Labour Regulation and Development

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Socio-Legal Perspectives

Edited by

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Preface

The goal of this volume is to explore how labour law can be understood as an institution and as a policy instrument in the context of a broader concept of economic and human development. The authors are predominantly labour lawyers, although among them are some with experience in development studies, and with knowledge and experience of key facets of economics, and of the quantitative research methods that are a commonplace in that discipline, even if they are not in law. One author is actually an economist – even if writing jointly with a lawyer.

This is important, because it serves in part to explain how we would see the volume as being situated. In particular it explains why there is little or no empirical, or quantitative analysis in a book about a subject which is frequently – in some disciplines, usually – considered from the perspective of such research methodologies. One way to understand this is to consider the volume in the context of the debate in the English language labour law literature – at least – over the functions and purposes of labour law. Much of this debate – not unusually for the discipline – is normative, or perhaps theoretical in nature. From this point of view, we hope the volume contributes to debate over an important question: what is and what should be the goals and purposes of labour law in an era when some of the received wisdom in that field has increasingly come into question? Several chapters touch on key issues in this debate, including the continuing changes in the nature of global production systems, and the increasing tension between those systems, and the concepts and capacities of nation states in the field of labour law.

If anything, it is only in keeping with the breadth of that labour law debate that a number of contributions to the volume range beyond the normative and theoretical to connect with matters that are frequently examined through other lenses. The volume stops short of engaging at length with the current debates over the turn to 'leximetric' analysis in labour law, or with the myriad contributions to the literature on the economic effects of labour market institutions. However, it by no means ignores them.

At the same time, the chapters in this volume speak to debates about the meaning, the purpose and the outcomes of the 'development project'.

Some of the contributions connect theoretically, others both theoretically and empirically. Some draw on thinking about the nature and the impact of fundamental human rights, and others reflect – from practical experience – on one of the key suppositions of much of the economic and development literature (and industry): that reform of legal institutions is possible, and can be effective, in supporting a transition to improved governance through rule of law, and so to improved development outcomes over time.

In truth, the challenge of how to support inclusive and sustainable development is both vast and enduring. And it is also constantly changing, as technologies, regulatory schemes and production systems adapt and change. From our point of view this book is directed towards the ever-present need to strive for policy levers that are apt to tackle the key challenges of human and economic development: how to lift people out of poverty, through work and jobs that are personally and economically enriching and sustainable.

This book has been rather a long time in the making. During that long time it has benefited from a lot of support from a large number of people. As a consequence, we, as the editors, owe a good many debts of gratitude to those without whom the volume would not have come to fruition.

The impetus for this book came from the International Labour Organization's ongoing search for new tools and ideas about how to ensure that the labour laws of nation-states contribute to and foster economic and human development. Mr George Dragnich – then ILO Executive Director for Social Dialogue – allocated resources to the labour law team in the former Industrial and Employment Relations Department to explore the issue. In turn Corinne Vargha – now Director of the ILO's International Labour Standards Department – brought Colin Fenwick into the work, and adopted the suggestion of Steve Gibbons, of Ergon Associates, to involve multiple authors. Renewing a prior collaboration with Colin Fenwick, Shelley Marshall was engaged to manage the project.

The initial project produced a report to the Office that included the early versions of the chapters in this volume by Simon Deakin, Colin Fenwick, Kevin Kolben, Shelley Marshall and Kamala Sankaran. The report included a chapter by Paul Benjamin (University of Cape Town) on labour law and regulation in southern Africa. It also had a chapter by Steve Gibbons and Kirsten Newitt (also of Ergon Associates) on the functional operation of the labour law team and its prospects for attracting additional resources to expand its work and increase its impact. For different reasons, neither of these papers was developed into a final chapter for this volume. But we remain very grateful to Paul, Steve and Kirsten for their early contributions.

The decision to revise the initial report into a book was driven by the strong sense that many of the ideas from the report would make a contribution to ongoing academic and policy debates about the impact and role of labour regulation in the development project. Another driver was the clear need to make the results of a significant investment of public resources available to a wider audience. The reviewers of the book proposal agreed that there was merit in the project, but also pointed to key omissions. Hence this volume includes a chapter on the relationship(s) between trade, labour standards and employment – by David Cheong and Franz Christian Ebert – and another on labour law and development in Latin America – by Graciela Bensusán. And when Paul Benjamin was unable to remain with the project, Shane Godfrey and Marlese von Broembsen stepped in to fill the gap.

