

Regulating for Decent Work in a Global Economy

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Abstract

The title of this article captures three important shifts in nomenclature in contemporary debates about labour law: from labour to work; from law to regulation; and from the national state to the global space. These shifts signal a trend towards broadening, not simply in the sense of expanding the personal scope of labour law, but, more radically, in terms of encompassing a plurality of platforms, techniques and spaces for regulating work. “Decent work” also captures a change in how we understand the normative basis for regulating work, which involves a movement away from unequal bargaining power and subordination to a more amorphous, contested and contextualised understanding of the values that work regulation ought to achieve. I focus on two aspects of the global economy – financialisation, and global value/supply chains – to illustrate my claim that it is opportune to move from an overarching narrative of labour law to one of regulating for decent work. I will also provide some examples of what I mean by regulating for decent work in a global economy. To conclude, I suggest the importance of developing approaches to regulating for decent work that are both attentive to the path along which labour market institutions evolve and the need to avoid rosy-tinted nostalgia.

I. Introduction

The title of this article, “Regulating for Decent Work in a Global Economy” is designed to capture three important shifts – from labour to work, from law to regulation, and from the nation state to the global space – in labour law debates. These shifts signal a broadening, not only in the sense of expanding the personal scope of labour law, but, more radically, in terms of encompassing a plurality of platforms, techniques and spaces for ensuring that working people enjoy autonomy and security, and are treated with dignity and in a non-discriminatory manner at work. Moreover, the term “decent work” involves a change in how we understand the normative basis for regulating work, a movement away from unequal bargaining power and subordination to a more amorphous, contested and contextualised understanding of the values that work regulation ought to achieve.¹ My argument is that this shift is beneficial. Not only does it not distract from the traditional preoccupations of labour law – which is embodied in the International Labour Organization’s (ILO) maxim that labour is not a commodity –

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¹ Gerry Rodgers, Decent Work as a Goal for the Global Economy, 2007, available at <http://fdm.rio20.net/sites/default/files/IMG/pdf_Rodgers_-_Decent_Work_as_a_Goal-2.pdf>.

more importantly, this shift better reflects how work is engaged and performed in the global economy and the types of regulation needed to make work decent.²

My argument proceeds in four stages. The first is descriptive and briefly explains what this shift in nomenclature entails, using the ILO's 1999 Decent Work agenda as my starting point. The second part focusses on two features of the contemporary global economy – financialisation, and global supply or value chains – which I argue require us to reconsider the traditional pillars of labour law if we are going to be successful in regulating for decent work. The third part outlines the goals of labour market regulation and sketches a functional approach to regulating for decent work. The fourth part provides a couple of illustrations of what regulating for decent work might entail. I conclude by emphasizing the importance of appreciating the path dependence of labour market institutions and regulations without at the same time being held hostage to the past.

II. Decent Work, Regulation and the Global Economy

In his first report to the International Labour Conference in June 1999, Director-General, Juan Somavia, declared that “The primary goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and dignity”.³ This report signalled the launch of the ILO's decent work agenda, which sets out four strategic objectives: first, the attainment of full employment; second, workers' rights, especially those included within the Fundamental Declaration of Principles and Rights at Work; third, social protection; and fourth, social dialogue. The underlying thrust of decent work is to integrate the economic goals of production and income with the social goals of integration, personal identity and dignity.⁴ A distinctive feature of decent work is that social dialogue is at its heart.

Significantly, decent work is much broader than the traditional scope of employment and labour law, which has been confined to individuals engaged under a contract of employment. Decent work goes beyond waged work in formal enterprises to capture informal work from waste picking and street vending to solo self-employment, such as gig work. It serves to break down the conceptual and regulatory barriers that channel work relations into different legal categories or jurisdictions, such as employment or commercial law.⁵ It also chips away at the separation between the workplace and the household, which is symbolised by the ILO's 2011 convention – Decent Work for Domestic Workers.⁶

² ILO, 26th Sess., *Declaration concerning the aims and purposes of the International Labour Organization*, (1944), being Annex 1(a) to the *ILO Constitution [1944 Declaration of Philadelphia]*. Reprinted in Ian Brownlie, ed., *Basic Documents in International Law*, 5th ed. (Oxford: Oxford University Press, 2002) at 53-54.

³ ILO, Decent Work. Report of the Director General, Report I-AI, International Labour Conference, 87th Meeting, Geneva (June 1999) at 3.

⁴ Rodgers, above n 1.

⁵ Judy Fudge “Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction” (2014) 22(1) *Feminist Legal Studies* 1-23.

