b>Collective</b>	<b>Rights/interests</b>	<b>Rights/interests</b>	<b>that are individual</b>

Labour law disputes might objectively arise, at a first level, for the protection of some minimum standards to be mutually recognized as not derogable – according to the meaning of derogability/minimum standards as present in the National States and in the International Institutions (*fundamental rights*); labour disputes might arise nonetheless, at a second level, for the protection of any other right that the applicable law, statutorily, collectively, or individually negotiated, is recognizing to the interested worker (*accessory rights*).

particularly it is cheaper than arbitration, it allows the Union and the employer to control the outcome of the dispute to a much greater extent than they can at arbitration, it can be used as a way of getting rid of disputes that the Union has no desire to fight, in the case of persistent members who cannot accept that their case is a lost one in the Union representatives’ opinion<sup>21</sup>.

After recalling such differences at the procedural level, considering both the European and the American models, some points shall be remarked at a substantive level nonetheless.

ADR schemes have been more widely set up to solve disputes in financial services, package travel/tourism, telecommunications; this may be related to the frequency of occurrence of consumer disputes in these sectors and the size of related consumer detriment<sup>22</sup>. As for labour relations (which are treated via ADR to a much more limited extent, especially in Europe), the increasing litigation started from the 70’s presents an increasing complexity that is relevant for both procedural and substantial consideration<sup>23</sup>; the complexity concerning labour disputes, for the purpose of this paper, can be simplified on a matrix which shows the object of labour law and its personal scope, and essentially re-poses the coexistence of individual and collective interests in the (now) globalized society.

These two first object-levels (*fundamental rights vs accessory rights*) interact with second two attention-levels: issues of fundamental rights and accessory rights, while we consider the scope of the substantive law, can be dealt with collectively or individually.

While the first distinction (*fundamental vs accessory*) is not clearly defined in any legal system, and relies upon a balance between economics and politics in a given society (balancing of interests), where the law is playing a role that is supposed to be neutral in theory, the second distinction (*collective vs individual*) is to be culturally found on the collective awareness of a society as well as on the individual consciousness

<sup>17</sup> Important exceptions to Unions and Management jurisdictions are the several U.S. administrative agencies involved in ADR, for example the National Mediation Board for the railway industry; see also in JHON T. DUNLUP & ARNOLD, M. ZACK, cited above.

<sup>18</sup> Between 1970 and 1992 an increase of 400%, alone in 1993 there were 93.000 discriminations complaints.

<sup>19</sup> Hans-Juergen Zahorka, Mediation in Labour Relations: what can be learned from the North American and EU Example? Labour Legislation and Arbitration Project, EuropeAid/1136/C/SV/Rsu, Annex 5, available at: <http://www.libertas-institut.com/de/PDF/Mediation.pdf>

<sup>20</sup> Hans-Juergen Zahorka, cited above.

<sup>21</sup> Why Mediation got hot in [www.ufew.net/articles/Toolkit/mediation\\_inside01.html](http://www.ufew.net/articles/Toolkit/mediation_inside01.html)

<sup>22</sup> [http://www.civic-consulting.de/reports/adr\\_study.pdf](http://www.civic-consulting.de/reports/adr_study.pdf)

<sup>23</sup> L.MARIUCCI uses the category of complexity to explain the development of Italian labour law in the last decades in his Lecture on 24<sup>th</sup> March 2014, Bologna.



(whereas the different sources of law, and their intervention, can give the significant overall picture).

Considering the need to cope with the complexities showed on the matrix, ADR procedural patterns could be the best in position to cope with it, because of their focus on simplification and departure from "formality"; nevertheless, because the collective nature of the interests as implied, only ADR which operate through the search of the parties' true consensus, can overcome complexity by respecting fundamental rights at the same time.

The difficulties while to legally define the borders amongst the first distinction (*fundamental vs accessory rights*) stress the importance of promoting mediation as a forum where employers and workers, going beyond the legal definitions indeed, might achieve a solution that would particularly fit their circumstances and their personal feeling of justice, given the due consideration to their relative position of weakness.

The second distinction (*individual rights vs collective rights*) is rather highlighting the limits of mediation on the other hand, since a collective dispute over a labour matter is typically one involving economics and politics that might be put on the negotiation table as a matter of general interest, thus requiring negotiating and mediating skills as generally possessed by the spoke persons (trade unions and the management in its apical positions); moreover, "meritorious claimant with limited resources of a point of public exposure and so of a source of pressure on the employer, especially to settle"<sup>24</sup> might see their individual rights in shadow. The sphere of the so called "ADR of interest" is different from the "ADR of rights", whenever the dispute proposes legal concerns that are never being approached by any court before: there would be the land of the "no precedent" and mediation couldn't solve it out properly, especially in the light of a broader meaning of democratic legal system<sup>25</sup>.