There are many people and institutions to thank. Our original authors stayed with this project over a long time, and with good grace. At the ILO, Corinne Vargha, Moussa Oumarou, Sangheon Lee and Raymond Torres all made space – in different ways and at different times – for this work to continue. The ILO's Regulating for Decent Work Network conferences provided opportunities for aspects of the work to be presented and discussed. The ILO found ways to enable Colin Fenwick to work on this book during absences from Geneva. The Department of Business Law and Taxation in Monash University's Faculty of Economics generously made space for Colin Fenwick to work on the book, and to discuss and present work in progress. The Department is also of course the home institution of Shelley Marshall. At different times and in different ways, Melbourne Law School – and especially its Centre for Employment and Labour Relations Law – played a key role in allowing the project to continue. Colin Fenwick was provided with research facilities and space, and opportunities to present and discuss work in progress. More fundamentally, the Centre and the Law School generated the connection between us that grew into the collaboration that led to this book.

The ILO's publishing unit endured with good humour the many delays and twists and turns along the way – and always with useful suggestions on how to move forward. We offer then our thanks to Charlotte Beauchamp, Chris Edgar and Alison Irvine for their continuing willingness to invest in the project. We offer a very special thanks to our co-publishers, Edward Elgar, who readily agreed to accept the manuscript for publication, at a very late stage, following the withdrawal of another publisher.

No prefatory remarks to a book of this nature would be complete without thanks to the families that have sustained us along the way. And for good reason: for without them the endeavour would not have come to

such a conclusion. To our partners, to our children, and to our parents – both living and dead – we express our deepest thanks for their continued support and love.

SDM
CFF
Melbourne and Geneva

1. Labour law and development: Characteristics and challenges

Shelley Marshall and Colin Fenwick

1. INTRODUCTION

The book explores the question of whether labour law has a positive role to play in promoting economic development, in the face of arguments that labour regulation is likely to play a negative role in this respect. It explores methodological issues, and pays attention to developments in different regions of the world. The book considers conceptual frameworks for labour market regulation that go beyond the purely economic – or econometric – and directly addresses the issues that arise in designing effective labour regulation for developing economies. The contributions in this volume do so very largely from qualitative, and/or socio-legal perspectives. They examine the employment effects of liberalising international trade, and also consider the role of the ILO in supporting labour law reforms at the national level. The book concludes that labour law can play a positive role, but that there are significant challenges to pursuing this goal.

The aim of this introductory chapter is to canvass some of the particular challenges for regulating labour and promoting development in the economic South. Though the focus of this volume is on poor and middle-income countries, in an era where the classical paradigm of labour law is under attack, a focus on the relationship between labour law and development is broadly relevant. In 'old' Europe, for instance, labour law has been commemorated in recent funeral services. The ideas canvassed for revitalising labour market regulation in the economic South may also be applied to the economic North, particularly in relation to precarious and atypical workers.

The second section of this chapter, following this introductory section, describes the challenges for labour law – and for labour regulation more generally – in poor and middle-income contexts, in so far as it is possible to generalise. The third section explores various approaches to development, and the ways we might think about the role of labour law in those

contexts. The fourth section summarises the contributions of the authors to this volume.

2. LABOUR REGULATION CHALLENGES IN THE ECONOMIC SOUTH

The desire to promote development is common to all nations of the world. However, there are markedly different labour market conditions in poor and middle-income countries from those in higher and middle-income, and/or OECD countries. Research on the specific dynamics of labour markets is only just accumulating with sufficient volume to say anything with certainty about some countries, with very little still known about many poor countries. A significant research gap exists. Variation in labour market characteristics is not only explained by differences in income level and the varying priorities and policy approaches of governments in relation to trade and labour protection, but also by endogenous socio-economic structures and institutional complexes. Still, research documented within the chapters of this book (and beyond) suggests the following generalised challenges for labour regulation in poor countries:

- A rapidly growing labour force;
- A large proportion of the labour force engaged in agriculture with very low average productivity of labour, with opportunities for increasing real output and income within agriculture;
- Low levels, or highly uneven levels of productivity and wages across much of the workforce, and hence, high rates of working poverty;
- Economic growth accompanied by sluggish increases in formal employment opportunities, with large urban informal and rural labour markets accounting for the majority of workers, who are not afforded employment or social protection;
- A high proportion of youth in the labour force, who are more likely to be un- and underemployed than the adult population;
- Gender disparities, particularly in terms of the underrepresentation of women in the formal economy (and overrepresentation in the informal economy and unpaid work);
- Rapid increases in urban populations in most developing countries in the past several decades with 'non-market' driven labour supply to these non-rural areas; and
- Dynamics of 'non-market' (cultural/social and institutional) influences on the level and structure of wages.

It might be said that the main issue for these countries is not the lack of work per se, but the lack of better paid and more protected work in the formal economy, and the inadequacy of social protection in general.

The subsequent sections of this first part of the chapter explore these points in greater detail.

2.1 Informality, Inequality and Decent Work Deficits

Informality and inequality are significant barriers to the proper functioning of labour market regulation and of economic growth, and both are major challenges for policy makers concerned with promoting development and decent work. The term 'informal economy' includes informal employment relations in formal enterprises, and work that occurs in informal or unregistered enterprises (Hussmanns, 2004; ILO, 2013). It thus assists in focusing on the nature and quality of the work relationship, rather than on the status of an enterprise for which a person works (Bronstein, 2009: 32–33). Informality is attracting increasing policy interest based on recognition of its persistence: for example, in 2015 the International Labour Conference (ILC) adopted a Recommendation Concerning the Transition from the Informal to the Formal Economy (ILO, 2015; La Hovary, 2014).

Informality and inequality are tied to each other in a number of respects. One aspect is empirical: when some workers' conditions are regulated by labour laws and others are not, this represents a divide in the workforce, with an elite minority of formal workers entitled to enjoy minimum working conditions, including to work in safer environments, while the rest are more likely to be excluded from access to such key entitlements. Inequality also promotes informality. As we shall see, inequality undermines the proper functioning of institutions, including labour market institutions.

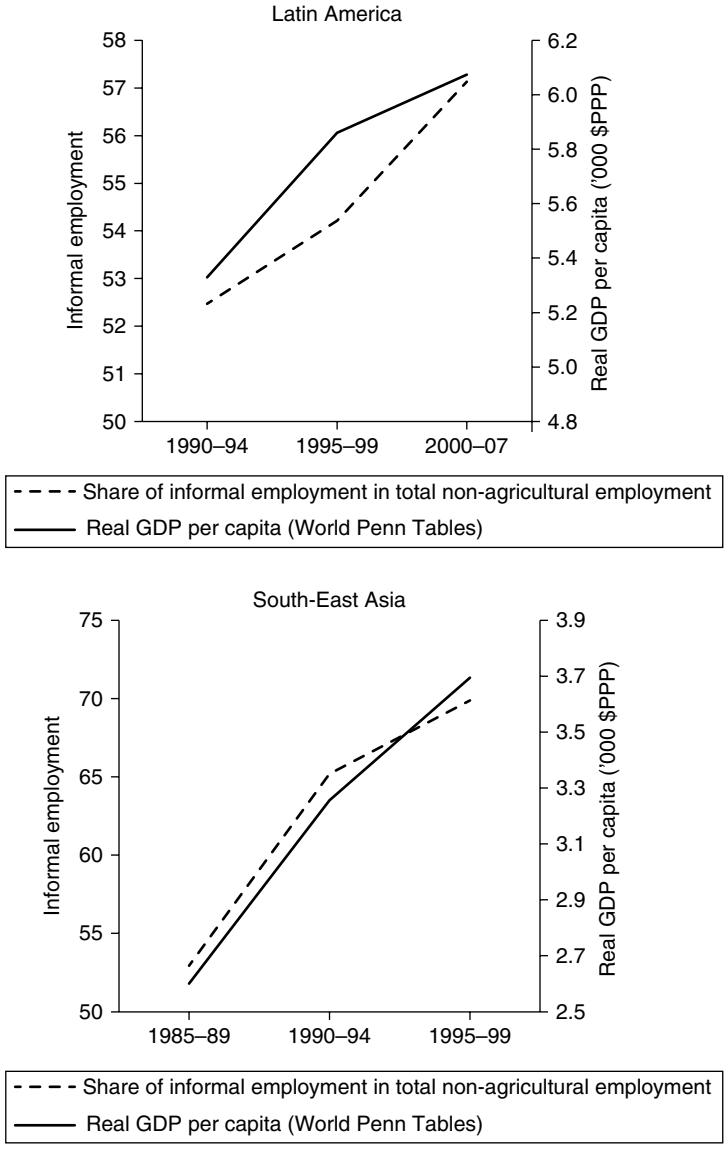
The informal economy has been the main source of work growth in recent years, particularly in developing and transition economies (Jütting and de Laiglesia, 2009). ILO global estimates from 2012 suggest that non-agricultural informal employment accounts for 82 per cent of total employment in South Asia, 66 per cent in sub-Saharan Africa, 65 per cent in east and South-East Asia (excluding China), 51 per cent in Latin America and 10 per cent in Eastern Europe and Central Asia. The share of employment in the informal economy only rises with the addition of agricultural employment (ILO, 2012). Over the past decade, many developing countries have experienced a growth revival, some with exceptionally high growth rates. Yet the record of decent employment creation has been very disappointing, and the impact of growth on unemployment,