⁶ Domestic Workers Convention, 2011 (No. 189), Convention concerning decent work for domestic workers (Entry into force: 05 Sep 2013) Adoption: Geneva, 100th ILC session (16 Jun 2011); Domestic

From the outset, a difficult challenge has been developing a mechanism for measuring and assessing progress towards decent work.⁷ Attempts to develop indices capable of being synthesised into a single indicator were abandoned in part because decent work is an abstract and subjective concept.⁸ The fact that the ILO is a tripartite institution, unlike other United Nations' bodies, also makes it difficult to agree about how to measure explicitly normative concepts.⁹ But at the same time, that indicators can popularise a concept, they can also be very rigid. Instead of developing an index, a Tripartite Meeting of Experts on the Measurement of Decent Work in Geneva in 2008 identified a global template of qualitative and quantitative indicators that could be used to measure progress towards decent work at the country level.¹⁰ Decent work is a flexible concept because it is applicable to countries across all levels of economic development. Although it incorporates some universal values such as freedom of association and non-discrimination, it also reflects the values and possibilities of each society. Decent work is also a progressive concept; it has a floor, but no ceiling.¹¹

Despite the difficulties in measuring it, decent work has become the guiding contemporary image of an acceptable or desirable working life. During the UN General Assembly in September 2015, decent work and the four pillars of the Decent Work Agenda became integral elements of the new 2030 Agenda for Sustainable Development.¹² The Decent Work Agenda radically broadens the ILO's traditional constituencies to focus on people at the periphery of formal systems of labour and social protection.¹³

The shift in focus from law to regulation is also crucial. Traditional tools of labour law have been standard setting and the facilitation of collective self-regulation through collective bargaining. While they continue to be important, we must, as John Howe admonishes, challenge our lawyerly assumptions about what regulation is, who engages in it, and on what basis it should be assessed and understood.¹⁴

Workers Recommendation, 2011 (No. 201) Recommendation concerning Decent Work for Domestic Workers Adoption: Geneva, 100th ILC session (16 Jun 2011).

⁷ Dharam Ghai, "Decent Work: Concept and Indicators" (2003) 122 *International Labour Review* 125; Naushen Nizami and Narayan Prasad, *Decent Work: Concept, Theory and Measurement* (Palgrave Macmillan, 2017).

⁸ Kirsten Sehnbruch, Brendan Burchell, Nurjk Agloni and Agnieszka Piasna (2015) 46 "Human Development and Decent Work: Why some Concepts Succeed and Others Fail to Make an Impact" *Development and Change* 197 at 211.

⁸ Edward Webster, Deborah Budlender and Mark Orkin, "Developing a diagnostic tool and policy instrument for the realization of decent work" (2015) 154 *International Labour Review* 123.

⁹ Sehnbruch, Burchell, Agloni and Piasna, above n 8 at 211.

¹⁰ Ibid, 126; ILO, Chairperson's report. Tripartite Meeting of Experts on the Measurement of Decent Work, Geneva, 8–10 Sept 2008 at 6–17.

¹¹ Edward Webster, Deborah Budlender and Mark Orkin, "Developing a diagnostic tool and policy instrument for the realization of decent work" (2015) 154 *International Labour Review* 123 at 125.

¹² Resolution adopted by the General Assembly on 25 September 2015 Transforming our world: the 2030 Agenda for Sustainable Development, United Nations, General Assembly, A/RES/70/1, 21 October 2015, Goal 8; ILO, 2030 Development Agenda, Targets for Goal #8: Decent work and economic growth, available at <http://www.ilo.org/global/topics/sdg-2030/goal-8/WCMS_403787/lang--en/index.htm>.

¹³ Deirdre McCann and Judy Fudge, "Unacceptable forms of work: A multidimensional model" (2017) 156 *International Labour Review* 147.

¹⁴ John Howe, "A Different World: The Regulatory Project in Labour Law" in John Howe, Anna Chapman and Ingrid Landau (eds) *The Evolving Project of Labour Law* (Federation Press, 2017) 71 at

Some traditionalists fear that this shift from hard to soft law, to nudges from commands, and to private actors away from public authorities is a cloak for a deregulatory agenda.¹⁵ However, I view this shift from law to regulation as a welcome departure from the straitjacket of legal positivism to an acceptance of the need to study law in action. I advocate adopting a socio-legal approach that begins with social relations and social activity, and then moves to legal categories rather than the traditional legal method, which starts with legal categories and then moves to social activity. The starting point for regulation should be the social activities bound up in work relations and not the existing legal categories of employee, worker or independent contractor.

Moreover, instead of a narrow focus on state law, it is also critical to embrace the concept of “regulatory space”, which:

contends that regulatory power – measures or interventions that seek to change the behaviour of individuals or groups – is not held solely by governments but dispersed throughout a number of bodies or groups such as firms..., non-governmental and supra-governmental agencies, standard-setting organisations, credit-rating agencies, business and professional associations, trade unions, religious organisations, courts, tribunals, peer groups, and others.¹⁶

As labour lawyers, we are familiar with collective bargaining, which creates norms under the shadow of state law. We need to draw on our understanding of the importance of parties’ self-regulation in appreciating the plurality of norm generation. To be successful, any regulatory strategy must both engage with, and be internalised by, the social actors whose behaviour is the subject of regulation. For these reasons, it is imperative to explore a wider range of tools and institutions for regulating work that falls outside the traditional repertoire of labour law.