The arena where the need to encourage mediation comes out, is obvious: where the complexities of the legal scenario are so many, for example in cross border disputes and whenever the individual case is at a point of presenting more attraction to peaceful settlement than to go on trial, or even to waive one's own rights, there mediation can help at best. In many of these cases the choice of considering some goods or personal conditions as accessory rights rather than fundamentals is a very relative type of consideration, which is fully related upon

circumstances amongst which the cultural level of the disputants, also risen and refreshed by the mediator, plays the main role. It will be up to the personal consideration of the people involved, rather than to an *ex ante* decision by the legal system, to follow the mediation track in place of other ADR procedures or directly to go to the in-court-procedure. Insofar mediation too is felt as an imposition, it's very deep contribution would be frustrated.

The mediator supports disputants with special negotiation skills and techniques, particularly by knowledge of the substantive labour laws, but does not solve the dispute by authoritarian means, while in arbitration the third party has an autonomous authority to decide over the matter in place of the parties.

Because of this not authoritative role, the way the mediator must actually gain his credibility is amongst the crucial points to be investigated and ruled while concerning an institutional support to this type of ADR.

Mediation is defined as "*aprocess where the parties to a dispute – in labour relations: the employer and the labour union – invite a third party, the mediator, to help them resolve their differences; the mediator has no power of decision concerning the conflict between the parties, but helps to find and reach a mutually acceptable and voluntary reached solution*"<sup>26</sup>. In other words, in mediation, as distinguished from litigation, and even arbitration, the parties retain control of their disputes and its resolution, instead of surrendering their case to a final decision by a third party.

In contrast with the prevailing image "*of an amateur effort by substantively unskilled do-gooders who approach substantive legal issues with a one-size fits all approach*", serious arguments are leading to the need of accepting mediation as a procedure for a reliable enforcement of also statutory rights, both fundamental and accessory, while capturing the profound and wide spread benefit of its possible outcomes in the globalized society.

## II. CULTURAL LIMITS OF MEDIATION IN EMPLOYMENT LAW

Employment law developed in Europe, since the early decades of 1900, much according to a Marxian vision of separation (the separation of the workers' valuable activity from the capital value) that has spread its influence well across the Continents. It is also because of this perspective of separation (that is accepted within the classical economists method, from

<sup>24</sup> M. FINKIN, cited above, p. 169.

<sup>25</sup> M. FINKIN, cited above, pp. 183-185, concludes being skeptical about private justice, as that implied in mediation, told to be successful on "practical outcomes" but not on democratic policy as well.

<sup>26</sup> HANS-JUERGEN ZAHORKA, cited above.

Smith to Keyens too<sup>27</sup>) that statutory labour law, in democratic countries, dresses a vision of the State (with its employment judiciary system) as an ultimate recourse for ending up the fight, through the imposition of a decision over the parties' inevitably divided will. Trade Unions as well, have been generally conceived in Europe, and in North America too, as fighters for the interest of the many working categories who was expressing a will just separated from the enterprises' intentions.

Trade Unions' protection has gone far in granting basic and uniform standards for almost every dependent worker, even independently from her/his association to the Union itself<sup>28</sup>, facing "the big" employer. The consequence of such approach is that it is rooted in the labour law culture of many modern democracies a conception of not merely conflicting labour relations (the conflict was already clear in the 1800s liberal economists view, as already recalled): more dramatically, it has prevailed a conception of "original separation" amongst the disputants that has lead to the assumption of "in-court-trial" being natural in order to impose a "super partes" decision. Thereafter, mediation is considered to be rather a non-sense route that is leading nowhere, a route not compatible with a vision of a separated scenario wherein one must necessarily choose where to belong.

The open-globalized scenario has not shadowed this conception, but it has proved the Trade Unions' action, and the Employment Tribunals working along for restoring of workers' rights, to be weak when facing the employers' freedom to move towards innovation at lower costs. If innovation is to be reached, and the employer is supposed to arrange the workforce accordingly, there it comes to a matter of "general choice" that cannot be dealt with as a point of just conflicting individual (or group of individuals) rights. The Fiat case in Italy<sup>29</sup>, as well as the several cases that

have been brought before the European Court of Justice<sup>30</sup> set out choices that are of general/political interest in their substance, and the courts themselves can only add a technical contribution to orientate the solution of the substantial dispute, which is finally going far beyond a possibly "super partes" application of the law.