underemployment and informal employment has been very limited in many cases (ILO, 2013: 9).

In 2015, the ILO's *World Employment and Social Outlook* revealed a marked shift away from the standard employment model, finding that fewer than 40 per cent of wage and salaried workers worldwide are employed on a full-time permanent basis – a share that appears to be declining (ILO, 2015: 13). The ILO also reported that, in emerging and developing economies, informal employment continues to be common, and very short-term contracts and irregular hours are becoming more widespread at the bottom of global supply chains (ILO, 2015: 13). The pervasive trend towards informal work is far more apparent in certain regions of the world. In the developed economies and EU, including Central and South-Eastern Europe and CIS, around eight in ten workers are employees – whereas in South Asia and sub-Saharan Africa, around 75 per cent of workers are either in own-account work or employed as contributing family workers (ILO, 2015: 28).

As this trend towards informal work continues, so too do the deleterious consequences of these insecure work arrangements. Unsurprisingly, informal employees earn far less than formal wage employees. In 2015, the ILO reported that the wages of informal employees were between 43 per cent (Philippines) and 64 per cent (Uruguay) lower than wages of formal employees (ILO, 2015: 41). The ILO also reported that poverty disproportionally affects temporary employees, the self-employed and unemployed (ILO, 2015: 47). In emerging and developing countries especially, the incidence of poverty when the household head is engaged in temporary/part-time/informal employment is especially high. In Mexico, for example, the poverty rate is just under 50 per cent when the household head is not permanently employed (compared to around 25 per cent when the household head is permanently employed) (ILO, 2015: 48). Figure 1.1 illustrates how, over the last 30 years, growth in selected countries in Southeast Asia and Latin America was accompanied by increasing informal employment.

Informality is a multifaceted and diverse phenomenon (International Labour Office, 2013: 4) that has old, structural causes as well as more recent causes. Older structural causes include the occupation of land by colonisers leading to loss of traditional work and food sources, internal migration and modernisation. Newer factors contributing to the growth of the nonstandard and informal workforce are numerous (Goldberg and Pavcnik, 2003). The vertical disintegration of production and the end of 'Fordist' production techniques have contributed to the growth of nonstandard and informal work for many years (Collins, 1990). Financial crises also contribute to this growth (Dao and Loungani, 2010; Atkinson and Morelli, 2011). Informal economies have grown most in countries that



Source: Jütting and de Laiglesia (2009), Chapter 2, Table 1.