It is also critical to appreciate that the economy is global. Despite the wishes of national populists who want to reconstruct tariff barriers and return to a world in which a few dominant countries, such as the US or a handful in Europe, set the terms of international trade, this state of affairs is no longer possible nor, from the perspective of most former colonies, desirable. While it is true that labour’s relative success in previous decades in securing protection was dependent on embedding the full ambit of the market within the social and political realm of the nation state, it is also true that the post-war compromise was limited to a very few advanced industrial states and that many citizens in the first world were treated as second class in the workplace.¹⁷

72; see also John Howe, “Labour regulation now and in the future: Current trends and emerging themes” (2012) 59 *Journal of Industrial Relations* 209.

¹⁵ Harry Arthurs, “Corporate Self-Regulation: Political Economy, State Regulation and Reflexive Labour law” in Brian Bercusson and Cynthia Estlund (eds) *Regulating Labour in the Wake of Globalization: New Challenges, New Institutions* (Hart Publishing, 2008) at 76-78.

¹⁶ Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) at 18-19; Colin Scott, “Analysing Regulatory Space: Fragmented Resources and Institutional Design” (2001) *Public Law* 329.

¹⁷ See the discussion in Judy Fudge “Challenging the Borders of Labour Rights” in Darcy DuToit (ed) *Labour Law and Social Progress Holding the Line or Shifting the Boundaries? Bulletin for Comparative Labour Relations*– 92 (Kluwer 2016) 73.

Moreover, the empirical evidence of the race to the bottom is mixed.¹⁸ Society has become more unequal, but today we are witnessing a reconfiguration of the north south divide to one which is intra-national – look at the north in the United Kingdom or the rust belt in the United States– and zonal.¹⁹ The problem is that the structural causes of many injustices in the globalising world, including financial markets, offshore factories, investment regimes and global media, are not located within the territory and authority of the nation state.²⁰ The election of Trump in the United States and the referendum in favour of leaving the European Union in the United Kingdom may simply be the death throes of the old regime of hegemonic states on the global stage and the birth of new ones. Only time will tell.

III. The Global Economy: Financialisation and Supply chains

Yet, it is clear that globalisation, understood as the increasing mobility of capital, services and goods across national boundaries, which is facilitated by digital technology and free trade agreements, has weakened the supports upon which the standard employment relationship were built.²¹

The standard employment relationship is a regulated employment relationship, which provides security of income and employment and insures for social risk in exchange for preserving managerial prerogatives to direct and control the workplace. Its institutionalisation depends upon several other pillars that must be firmly embedded; these are the welfare state, social democratic political parties, industrial trade unions, a sexual division of social reproductive labour and vertically integrated firms. What the standard employment relationship does is link capitalist work relations to the wider risk-sharing role of the welfare state.²² The standard employment relationship was both the basis for, and outcome of, labour law in general and collective bargaining in particular. Large manufacturing firms needed a stable supply of workers disciplined to accept managerial authority, and these workers, in turn, formed industrial unions in order to both limit that authority and to obtain employment and income security. Workers' legal claims to wage or job protection were routed through the corporate asset pool. State policies, such as protective tariff walls and the regulation of financial markets, also supported the rise of large vertically integrated corporations that were embedded in national territories. The institution of the standard employment

¹⁸ For a discussion of the literature see Judy Fudge and Guy Mundlak, "Justice in a Globalizing World: Resolving Conflicts Involving Workers Rights Beyond the Nation State" in Yosi Dahan, Hanna Lerner, Faina Milman (eds) *Global Justice and International Labour Rights* (Cambridge University Press, 2016) 121.

¹⁹ Edward, Peter and Sumner, Andy, *The Geography of Inequality: Where and by How Much Has Income Distribution Changed Since 1990?* (September 5, 2013). Center for Global Development Working Paper No. 341. Available at <https://www.cgdev.org/sites/default/files/edward-sumner-geography-of-inequality_1_0.pdf>

²⁰ Fudge and Mundlak, above n 18.

²¹ This section derives from Judy Fudge, "The future of the standard employment relationship: Labour law, new institutional economics and old power resource theory" (2017) 59 *Journal of Industrial Relations* 374.

²² Simon Deakin, "What Exactly is Happening to the Contract of Employment? Reflections on Mark Freedland and Nicola Kountouris's Legal Construction of Personal Work Relations" (2013) 7 *Jerusalem Review of Legal Studies* 135 at 136.

relationship is the manifestation of a compromise between competing interests and logics brokered by democratic states.