In such new conflicting context, the fight has shift from "separation of capital from workers", which is still far evident in the less developed areas, to a ruled game where the political institutions are using several tools, amongst which we find the statutory law, to drive the economies not only to grant protection to workers, but to achieve a better quality of occupation too, to encourage green economies as well, to assure a sustainable growth in a broader meaning, to encourage workers' participation in the capital.

In such a context, disputes arising in employment relationship, generally in term of challenge on the occupational levels, any mediator should be an expert not only in employment, but in social science and psychology as well. Labour lawyers acquired their skills in a context where labour force is considered all but not a commodity, and got used to denounce any type of social development as just meant to consider the employees as goods to be possibly sold. Now these traditional values must be balanced with the search for sustainable growth and projects for green policies, in other words, the laws ruling labour relations must be balanced with other laws ruling substantial fields just interacting in the economic sector that is in point.

It is still a matter of going left rather than right, but it is far from easy to state what is left and what is right. The conflicting policy scenario is well emerging, at the judiciary level, by comparing the European Union constitution, that is fully based on economics and movements of people, with the European National constitutions, that are social contracts establishing social/governments based on democracy and territorial governance, but for giving precedence to the legal supremacy of international/European law<sup>31</sup>.

The labour claims brought before the European Court of Justice in nearly 2007 and regarding posting of workers, strike and the social dumping as a general policy issue staying underneath the business choices at stake, gave a clear picture of the relativity of the power that the judiciary system can play while asked to interpret the laws from a "super partes point of view". The table above is referring to this relativity too: it illustrates the (growing) extent of the orange zone, which

<sup>27</sup> P. TRIDICO, Flessibilità e istituzioni nel mercato del lavoro: dagli economisti classici agli istituzionalisti, un *Economia & Lavoro*, Anno XLIII, Saggi, 113-139. The Author found that, except for marginalist economists, the classical economists see the equilibrium in the economic system as one theoretically implying a given wage, thus not granting full employment nor greater productivity. These are theoretical assumptions that bring along social conflicts.

<sup>28</sup> This has been done by virtue of an extended interpretation of the scope of the legal effects deriving from collective agreements, or by virtue of a statutory provision for the collective agreement to be binding for all, or, in common law countries, by virtue of some closed-shop clauses which are forms of union security agreement under which the employer agrees to hire union members only, or require the employees to join the union if they are not members already.

<sup>29</sup> The FIAT case brought the matter of trade union's representativeness before the Constitutional Court; since the main union (CGIL) was denied to have trade union's right on the premises because of its refusal to sign the FIAT proposal agreement, the Court was called to decide whether the statutory provision requiring the signature of a collective agreement to be representative was consistent with the freedom of association and fair treatment for any established union.

<sup>30</sup> Particular relevance have had the Laval, Viking, Laval, Ruffert and Luxemburg, commented by several Authors in A. ANDREAONI, B. VENEZIANI (a cura di) *Libertà economiche e diritti sociali nell'Unione Europea*, Ediesse, 2009.

<sup>31</sup> L.Cavallaro, *Servitore di due padroni, ovvero il paradosso del giudice del lavoro*, RIDL, 1/2014.

is the mixture amongst fundamental, accessory, individual and collective rights, making it evident how the legal borders are not so apparent as in the other cells of the table, where it is still possible to draw the limits of what is legally individual, collective, fundamental, accessory. So far as it is possible to draw the line, that far the courts might still play a "super partes" role and recognize the supremacy of one right over another, whereas in the orange zone, any intervention of the judiciary is going to become a political decision.

This is why the orange zone becomes the growing sector where a skilled and neutral mediator would facilitate the difficult choices to be made to solve the disputes or even to prevent the conflict. He would help the parties to consider their interests from out of their dispute.

There can be a refusal to undertake ADR where the judiciary system is seen as the only one having the full range of tools to ascertain facts and relevant laws: in some North American practices, ADR is suggested to be not the best way to solve a dispute in "*cases of continuing struggle with (.....) discriminatory practices or a subcontracting decision in a union setting that may determine the employer's future economic viability; in these cases, the importance of the issue warrants use of the full legal process which is best served by full scale advocacy of opposing viewpoints before an experienced and neutral tribunal*"<sup>32</sup>. Such a conclusion is in accordance with the construction of a judiciary system that is called to play a neutral role, but by declaring the winner party's stronger arguments. So the question is: are the "in courts" tools to ascertain facts and relevant laws really neutral? What is more neutral of a procedure granting the parties' full awareness about legal and less legal implications, in and out from their dispute?<sup>33</sup>

Over these kind of cultural limits, there are several statutory obstacles that stays against the European proposals to stress mediation in labour disputes forward, as I am going to illustrate here below.