Figure 1.1 Informal employment and GDP in Latin America and South-East Asia

experienced financial crisis where social security was underdeveloped, as people sought any means for survival (Atkinson and Morelli, 2011; Court and Cornia, 2004). Informal employment also grew after the implementation of structural reform packages which entailed trade liberalisation and the privatisation of formerly state-owned enterprises (Goldberg and Pavcnik, 2003) without a sufficient focus on job growth and decent work.

Informality is both a symptom of inequality, poverty and decent work deficits, and a cause of them. Previous research conducted for the ILO suggests that job quality within the informal economy and the micro- and small enterprises that constitute it is often far lower than the formal sector (Fenwick et al., 2008). Incomes are generally much lower in the informal economy than in the formal economy, and informal economy workers generally receive no health benefits, no work-related childcare, no sick leave and no pensions (Reinecke and White, 2004). Instability and insecurity are pervasive in the informal economy, by its very nature. In addition to this, if treated unfairly by employers, workers have no recourse to the courts, because the employment relationship is rarely documented (Sankaran, 2002, 2008).

The most undesirable of work practices are found disproportionately in informal economies (Freije, 2001; ILO, 2012; Solorzano and Cid, 2002). Most forced labour is likely to occur in informal economies. Bonded and forced labour remain major problems for labour market regulation in many poor countries. Sankaran (this volume) argues that this demands a rethinking of the definition and identification of bonded labour, and the degree to which it overlaps with forced labour as understood in the ILO Conventions on the subject. Courts in India can presume the existence of bonded labour where forced labour exists.

Often, children are engaged in forms of work that are linked to the informal economy, including agriculture, mining, fishing and manufacturing, mainly as contributing family workers. Workers in the informal economy are more frequently exposed to workplace hazards and suffer more work-related injuries and illnesses than employees in larger workplaces (Lamm and Walters, 2004). Compliance with occupational health and safety regulations in the small and micro enterprises that constitute the larger part of the informal economy is very limited (Scott, 1998).

Recent studies have reiterated key findings that workers in non-standard forms of employment face more risk at work. Generally, workers in non-standard forms of employment have higher rates of workplace accidents than permanent employees, and the work may be associated with psychological factors that increase the risk of adverse health outcomes (ILO, 2015: 29). In OECD economies, temporary employment con-

tracts are strongly associated with lower job quality in all three measures assessed by the OECD (earnings quality, labour market insecurity and job strain) (OECD, 2014: 120). The higher incidence of job strain among temporary workers tends to be driven by both higher job demands and lower job resources.[1] In particular, temporary workers report higher exposure to physical health risk factors at work and workplace intimidation, while having less autonomy and learning opportunities, and receiving lower support from their colleagues (OECD, 2014: 120).

The assumption that employers in the informal economy of developing countries have maximum flexibility is inaccurate, particularly if flexibility is seen as not only the ability to reduce employment but also to increase it. Though there may be few, if any, regulations that hinder hiring or firing (external numerical flexibility) or working time (internal numerical flexibility), these employers are constrained by poor access to credit, infrastructure and other factors, which act as a break on employment growth in these enterprises. High labour turnover in enterprises also operates as a disincentive for training and investment and thus further inhibits the economic and social development of both the enterprise and the individual worker. Informality acts as a barrier for individuals to increase their income through becoming more highly trained and progressing into more highly paid jobs. It is a factor in maintaining a gap between those who are already educated and those who might otherwise make progress in the workplace.

We can see, then, that informality and inequality are intertwined, though growing inequality has a number of causes. Bensusán's chapter in this volume discusses the ways that structural problems and segmentation in Latin American labour markets have resulted in greater inequality. This is related in particular to the emergence of the new economy alongside older, low productivity labour markets, with the two remaining remarkably separate. It is estimated that low productivity work constitutes 30.7 per cent of the labour market in Chile and 64.6 per cent in Peru (see Bensusán's chapter).