I want to focus upon two features of the contemporary global capitalist economy – financialisation, and global supply chains – that undermine the supports for the traditional conception of labour law. Financialisation refers to the shift from industrial to financial capitalism. The increasingly autonomous realm of global finance has altered the underlying logic of the industrial economy and the inner workings of democratic society.²³ At the macro level, financialisation is a regime of accumulation that has succeeded the Fordist regime. Faced with increased international competition and domestic demand for shareholder return in the 1970s, American manufacturers have off-shored production and controlled foreign supply chains to cut down costs. Neo-liberal policies that deregulated the financial market further facilitated and promoted financialisation.²⁴ Productivity gains are not reinvested in the corporation, but, instead, are distributed to shareholders or used to purchase financial products. The income of rentiers has come at the expense of wage earners. Increased income inequality and high levels of household debt have simultaneously increased the systemic risk in financialised capitalism.²⁵

At the meso level, financialisation refers to the shareholder value approach, which has become the dominant corporate governance model.²⁶ Corporate restructuring to promote shareholder value and, most strikingly, managers' income, result in job loss, wage and benefit roll backs, and intensified work. While the United States and the United Kingdom have been leaders, it is clear that shareholder value has been shaping the institutional practices in countries around the globe. This process of financialisation has weakened workers' bargaining power through decentralisation and reduced the level of employment protection.²⁷

Although the rise of financial elites and the strength of the rentier and managerial classes are critical to understanding the shareholder value strategy, the mechanisms by which it is disseminated and transmitted are complicated, and extend to the state and to wage earners. The switch from pay-as-you-go state pension systems to funded pension schemes and the provision of tax benefits for individual investment in mutual funds encourage citizen-earners to invest in financial markets and actively promote the financialisation of everyday life. Individuals are responsible for managing their own risk and the approved way of doing so is to seek high rates of return in the equity market. Instead of embedding the market in the social, states increasingly expand the market into the social. Crouch characterises this change in the role of the welfare state as the shift from public Keynesianism, in which the state takes on debt, to privatised Keynesianism in which citizens are encouraged to take on debt to stimulate the

²³ Natascha Van der Zwan, "Making sense of financialization" (2014) 12 *Socio-Economic Review* 99 at 100.

²⁴ Sanford Jacoby, "Finance and Labor: Perspectives on Risk, Inequality, and Democracy" (2008) 30 *Comparative Labour Law and Policy Journal* 17; David Harvey, *A Brief History of Neo-liberalism* (Oxford, Oxford University Press, 2005).

²⁵ Simon Deakin and Aristeia Koukiadaki, "The sovereign debt crisis and the evolution of labour law in Europe" in Nicola Countouris and Mark Freedland M (eds) *Resocialising Europe in a Time of Crisis* (Cambridge University Press, 2013)163.

²⁶ Van der Zwan, above n 23.

²⁷ Thibault Darcillo, "Do Interactions between Finance and Labour Market Institutions Affect the Income Distribution?" (2016) 30 *Labour: Review of Labour Economics and Industrial Relations* 235.

economy. As a result, wage earners are increasingly capital owners.²⁸ This dual identity creates problems for creating and maintaining political coalitions that support the decommodification of labour.

Financialisation calls into question some of the key elements in the Fordist compromise for industrial capitalism that were central to the emergence of a standard employment relationship. I want to focus on one, which is the large manufacturing firm. The institutionalisation of the standard employment relationship was dependent upon the rise of the large manufacturing firm with which it evolved. Changes in how the firm is organised and to how work is contracted and deployed tend to undermine the standard employment relationship.

David Weil describes how the large vertically integrated firms that were essential to the consolidation of the standard employment relationship have shed employment and transferred it to a complicated network of smaller business units, with the result that employment has become more precarious.²⁹ This fissuring of the workplace allows key firms to focus on core competences, discard workers, and reduce costs, and it represents a response to pressures from capital markets. Significantly, new technologies enable lead firms to maintain control over their brand or product through the imposition and monitoring of standards while simultaneously transferring employment and risk outside their corporate boundaries.

The ability to fissure workplaces across national boundaries compounds the difficulty that states and unions have in maintaining or expanding the standard employment relationship. A distinctive feature of global capitalism is the increased permeability of national employment and business systems, through trade, production chains and international ownership. The ease with which firms can adopt different organisational forms enables them to disaggregate different components of production and service provision around the globe. The core activities of production, consumption and circulation, as well as their components (capital, labour, raw materials, management, information, technology and markets), are organised on a global scale through a network of linkages between economic agents. Global production and supply chains proliferate, and new technologies have resulted in the expansion of global services. The ILO estimates that, worldwide, one in five jobs are linked to global supply chains.³⁰

The expansion of transnational value chains disrupts dominant frameworks for understanding and analysing employment relations, which focus either on the firm or the implications of different national contexts for firms, such as varieties of capitalism.³¹ Lakhani, Kuruvilla and Avgar argue that varieties of capitalism approaches are limited when it comes to understanding the employment relationship in cross-national value chains. Not only do varieties of capitalism approaches assume institutional stability, which is problematic in light of the changes generated by

²⁸ Colin Crouch, "Privatised Keynesianism: an unacknowledged policy regime" (2009) 11 *British Journal of Politics and International Relations* 382.

²⁹ David Weil, *The Fissured Workplace Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).

³⁰ ILO, *Work Employment and Social Outlook: Trends 2015* (International Labour Organization, 2015) at 133.