### III. THE PROCEDURAL RULES FOR MEDIATION IN EUROPE AND ITALY

Article 47 of the European Charter (Right to an effective remedy and to a fair trial) says that everyone, whose rights and freedoms guaranteed by the law of the Union are violated, has the right to "an effective remedy before a tribunal", that everyone is entitled to "*a fair and*

*public hearing within a reasonable time by an independent and impartial tribunal previously established by law*", that everyone shall have "the possibility of being advised, defended and represented" and to those who lack sufficient resources, in so far legal aid is necessary to ensure effective access to justice, legal aid shall be made available.

The EU Charter of Fundamental Rights complements, but does not replace, national constitutional systems or the system of fundamental rights protection guaranteed by the European Convention on Human Rights. In other words, the enforcement machinery of the EU Charter is very different from that of the parallel instrument of the Council of Europe in the field of human rights: the former covers the breach of European laws only, and relies on supervision and implementation by the EU Institutions, included the European Court of Justice, while the latter allows for direct individual complaints to the European Court of Human Rights, which delivers judgements that are directly binding on individuals. Whereas the enforcement of the European Convention is direct, enforcement of the European Charter is rather passing through a system where judicial and substantive rules delivered by both the EU and the Member States must be coordinated.

Given such a scenario (international judiciary system), to inquire over mediation in labour disputes implies an effort of investigating procedural rules on both national and European level.

Let's remember the main European references on ADR first.

The European Commission adopted two Recommendations on ADR (98/257/EC and 2001/310/EC). The first one dates 1998 and was a follow-up to the conclusions of the 1993 Green Paper on access of *consumers* to justice and the settlement of consumer disputes in the single market; it set few basic principle for ADR schemes to operate, essentially by describing an active intervention of a called third party, frequently an arbitrator, who is thought to find and impose a solution in accordance to the following principles:

- Independence of the decision-making person/body
- Transparency of the procedure
- Adversarial principle
- Effectiveness as to the aspects of access, costs, time to decide, active role of the decision making body
- Principle of legality (no prejudice on the mandatory protection as granted by the national law
- Principle of liberty (for the parties to accept a binding decision)
- Principle of representation.

The second Recommendation in 2001 (2001/310/EC) contemplated ADR schemes as attempts to bring the parties together and convince them to find a

<sup>32</sup> [http://www.contilaw.com/practice\\_workplace.php](http://www.contilaw.com/practice_workplace.php)

<sup>33</sup> Frequently ADR schemes carry out collective investigations, i.e. if many claims against one trader are similar they undergo the same investigation, or just a sample of them are investigated, then all the parties settle individually on the basis of those decisions ([http://www.contilaw.com/practice\\_workplace.php](http://www.contilaw.com/practice_workplace.php))

solution by common consent. Therefore, it newly ruled over mediation. Principles to be followed were:

- Impartiality
- Transparency
- Effectiveness
- Fairness.

In such a context it was far from easy to delineate where, in practice, there was floor for a private judge (an arbitrator or a conciliator) to impose his solution and where for a mediator to search for consensus; the procedure to be followed turns to be significantly different. In the first case formality is prevailing, while in the second case, consensus and research of consensus being the priority, formalities are less important. The overall aim of any ADR procedure stressing the importance of trying to mediate is immediately understandable: it is a matter of pursuing a rather peaceful and responsible acting of any person or group of people involved over the need for an authoritative type of intervention.

Later, Directive 2008/52/EC of the European Parliament and Council (21 May 2008) on mediation in *civil and commercial matters* gave binding effects to the earlier Recommendations, and specified that its scope was to facilitate access to ADR and to promote amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings to civil and commercial matters.

Exceptions on the Directive applicability regard *"rights and obligations which are not at the parties' disposal under the relevant applicable law"* particularly revenue, customs and administrative matters or to the liability of the State for acts and omission of the State Authority.

Now, since the 2008 Directive makes reference to civil and commercial transaction only, but broadly meant, it is not clearly comprehending employment disputes, neither it excludes them. Insofar as we consider employment law as a part of the civil legal sector, and define employment as a rather separated field of legislation (where the public intervention is prevailing and ready to maintain a sort of administrative authority over the parties' disposals), then the Directive is not applicable; contrarily, if we do understand labour relations as part of the civil legal sector, then we could theoretically refer the 2008 Directive to many labour disputes too, particularly to those which are implying rights and obligations being at the parties' disposal<sup>34</sup>.