Economic modelling conducted by Sen and others indicates that whilst income inequality at very low levels may accelerate growth, income inequality at a high level diminishes growth (Sen, 1992). The reason for this appears to lie, to a significant extent, in institutional contexts. There

[1] According to the OECD, job strain is characterised by a high level of work stressors combined with insufficient resources and support in the workplace to accomplish duties, including, for example, exposure to physical health risk factors and workplace intimidation. Job strain constitutes a major health risk factor for workers (OECD, 2014: 87–88).

is strong empirical support for the proposition that inequality impacts negatively upon the *quality* of institutions (Chong and Gradstein, 2004; Saavedra and Chong, 1999). Institutions (including labour institutions) assist in overcoming collective action problems. This entails generating the expectation that repeat actions will result in the same or similar outcomes. Institutions are distrusted when they are perceived to be predatory or are believed only to operate in the interests of elite groups in society. When this is the case, people tend to avoid formal institutions and instead rely upon informal networks. For this reason, Bardhan reached the conclusion that the 'history of underdevelopment suggests that a major stumbling block to beneficial institutional change in many poor countries lies in the distributive conflicts and asymmetries in bargaining power among social groups' (Bardhan, 2005: 512). A high degree of economic and political inequality enables elites to resist efforts to reform inefficient institutions and to capture rents from existing institutions. In recent years this has been accompanied in some contexts by greater difficulties for lower income groups to engage in collective action that can translate to effective political action. The outcome can be a vicious circle of institutional underdevelopment (Lee and Gerecke, 2015). As Picketty writes: the 'forces of divergence can at any point regain the upper hand, as seems to be happening now, at the beginning of the twenty-first century', and if current trends continue, 'the consequences for the long-term dynamics of the wealth distribution are potentially terrifying' (quoted in Cassidy, 2014).

When institutions are performing poorly, informality is more likely. In the field of labour regulation, this vicious cycle of institutional underdevelopment is readily apparent. For example, when inequality is high, and the wages of the majority of workers are low, rich companies can more easily pay off labour inspectors. The cost to the company may be low relative to net profit. Such is the case in Cambodia where labour inspectors frequently do not make it past the administrative office of factories, and companies may even pay the fuel costs for the labour inspector's visit (Hall, 2000, 2010). Breaches of core labour standards remain unchecked in larger companies and labour inspectors unable to visit smaller enterprises due to fuel costs and the lack of bribes to augment low wages. This contributes to distrust in the institution of labour inspection. Workers perceive that the labour inspectorate is 'not for them'. This reduces the number of complaints to the labour inspectorate, and thus the effectiveness of the inspectorate. This regulatory failure results in the labour inspectorate acting as a conduit for reproducing inequality instead of reducing it.

We can see, then, that informality, inequality and decent work deficits have intertwined causes and operate in an unvirtuous cycle. Recently,

such conditions of inequality, under-employment and informal work have led to social unrest, as seen in the 'Arab Spring' and the 2014 protests in Cambodia which shut down the country's capital. In 2011 the ILO developed a 'Social Unrest Index', a composite indicator reflecting the social and political unrest in any given state. The index weighs variables related to respondents' confidence in government, standard of living, personal freedoms, job opportunities and access to the internet (ILO, 2011: 12 fn 11). In 2010, the social unrest index increased for all regions in the world except Latin America and the Caribbean and sub-Saharan Africa – with sizeable increases in the index reported in the Middle East, North Africa and South Asia (ILO, 2011: 13). In 2013, the ILO reported that economic growth and the unemployment rate are the two most important determinants of social unrest (ILO, 2013: 14). The ILO's figures also suggested that, out of 71 economies for which information was available, the risk of social unrest increased in 46 of them between 2011 and 2012 (ILO, 2013: 14).

Labour market institutions have an important role to play in interceding in unrest of this type by providing agonistic, democratic avenues for mediating the often deeply conflicting interests that lie behind these forms of upheaval. Labour market institutions can play a positive role in reducing informality (ILO, 2014b: Chapter 6), in reducing inequality (Berg, 2015), and in promoting justice more broadly (Berg and Kucera, 2008). Where inequality is concerned, labour market institutions and policies with redistributive effects are essential (Luebker, 2015; ILO, 2014a), and can be developed without necessary risk to overall growth (Ostry et al., 2014).