³¹ Tashlan Lakhani, Sarosh Kuruvilla and Ariel Avgar, "From the Firm to the Network: Global Value Chains and Employment Relations Theory" (2013) 51 *British Journal of Industrial Relations* 440.

globalisation and market liberalisation, they are not particularly useful for understanding how the connections between firms across national boundaries affects employment relations. For these reasons, they urge researchers to shift the focus of employment relations analysis away from the individual firm to the interconnected networks in which they belong. Global value chain theory suggests that different value chains create different relationships between firms in the network operating under multiple national systems, and they propose that employment relations will also vary across different value chain configurations. Thus, Lakhani, Kuruvilla and Avgar advocate moving the level of analysis to the value chain in order to identify the diverse lead firm-supplier configurations that operate across national and firm boundaries.

Transnational value chains provide a particularly potent threat to the integrity of industrial relations systems and to the standard employment relationship. The reconfiguration of value-added activities across national boundaries also poses major challenges for trade unions, both undermining organised labour in advanced political economies of the global North and “exacerbating difficulties for building collective worker organization in the global South”.³² For this reason, the ILO has embarked on the long and highly contested journey of trying to develop an international instrument that seeks to cultivate decent work throughout global supply chains.³³ The configurational framework Lakhani, Kuruvilla, and Avgar propose provides an additional lens focussing on the global level that assists in identifying the conditions under which lead firms in transnational supply chains can be persuaded to “regulate” the employment relations of workers employed by their suppliers. The trick, however, is not to lose sight of the continuing significance of the territorial or local level.³⁴

Not only is the vertically integrated firm fissuring, other pillars that supported the platform for labour law, the standard employment relationships, are weakening. The andro-centric model of a citizen (male) breadwinner with equality norms extended to women or migrants is not fit for purpose for these workers who need bespoke standards not the same ones.³⁵ The space of labour law, the territory of the nation state, no longer corresponds to how economic power is organised, and the traditional techniques, institutions and actors in labour law need to be broadened. Given the transformation in some of the pillars supporting the standard employment relationship and traditional conceptions of labour law, we need to consider a range of platforms for regulating work. I want to be clear that I am not calling for labour law to be abandoned. However, I do not think it is possible simply to stretch the existing platform of the contract of employment to encompass the wide range of work that needs to be regulated for it to be decent.

³² Philip Taylor, “Putting Labour in its Place: Labour Process Analysis and Global Value Chains” in Kirstey Newsome, Jennifer Bair and Al Rainnie (eds) *Putting Labour in its Place: Labour Process Analysis and Global Value Chains* (Palgrave Macmillan, 2015) 1 at 11.

³³ ILO, *Decent work in global supply chains*, Report IV, International Labour Conference, 105th Session, 2016, ILC.105/IV.

³⁴ Neil Coe, “Labour and Global Production Networks: Mapping Variegated Landscapes of Agency” in Kirstey Newsome, Jennifer Bair and Al Rainnie (eds) *Putting Labour in its Place: Labour Process Analysis and Global Value Chains* (London, Palgrave, 2015) 171.

³⁵ Judy Fudge “Domestic Work, Mobility and Labour Law: Challenging Borders’ in Kerstin Ahlberg and Niklas Bruun (eds) *The New Foundation’s of Labour Law* (Peter Lang, 2017) 215.

IV. The Goals of Regulating Labour Markets and a Functional Approach to Regulating Work

The time is ripe to search for forms of regulation and institutions that are functionally equivalent to labour law. A functional approach to regulating for decent work would start with identifying the goals of regulation. On the basis of a review of the law and development and labour law literatures, Simon Deakin and Shelley Marshall have developed the following list of goals of labour market regulation, which includes:

- Economic coordination;
- Risk distribution;
- Demand management;
- Democratisation;
- Empowerment and
- Redressing the specific vulnerabilities and unfreedoms in a region or country.³⁶

These goals should be the basis for any type of regulation for decent work.

After selecting the goals, the next step in developing regulatory interventions is to map the structure of the specific market. Organisational form interacts with the structure of markets to influence work arrangements. Some markets are structured in ways that increase the vulnerability of workers to poor outcomes and shifting risk from profit takers to workers. This risk shifting behaviour is frequently the case where large concentrated business entities have greater market power than the numerous small-scale entities with which they interact.

David Weil identifies four types of monopsony markets with distinctive competitive dynamics that cause or exacerbate worker vulnerability.³⁷ They are: strong buyers sourcing in competitive supply chains; central production co-coordinators managing large contracting networks; small workshops linked to large branded national industries; and small workplaces and contractors linked to common purchasers. Garment and food supply chains, fast fashion, residential home construction, petty agricultural production, courier companies, gig workers, and waste pickers fall into these monopsony markets.

The third step is to look for functional equivalents to the institutional role that the employer played in the standard employment relationship.³⁸ In some cases, the regulation of work would be similar in many respects to the traditional forms of labour law as it would focus on work as a relationship between entities that exercises economic or labour process control over the worker. Such entities would include an employer, a retailer, a supplier, or purchaser. However, in other contexts, such as household workers who are family members, street vendors who do not depend upon one or two suppliers,

³⁶ Simon Deakin, "Labour law and development in the Long Run" in Shelley Marshall and Colin Fenwick (eds) *Labour Regulation and Development: Socio-Legal Perspectives* (Edward Edgar, 2016) 33; Shelley Marshall, "Revitalizing labour market regulation for the economic South: New forms and tools" in Shelley Marshall and Colin Fenwick (eds) *Labour Regulation and Development: Socio-Legal Perspectives* (Edward Edgar, 2016) 288 at 292-3.