Expressly, at preamble 10 of Directive we can read: *"it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law"*. The European legislator, on its part, is thus not excluding employment disputes *a priori*.

Recently, in 2013 the European Union delivered both Directive 2013/11/CE on ADR for consumer protection and Regulation 514/2013 providing for a mandatory *on line platform for the protection of consumers*. These two Acts are thought to be interconnected, and should be read systematically, since the Regulation – that is immediately binding and delivers direct effects on individuals – disposes for all the ADR bodies to be connected to the one IT platform. Preamble 19 of the 2013 Directive, states expressly that it should be prevailing over Directive 2008/52/CE, just in case of any conflicts. Thereafter, we can observe no news as for the substantial scope of the law on ADR after the 2008 provisions: employment disputes are not excluded *a priori*<sup>35</sup>.

As for the type of normative support that the EU provisions are giving to mediation, the 2008 Directive does not prevent national Member States from providing also "mandatory" interventions (art. 5). Art. 1 of the 2013 Directive seems to be quite open to mandatory mediation provided by the national legislators also, insofar as it is going to not frustrate the right of the disputants to access the judiciary system.

One of the major controversies in ADR promotion, indeed, is its relying on an authoritative intervention. It is in the (correct) opinion of many Italian lawyers that ADR (and mediation) is *"to be trusted, but for its success to be relying on a free and aware choice by the litigants, as well as on a judicial system which must be trusted, and be efficient, as well"*<sup>36</sup>.

2013 Directive is meant to facilitate the enforcement of rights, in consideration of ADR being complementary to the judiciary system, on one side, and in consideration of the overloaded conditions of the latter (see the connection with Directive 2009/22/EC and Regulation EC No. 2006/2004 on enforcement of consumers' protection interests and laws). It is in this perspective (enforcement of rights) that we can try to investigate whether the European provisions on ADR can support somehow the need for a cultural focus on mediation in labour relations too, and possibly a direct effect to already legitimate mediations in emerging labour relations.

<sup>34</sup> Here it comes the critical point as above highlighted: what is at the parties' disposal and what is not? What is fundamental and what is accessory? What is not at the parties' disposal, surely, are the so called fundamental rights, like those defined in our national Constitutions and in International fundamental charters (for example the right to be not discriminated), while it seems to be possible a mediation having in object any accessory rights, that the workers'

might decide to waive in order to get an overall satisfactory compromise or agreement (example the right to claim for the full remuneration as previously agreed).

<sup>35</sup> F.P. LUISO, cited above, accurately investigates over the scope of the 2013/2011 EU Directive.

<sup>36</sup> G.ALPA, at <http://www.altalex.com/index.php?idnot=65513> last read on 15 April 2014.



Going to the (Italian) national level, the 2008 EU Directive on civil and commercial disputes was implemented in Italy by an Act of the Parliament (Legge n.69/2009, 18th June) and a subsequent Act of the Government (D.lgs 28/2010<sup>37</sup>, March, 4th ) providing for a mandatory procedure to mediate in some specific cases (properties, heritage, medical faults, etc.). Separately, Act n. 138/2010 , for employment disputes specifically, provided for both rules on arbitrating procedures and conciliating attempts (to be made before going to in-court-trial) but no express provisions were made to promote mediation, perhaps in the apparent confusion of taking conciliation for mediation.

Italian conciliation is different from mediation since it implies a proposal by the impartial conciliating commission that not necessarily comes out from an amicable settling; conciliation as newly ruled, is far from having the nature of a mediation, in that it is still the expression of a third party to make a satisfactory proposal to stop the dispute, furthermore, several legal dispositions now highlight the judicial-like authority of the administrative conciliators<sup>38</sup>, which imply a sort of influence on the later judge made decision (in the event of an access to justice, in other words, in the event conciliation substantially fails and the litigants go back to litigate).

Today employment disputes do not require anymore a “mandatory-conciliation” before the administrative provincial agencies (DPL Direzione Provinciale Lavoro), except in few cases when it is in dispute a work contract that has been previously “certified”.

In such a normative context, there seems to be no floor for European procedural rules on mediation to be applied. Nor it can be said that mediation in labour disputes is accidentally practiced whenever the disputants opt to settle their case at the trade union places; that is a mere attempt to negotiate by help of someone who is not neutral, although skilled and arguably technically prepared.