2.2 Socio-Economic Drivers and Characteristics of Labour Markets in the South

Though socio-economic factors shape labour markets everywhere, what is often referred to as 'non-market factors' are particularly strong determinants of labour market dynamics in poor countries. The expression 'non-market' is misleading, because markets are always socially embedded: market relations are social relations, but because the expression is an accepted term in the labour relations literature it is used in this chapter. Disparities in power and social status between men and women as well as caste, ethnicity and a host of other characteristics are particularly strong determinants of worker behaviour and labour market structures which deserve the attention of the designers of labour regulation.

2.2.1 Gender

Though gender disparities in the labour market are not unique to poor and middle-income countries, the gendered nature of work also has an impact on informality, and on the particular expression of poverty. Women workers are particularly overrepresented in informal work, comprising around three-quarters of informal workers (Kucera and Xenogiani, 2009). Workers in the informal economy typically experience both direct and indirect discrimination in the level of their working conditions. The gendered dimension creates specific vulnerabilities which must be addressed through labour market regulation. In most countries for which data disaggregated by sex are available, the share of women in informal employment in non-agricultural activities outnumbers that of men. In sub-Saharan Africa, 74 per cent of women's employment (non-agricultural) is informal, in contrast with 61 per cent for men; in Latin America and the Caribbean the figures are 54 and 48 per cent; in South Asia, 83 and 82 per cent; and in urban China, 36 and 30 per cent (ILO and WEIGO, 2002; ILO, 2002).

This data has several features, outlined by Chen (2001). First, the informal economy is the main source of work for women in most developing countries. The majority of economically active women in developing countries are engaged in the informal economy. In some countries in sub-Saharan Africa, virtually all of the female non-agricultural labour force is in the informal economy. For example, in India and in Indonesia, the informal economy accounts for nine out of every ten women working outside agriculture. In five Latin American and four East Asian countries, for which data are available, more than half of the female non-agricultural workforce is in the informal economy. Second, the informal economy is a larger source of employment for women than for men. The proportion of women workers in the informal economy exceeds that of men in most countries. Third, women's share of the total informal workforce outside of agriculture is higher than men's share in nine out of 21 developing countries for which data are available (Chen, 2001). A final and important dimension of the gendered nature of informal work is that women are more likely to be engaged in work from their homes (Chen estimates that over 85 per cent of home-based workers in most countries are women (Chen, 2001: 76)) and in industrial subcontracting chains as outworkers. These factors exacerbate their powerlessness and their lack of visibility in statistics and to regulators.

Sankaran (Chapter 7 this volume) suggests that labour law needs to render this contribution visible by granting the status of 'worker' to such unpaid family 'helpers'. The undervaluation of women's work in the gender segregation of occupations and the law's failure to value women's work adequately is another source of discrimination.

2.2.2 Discrimination based on particular social categories

Discrimination on the basis of caste and other social categories remains an important factor influencing the structure of labour markets. In India, for instance, Sankaran (this volume) notes the increasing recognition of large numbers of the socially discriminated (*dalits* or scheduled castes), tribals and members of religious minorities such as Muslims in informal employment and their relative absence in regular, formal employment. Religious affiliations, caste and ethnicity impact upon access to housing, credit, customers and storage facilities, and thus also affect workers' abilities to build their own account micro-businesses. Anti-discrimination laws either do not exist or fail to contribute to the systematic restructuring of labour markets to the extent necessary.

2.2.3 Non-market drivers of internal and between-country migration

Migrant workers are one of the more vulnerable contingents of the workforce in less-developed countries. One of the reasons that urban underemployment is so high in many countries in the economic South is because internal migration is not driven by supply, it is triggered by other factors (Breman, 2010). Much of this migration is driven by poverty, as whole families migrate in search of work, becoming part of the vulnerable urban poor. Migration due to displacement because of violence and conflict is a further cause of impoverishment in many less-developed countries, as is displacement for major development projects such as dams and mines. Some authors have suggested that something akin to the enclosure movements of British industrialisation is occurring in many poor countries around the world that are feeding demand for the fuel and building materials required for rapid industrialisation. Such circulation of workers who have been expelled from their land for various reasons to urban settings in search of work is observed throughout the economic South (Breman, 2010).