³⁷ David Weil, "Rethinking the Regulation of Vulnerable work in the USA: A Sector-Based Approach" (2009) 51 *Journal of Industrial Relations* 411.

³⁸ Marshall, above n 36 at 300.

or self-employed seamstresses, there is no entity that exercises control over the worker. In these cases, it is important to find other platforms and techniques for regulating work and protecting workers than those traditionally associated with labour law. For example, the income protective function performed by firms in employment relationships can be accomplished by a range of social security schemes that can be funded by a variety of revenue-raising methods.³⁹

My contention is that many of the key problems that we must confront in regulating for decent work in a global economy are not simply matters of the classification. While there is a big problem with disguised or sham self-employment, which essentially involves questions about where to draw the lines between employees and independent contractors and whether there should be an intermediate category with diluted rights, these questions do not confront the critical problem: which is that the changing nature of firms and the organisation of production and the increasingly heterogeneous workforce no longer fit within our traditional labour law paradigm.⁴⁰ Furthermore, this traditional paradigm – a regulated and bilateral contract of employment – has never really come to grips with the perennial problem of informal work.⁴¹

Over the past 40 years, the prediction that the informal sector, which was characterised as a residual sector in developing countries, would be absorbed into the formal or capitalist economy as economies modernised, has proven to be incorrect.⁴² In fact, in developing and developed countries, the informal economy has persisted and with it, low-skilled, poorly paid, intermittent, and insecure employment. Although wage and salary employment is gradually growing as a percentage of total employment worldwide, informal employment remains stubbornly high, comprising more than 50 per cent of non-agricultural employment in most regions of the developing world. According to Women in Informal Employment: Globalising and Organising (WIEGO), the share informal employment of all non agricultural employment is 82 per cent in South Asia, 66 per cent in Sub-Saharan Africa, 65 per cent in East and Southeast Asia and 51 per cent in Latin America. In the Middle East and North Africa, informal employment is 45 per cent of non-agricultural employment.⁴³ Changes in production and the ways in which firms pursue flexible forms of labour, such as casual labour, contract labour, outsourcing, home working and other forms of subcontracting that offer the prospect of minimising fixed non-wage costs, have strengthened the links between informal and formal economic activities. Thus, we have witnessed a process of ‘informalisation’ whereby “employment is increasingly unregulated and workers are not protected by labour law”.⁴⁴

³⁹ Ibid.

⁴⁰ Judy Fudge, “Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation” (2006) 44 Osgoode Hall Law Journal 609.

⁴¹ Kamala Sankaran, “Labour Law in South Asia” in Shelley Marshall and Colin Fenwick (eds) *Labour Regulation and Development: Socio-Legal Perspectives* (Edward Edgar 2016) 207 at 211.

⁴² For a discussion of the definitions of informal sector, informal economy and informal employment see, Joann Vanek, Martha Alter Chen, Françoise Carré, James Heintz and Ralf Hussmanns, Statistics on the Informal Economy: Definitions, Regional Estimates & Challenges, WIEGO Working Paper (Statistics) N° 2, April 2014.

⁴³ Ibid, at 1.

⁴⁴ Judy Fudge and Deirdre McCann, Unacceptable Forms of Work: A Global and Comparative Study International Labour Office: Geneva 2015), 30-35, available <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/documents/publication/wcms_436504.pdf>

V. Informal Workers and Platform-Mediated Work

Given the endurance and prevalence of informal work, my first set of examples about how to regulate for decent work begins with the initiatives and research of WIEGO. WIEGO is a global network focussed on securing livelihoods for the working poor, especially women, in the informal economy. WIEGO celebrated its 20th anniversary in November 2017.

WIEGO recognises that informal workers, like *all* workers, require a regulatory framework that protects their rights in the workplace, balances the needs of all stakeholders, and promotes a climate of stability and security. Moreover, working with groups of informal workers, WIEGO has developed a series of briefs on regulation designed for specific occupational sectors, such as domestic workers, home-based workers, street vendors and waste pickers, in countries as diverse as Mexico, Ghana, South Africa, Thailand, India and Cambodia.⁴⁵

A good example of a successful regulatory initiative is the waste pickers in Pune, a city of over three million inhabitants in India.⁴⁶ Pune boasts robust recyclable materials markets where materials trading and processing operations are carried out. The markets consist of sub-markets that operate at different levels of trading activity. The lowest end is the retail segment in which waste pickers, who constitute the base of the pyramidal market structure, and itinerant waste buyers are the sellers. These workers, most of whom are women, comprise 76 per cent of the workers in the recycling market. Transactions are complex in this sub-market, with buyers and sellers changing places for different commodities. Towards the apex of the pyramid, there is progressive commodity specialisation. Recyclable materials transit to manufacturing industries through the higher levels of trade enterprises. Informal recovery and trading in recyclable materials is entirely market driven and flourishes without any subsidies.