Evidently, in accordance to a rather prevailing view, that looks at social security and labour law as two pieces of the same medal (in a common perspective of public labour law, which tends to consider the employer as a public actor!) in Italy labour relations are generally considered out from civil disputes and treated separately by the legislator. Moreover, the Italian tradition considers ADR in employment law (arbitration) as an exclusive province of the trade unions<sup>39</sup>, whereas only in 2010 (Legge n.138/2010, so called “Collegato lavoro”) arbitration has been conceived for the individual

disposition of the litigants also, and “equitable arbitration” – award delivered not only in accordance to strictly statutory law – has been introduced. Scholars use to debate over the issue of labour law and civil law in terms of interconnections since the beginning of labour law as an autonomous field of studies<sup>40</sup>.

If we maintain ourselves open to a contamination of civil law in labour law, it is important to recall that D.lgs 28/2010 on mediation was questioned before the Italian Constitutional Court. The question was weather that (mandatory) mediation was consistent with art. 24 of the Constitution, assuring a fair trial and defence before an independent judge for all; the Court stated it was not, but for the uncorrect procedure of the legislative process<sup>41</sup>. Few times later Italian Act n.98/2013 (so called Legge “del fare”) introduced back the mandatory attempt to mediate in civil disputes. Still there are doubts as weather the legal frame as in force nowadays is just repeating the same imperfections that the 2010 Acts brought along. These imperfections, that were not investigated openly and fully by the Constitutional Court, are dealing with:

1. The imposition of a procedure, that could represent an infringement on art. 6 ECHR;
2. The additional cost that the mandatory procedure does imply on detriment of the poorer;
3. The consideration of *skills and knowledge of mediators*.

Particularly the skills and knowledge that the EU normative scenario is requiring on the persons acting as mediators seems to be weakly assured by the Italian 98/2013 Act; those requirements are linked to the attendance of few hours of learning, which quality is not much under concern, and more dangerously, any lawyer is considered to be a mediator just because already he is a lawyer (such an assumption does not recognize the peculiarity of the social role of this profession, that was

<sup>40</sup> About this theme, in Italy: P. ICHINO, 2011, Il percorso tortuoso del diritto del lavoro tra emancipazione dal diritto civile e ritorno al diritto civile, Relazione al convegno dell'Associazione dei Civilisti Italiani su Il diritto civile e “gli altri” Università “la Sapienza” di Roma – 2nd December 2011; L.Cavallaro, cited above. For an American perspective over the matter of private judging, and its questionable effect in the light of the democratic principle, M. FINKIN, cited above. Against privatization in this field Theresa M. Beiner, The many lanes out of court: against privatization of employment discrimination disputes, Maryland Law Review, 837, 2014.

<sup>41</sup> See at note 10. The Constitutional Court stopped the enthusiasm about mediation, but did not find any prevention from obtaining justice before a tribunal in the Act, as also art. 6 of ECHR is affirming; the court underlined that the introduction of a mandatory form of mediation is in the power of the Member States, in accordance with Directive 2008/52/EC, that is not indicating any limits in such a perspective, but for an effective right of anyone to choose the formal trial (Decision n. 272/2012).

<sup>37</sup> 4<sup>th</sup> November 2010 amended in 2011.

<sup>38</sup> See, as example, art. 411 Italian Civil Procedure Code, co. 2.

<sup>39</sup> Trade unions were ruled by (public) statutory law in the Italian corporativist/fascist period (1922-1943).



in the mind of the Italian legislator as peculiar since 1958<sup>42</sup> if not earlier).

#### IV. CONCLUSIVE ARGUMENTATIONS

The European legal frame for mediation, read together with national/Italian one, is not directly and expressly concerning employment relations.

Nonetheless, there are at least three reasons why we can argue that employment disputes having in object rights that are at the workers' disposal might fall under the applicability of ADR procedural provisions for mediation. From a legal policy point of perspective, perhaps, also some of those rights that are, theoretically, not at the parties's disposal, might fall under the beneficial effect of accessing a mediation procedure, once the party could recognize the prevalence of some other interest.

Reasons for arguing that mediation procedures – provided for consumers' protection – are available for also employment disputes are the following:

1. Consumers and workers are treated by the legislator similarly, in consideration of their weaker position;
2. No express provision is denying the possibility to access mediation procedures, standing the right to access the competent employment tribunal in case of failure;
3. From a legal policy point of perspective, this would be easily fitting self employment relationships, and particularly professional activity that might fall under art. 57 of the European Treaty. It can be proposed that the implementation of this tool would increase the *level of enforcement* of both employed workers and self-employed workers, giving the opportunity to seriously consider enforcement of also those self-employed being economically dependent on one single employer, also in accordance with the purposes of the European Parliament Resolution regarding "Social Protection for all, including self-employed workers" (dated 2014, January 14th). This late EU Parliament Resolution (point 23) sets a strong support to the proposal of a scoreboard of key employment and social indicators, which could be a first step in identifying concrete benchmarks, and mediators may easily list them, helping the development of the judiciary already fighting bogus self-employment in courts.

a) *The weak position as a preliminary point where to start from*

A research path to match protection of consumers and protection of workers legislation is notably the focus over the substantive weak alike position of consumers and workers, whenever they face

big (sometimes small) business that are taking advantage on them. The weakness of the individual consumer comes out from his/her indirect relationship with the producer – especially when buying from the internet – from his/her ignorance about the producing process and the risks implied in the using of what is bought, the possibility of hidden imperfections. The weakness of the worker, on the other side, comes out from his/her income relying on the employer's remuneration, as well as from her/his conceiving personal dignity in connection with the working activity. In both cases, a matter of distance and unbalanced power, as well as a matter of undisclosed information, can prevent from an easy solution of a dispute, sometimes it prevents from even denouncing the problem; the fact that only in working relationships the entire person – perhaps his/her family too – is involved, whereas in consumers issues the matter involves an object or a service, does not mean the legal parallel cannot be followed whenever the solution is to be found, preferably without going to trial. To investigate working relationships within the legal frame of civil laws, is a theoretical argument that plays in favour of this parallel to be followed, while encouraging ADR.

b) *None express provision is keeping employment relations out*

As reported above, the 2008 Directive on civil and commercial protection is not expressly denying the possibility that also employment issues are dealt with it – but for them to be related to rights that are at the private parties disposal.

Moreover, Directive 2013/11/EU (amending Regulation No. 2006/2004 and Directive 2009/22/EC) affirms that: "*As advocated by the European Parliament (...) any holistic approach to the single market which delivers results for its citizens should as a priority develop simple, affordable, expedient and accessible system to redress*"<sup>43</sup>.

The EU Parliament Resolution of 25 October 2011 clearly stated that an horizontal approach to ADR is to be pursued, and by doing so it also welcomes the Commission consultation on ADR. The Parliament believes that ADR forms part of a general 'justice-for-growth' agenda across sectors and takes the view that "*any approach to ADR should go beyond consumer disputes so as to include business-to-business (B2B) civil and commercial transactions, irrespective of whether they are carried out between private or public undertakings, family disputes, defamation cases and other general interest disputes or ones involving parties with different legal statuses*".

So, employment type of issues are not mentioned, but other types of issues that can be even

<sup>42</sup> It is dated 21 march 1958 the first Act – n. 253 – on the profession of the mediator.

<sup>43</sup> Point 8.

less at the parties disposal, like it is in family issues, are mentioned instead, therefore we can argue that the mentioned horizontal and holistic approach is not forbidden in this field at all.

c) *The legal policy perspective.*

As for the legal policy perspective, to extend ADR, with their tools and mechanisms, to also work relationships, is a possibility that is theoretically already possible for self-employment type of working relationships, particularly for professional activities that might fall under art. 57 of the European Treaty. Contrarily, the same extension surely would pose questions on laws protecting dependent workers: in national legislations implying a theoretical inderogability of labour law as a whole field regarding dependent workers<sup>44</sup>, as the Italian one tends to be, the matter must be analysed deeper.

As for self-employment, the European Treaty, at the now art. 57, states that *"services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons"*. Although the provision states that service *"shall in particular include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions, and literature regarding the content and possible meaning of this provision is to be investigated, as well as the literature about distinction amongst free movement of service and right of establishment, what is plain clear is that the norm aims at covering the main traditional economic sectors. Industry, commerce, transports and liberal professions are mentioned, and although the agricultural, the financial, communications, health service are not, the Court of Justice delivered a broad definition of "service" here. The ECJC's definition is simply relying over the economic nature of remuneration of the service (it includes hazard games too<sup>45</sup>). Therefore, we can firmly say that art. 57 does not imply a particular distinction regarding the position of workers. It means that a service under the European conception – as well as under the national one – can be provided by form of a personal activity, individually*

performed, as well as in form of a larger businesses, including enterprises investing capitals and having employed workers. Any service offered under a remuneration is covered by art. 57.

This definition gives us a vehicle to transport any work relationship, which was involved in the service as in object, onto the sphere of consumers' protection, and particularly for the purpose of this essay, onto the applicability of those European procedural rules to be followed in case amediation is called to solve a dispute.

To give an example, anything is preventing from mediate – so to apply the standard rules on European mediation – in case a consumer is not satisfied with the service as provided from both the single professional worker, as well as from workers who are just employed by the body that made the contract – although these disputes might rise very different type of concerns.