A union, Kagad Kach Patra Kashtakari Panchayat (KKPKP), organised the waste workers at the bottom of the pyramid and sought recognition of its members as workers from the Pune Municipal Corporation. The union led a series of collective actions by aggrieved waste pickers that protested against abuse and discrimination. Since the waste pickers are not municipal employees, but instead are self-employed workers, the union used political leverage rather than traditional forms of collective bargaining to put pressure on the municipality.

The KKPKP first obtained identity cards for the workers from the municipal corporation, and the workers began to organise for secure income and clear access to the waste. As waste-picking activities became more organised, the municipality threatened to privatise the work of purchasing the waste. At that time, the union set up

⁴⁵ WIEGO, Empowering Informal Workers, Securing Informal Livelihoods, available at <<http://www.wiego.org/informal-economy/occupational-groups>>.

⁴⁶ The discussion of waste pickers in Pune is derived from Poornima Chikarmane, Waste Pickers in Pune, India, IEMS Informal Economy Monitoring Study, available at <<http://www.wiego.org/publications/city-report-informal-economy-monitoring-study-waste-pickers-pune-india>>; Poornima Chikarmane and Lakshmi Narayanan, 'Transform or Perish: Changing Conceptions of Work in Recycling' in Judy Fudge, With Kamala Sankaran, and Shae McCrystal (eds) *Regulating Work: Challenging Legal Boundaries* (Onati series) (Hart, 2012) 49.

a wholly worker-owned autonomous cooperative of waste pickers to purchase the waste and to act as a vehicle that would provide front-end waste management services to the city of Pune and recover user fees from households. The co-op and the municipal corporation entered into a formal memorandum of understanding for door-to-door collection of waste in 2008.

The workers wear uniforms, have access to sorting space at the co-op, and the union and the co-op provide group life and medical insurance to the workers as well as access to credit. Harassment has decreased and working conditions have improved. The waste pickers have a stable source of income and a firm identify as workers.

What is significant about this example is that it illustrates the range of membership-based organisations that are critical for regulating for decent work. In addition to their traditional role in collective bargaining, unions can exercise political power, establish co-operatives, engage in training or provide a hiring hall. Worker cooperatives are a form of enterprise that is owned and democratically controlled by their members, who are also workers/employees themselves. Both types of organisations, unions and cooperatives, have their place. However, it is critical for workers' organisations to identify the entity or authority most responsible for the issues over which they wish to negotiate. It is also important to recognise that the negotiating partner may differ for different issues even for a single group of workers.⁴⁷

The second group of workers I want to focus on are workers whose employment is mediated by digital platforms, which is commonly referred to as crowdsourcing or the 'gig economy'. In crowdwork, workers complete small jobs or tasks through online platforms, such as Amazon Mechanical Turk, Freelancer, Upwork, Crowdfunder, Fiver, and Clickworker.⁴⁸ These platforms may create a demand for highly skilled labour or provide micro tasks that require minimal skill, training and rewards. They enable workers to reach a global market for their labour, increasing their chances of finding flexible, paid work. However, they can also reinforce a gender-based division of labour when women try to combine crowdwork with care obligations or forms of social exclusion for populations who do not have access to the internet.⁴⁹ In "work-on-demand via apps", which is known as gig work, workers perform duties, such as providing transport, cleaning, home repairs, or running errands, but the workers learn about these jobs through mobile apps, from companies such as Uber, Taskrabbit, and Handy.⁵⁰ A distinctive feature of these jobs is that they are performed locally. Both crowdwork and on-demand work manifest many of the same features found in the wider labour market, including casualisation, income instability and (not infrequently) a disguised employment relationship.⁵¹

⁴⁷ Debbie Budlender, "Informal Workers and Collective Bargaining: Five Case Studies" WIEGO Organizing Brief No 9 October 2013, available at <<http://www.wiego.org/sites/default/files/publications/files/Budlender-Informal-Workers-Collective-Bargaining-WIEGO-OB9.pdf>>.

⁴⁸ Valerio De Stefano, *The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy."* Conditions of Work and Employment Series WP 71, Geneva, ILO, 2016.

⁴⁹ Janine Berg, *Income security in the on-demand economy: Findings and policy lessons from a survey of crowdworkers.* Conditions of Work and Employment Series No. 74 Inclusive Labour Markets, Labour Relations and Working International Labour Office – Geneva, 2015.

⁵⁰ De Stefano, above n 48.

⁵¹ Wayne Lewchuk. "Precarious jobs: where are they, and how do they affect well-being?" (2017) 28

Digital platforms, such as Amazon's Mechanical Turk or Uber, act as a form of 'internalised offshoring' to allocate work and provide services. The World Bank recently estimated that there were 48 million people registered on such platforms, though only around 10 per cent were considered to be active.⁵² By disrupting traditional boundaries between nation states and legal categories, they call into question the paradigms of labour law.

Here again, it is important to go beyond seeing the problem as simply one of classification.⁵³ Troy Sarina and Joellen Riley move beyond this simple step and they urge gig workers to investigate the:⁵⁴

potential for a different organisational form, better designed to ensure that the workers in a venture derive not just a minimal fee-for-service (as is presently the model for many gig economy platforms), but an opportunity to share in the profits of the venture, and to facilitate an efficient sharing of risks inherent in equipment ownership.

They argue that gig work via digitalised platforms may be particularly appropriate for organisations through the cooperative form, which is an organisational model that is an alternative to the for-profit corporation.⁵⁵ In fact, in South Africa, there is a cooperative called Coopify that runs an app for domestic workers that is designed to provide them with decent work.⁵⁶ Cooperatives will not solve all of the problems involved in commodifying labour, but they substitute democratic control by the workers for the profit maximising interests of shareholders. The cooperative form is not a panacea to the problem of labour exploitation, but it is an alternative model that challenges, rather than reflects, the mistaken belief that wealth trickles down and that undemocratic forms

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⁵² Siou Chew Kuek, Cecilia Maria Paradi-Guilford, Toks Fayomi, Saori Imaizumi, Panos Ipeirotis, *The global opportunity in online outsourcing* (Washington, D.C., World Bank Group, 2015) available at <<http://documents.worldbank.org/curated/en/138371468000900555/The-global-opportunity-in-online-outsourcing>>; One large recent study, McKinsey Global Institute, *Independent Work: Choice, Necessity, and the Gig Economy* (2016) [hereinafter MGI Study on Independent Work], found that 20 to 30 per cent of working age individuals in the U.S. and Europe engaged in some "independent work." Of those, most said that they did so by choice, either for their primary source of income (30 per cent) or for supplemental income (40 per cent). The remainder said they did "independent work" out of necessity, either as their primary source of income (though they would prefer a "traditional job") (14 per cent), or for supplemental income (16 per cent). Ibid, at viii.

⁵³ Stewart and Stanford identified five different options for regulating crowd source gig workers, which are 1) confirming and enforcing existing laws; 2) clarifying or expanding definitions of employment; 3) create a new category of 'independent worker'; 4) creating rights for workers, not employees; and 5) Reconsider the concept of an employer. Andrew Stewart and Jim Stanford, "Regulating work in the gig economy: What are the options?" (2017) 28, *The Economic and Labour Relations Review* 420.

⁵⁴ Troy Sarina and Joellen Riley, "Re-crafting the enterprise for the gig-economy" Paper presented at Fourth New Zealand Labour Law Society Conference, 24-25 November 2017, Christchurch, New Zealand, cited with authors' permission,

⁵⁵ A cooperative is defined by the International Cooperative Alliance, the International Labour Organization and the Government of South Africa as 'an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly--owned and democratically-controlled enterprise.' ILO Promotion of Cooperatives Recommendation, 2002 (No. 193).

⁵⁶ Abigail Hunt and Fortunate Machingura, *A good gig? The rise of on-demand domestic work* Working Paper 7 Overseas Development Institute (London, 2016).

of economic organisation – the corporation – result in the greatest wealth for all. Cooperatives could help to create a true sharing economy.

VI. Conclusion

Labour law regimes arose as solutions to problems that are endemic to labour markets.⁵⁷ However, the precise institutions and regimes that become embedded are context specific, with the result that subsequent regulations tend to follow an established path. The standard employment relationship and the labour laws with which are associated were solutions that were functional to resolving the recurring dilemmas in commodifying labour. The challenge now is to find functional equivalents.

At one level, this is an intellectual challenge. At the same time, as we must acknowledge the extent to which the past shapes the present, we must also avoid looking at the past through rose coloured glasses. The standard employment relationship was limited; and failing to acknowledge its limitations and only emphasising its achievements will not help us to address the regulatory challenges we face today. It is important to appreciate the extent to which the past was built on such institutionalised forms of subordination as patriarchy and colonialism. A return to the good old days is neither possible nor desirable.

Nativism and parochialism are not the solutions to deciding the difficult questions of entry to and membership in a territory. New ideas matter because ideas and discourse precede, legitimise and actuate policy change. Forging new foundations for labour law requires us to question and break down borders between production and social reproduction, the sexual division of labour, and nation states, to develop new forms of and vehicles for solidarity, and to appreciate the need to emancipate, and not simply to protect, society from capitalism.

However, it is important not to conflate the notion that “ideas matter” with the “power of ideas”.⁵⁸ Successful regulatory strategies must engage with social actors whose behaviour is the subject of regulation. The critical regulatory challenge for achieving decent work is to identify and institutionalise innovative forms of participatory governance alive to workers’ specific social location. This is the recurring struggle of labour law, collective self-organisation, and it is at the heart of regulating for decent work in a global economy.

⁵⁷ Judy Fudge, “Labour as a ‘Fictive Commodity’: Radically Reconceptualizing Labour Law” in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011).

⁵⁸ Huw Thomas and Peter Turnbull, “From horizontal to vertical labour governance: The International Labour Organization (ILO) and decent work in global supply chains” (2017) *Human Relations*, 19 First Published September 8, 2017.