Both the rights of a regular employee engaged to perform, let assume, in an health service, and the rights of a self-employed engaged in the same sector, being he/she economically dependent or not, could be the object of a mediation procedure. Fundamental rights that would likely follow in the sphere of "inderogability", of the "not at disposition" by the individual person, might arise in each of these cases – let's think about the filed of safe and security provisions in the workplace or about the field of discrimination.

Once the "not to be disposed by the private parties" nature of the concerned right would come out, there mediation would be not an available track, accordingly, first, to the 2008 EU Directive. The employer who would have entered a mediation-negotiation sic et simpliciter, might encounter big problems deriving from art. 2112 c.c.. which is a national norm protecting the genuine consensus of the worker as a weaker party.

Here again, comes the burderline matter, or the "certainty matter". Which are the labour rights that cannot be disposed by the parties? What about them if a statute and labour tribunals together do not give a fixed reply yet? To be concrete, what about the case of a service sold but involving labour activity? For example a medical activity might have included the work of an healthcare assistant. Not to try to mediate in such a case does not really appear coherent with the horizontal approach that the EU Institutions are encouraging.

From a procedural point of perspective, it is important to stress the fact that only in a preventive consultation the parties can become fully aware about the fundamental nature of the concerned rights and the connected inderogability of them. Fundamental rights that are not at the parties' disposal in theory, might become rights that the parties are willing to waive in order to end up the fight (ex. the fundamental right to a just and proportionate remuneration can be waived to

<sup>44</sup> May I cite here my work "Let's deconstruct the meaning of dependent work to enlarge the scope of labour law", which is about to be published in the International Journal of Business and Social Research (<http://thejournalofbusiness.org/index.php/site>)

<sup>45</sup> See at : [http://ec.europa.eu/internal\\_market/services/docs/infringements/art56-services\\_fr.pdf](http://ec.europa.eu/internal_market/services/docs/infringements/art56-services_fr.pdf) where it is reported jurisprudence underlining : *La notion de 'services' au sens de l'article 50 CE implique qu'il s'agit de prestations fournies normalement contre une rémunération et que celle-ci constitue la contrepartie économique de la prestation et est définie entre le prestataire et le destinataire du service* (Case 169/08, Presidente del Consiglio dei Ministri Vs Regione Sardegna, 17th Novembre 2009).

achieve a more personal type of recognition or a mobility disposition). Mediation is fully part of that consulting first phase that any reasonable person decides to go through, before recouring to courts.

The mediator, whose role is different from any other consultant for his/her deeper ability to search consensus, is supposed to have the personal capacity and the professional skills to make the parties aware about the fact that some of the rights which are dealt with, need to be considered theoretically not at their legal disposal, and that the courts will be tending to decide accordingly.

Of course, the management of such rights in a private sphere, does not play in favour of the public relevance of denouncing the offence, and, more finally, to grant the democratic controll over important decisions.

Specifically for labour law, it is questionable the idea that the trade unions' voice – as expression of the collective policy on labour rights – could be not considered while labour rights are in point.

The mediating panel is going to likely witness the forgiveness of many offences. This is something not to persue neither to suggest from a civil justice point of perspective. Insofar forgiveness is to be considered an attitude of the spirit, different from any civil interests and civil choices, its occurance does not change much the proposed conclusion when mediation is reached in a public panel, nor when it occurs before a court or within the trade unions' places.

As a matter of fact, the attitude of the spirit, as well as any political considerations (trade unions politics in our consideration) of the interested people, do have an impact on the searching of the better solution to the dispute.

This allows to reach a conception of those rights, which are theoretically/legally retained fundamental, as fundamental in the opinion of the really interested people too. This is consistent with the fact that mediation, in case where fundamental rights are concerned, would not prevent any eventual waiver (but made conscious about such a waiving by the mediator) to go on court in case he/her wanted to go back and brake the mediated agreement.

*Rebus sic stantibus*, the parties can benefit from a procedure that really puts them in position to search for the better, informed, not forced by others, solution; they can formalize it without necessarily stick with it forever, only insofar as the balanced positions will be finding their equilibrium in the next future, keeping in mind a judiciary system that is ready to reverse false perceptions and achievements. There shall be space for a justice that considers the passing of time, that is not strictly self-referencing, that is measuring itself with the social perception of the human dignity, that is what justice is though to serve for in the long run.

# GLOBAL JOURNALS INC. (US) GUIDELINES HANDBOOK 2014

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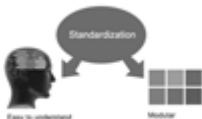






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4. Manuscript's Category,
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<i>References</i>	Complete and correct format, well organized	Beside the point, Incomplete	Wrong format and structuring



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