2.3 Institutional Challenges for Labour Regulation

As is documented in Colin Fenwick's contribution to this book, one of the biggest barriers to effective labour market regulation is lack of institutional capacity. A number of the countries that Fenwick considers have labour laws that in large measure reflect much of what might be sought from the point of view of conformity with ILO standards. But it is notorious that the law on the books is not applied effectively in practice: labour laws are weakly enforced by state inspectorates, and trade unions and civil society bodies may have limited capacity to fill that gap. State inspectorates are small and poorly funded, because the revenue base is insufficient. One reason for this is that the scale of informal enterprises and work means

that little tax is being paid. Alternatively, funds are being prioritised for other policy areas. As a consequence, labour inspectors can often easily be bought off, and/or are simply overworked and poorly trained.

Union activity has frequently been repressed under non-democratic governments, as in Fenwick's case study of El Salvador, for example. In her chapter in this volume Bensusán describes how the murder of trade unionists in Colombia and barriers to the creation and operation of independent trade unions in Mexico act as obstacles to the emergence of an independent trade union movement. In state-socialist countries, unions played a non-agonistic role, and recalibration takes time. In other countries, civil society is thriving, but conflicts over ideology and competition for power makes cooperation during reform processes nigh impossible. Thus, Fenwick writes, despite the ILO's mandate to engage in tripartite consultation when providing technical assistance to countries that are reforming their labour laws, the capacity for the social partners to participate effectively may be severely constrained. This, combined with weak state capacity, can raise the risk of the ILO – or any other external actor – preparing draft texts with only very limited input from the state, unions or employer organisations. Fenwick describes how this occurred in Liberia in 2009–10.

Cazes and Verick (2010) suggest that the principal constraints on the capacity to implement labour regulation for low-income countries are the lack of fiscal space and inadequate administrative/institutional capacity. In addition, social dialogue is weak, while active and passive labour market policies only reach a small proportion of the population. Added to this is the relatively strong power of large enterprises compared with labour departments and the state more broadly, as well as the limited jurisdiction of labour market regulation (see Table 1.1).

The authors in the present volume suggest various ways to incrementally build the capacity of state and social partners. Indeed, it is one of the roles of labour regulation to contribute to the democratic capacity of the various players – workers, employer organisations and other users of labour, and government. Adapting social dialogue processes for the informal economy is a special challenge addressed by various authors. Since a large number of such workers are self-employed or own account workers, there are generally no unions which represent them. Kevin Kolben, for example, focuses on partnerships between state and international organisations aimed at bolstering the capacity of states. These themes are explored further in the final chapter of this volume (Chapter 9, Marshall).

The chapters of this book demonstrate that the challenges for labour law in developing contexts are vastly different, in many respects, from those of industrialised and richer nations. As such, it is a mistake to imagine that the debates about the nature of labour law can be transferred

Table 1.1 Institutional challenges facing developing countries in improving decent work

Policy element	Challenges for developing countries
Fiscal capacity	Many developing countries have inadequate tax bases and little fiscal space.
Institutional capacity	Often there is little administrative and institutional capacity to administer labour market and social protection, and enforce labour legislation.
Social dialogue	Worker and employer organisations are often weak in developing countries, and social dialogue and collective bargaining mechanisms are typically inadequate.
Passive labour market policies	Income replacement mechanisms, such as unemployment insurance, are either inadequate or non-existent.
Active labour market policies	Active labour market policies, such as training systems, are few, often weak, and inappropriate for relevant skill development. Public employment services are also inadequately developed and ineffective. However, innovative employment guarantee and conditional cash transfer programmes are nonetheless observed.
Relative power	Large enterprises operating in developing countries often have far greater financial and institutional capacity than the labour departments of the state.
Jurisdiction	Labour market regulation is limited to national jurisdictions, while a high proportion of production (for export, in particular) occurs in transnational supply chains and for companies headquartered outside the developing country.

Source: Modified from Cazes and Verick (2010).

and applied from richer country settings to poorer countries. The particular challenges, aims and deficits of labour regulation in poor nations are a matter of empirical study and local debate. By drawing data and debates from different corners of the globe, this book hopes to bring these localised debates to a broader audience.

3. APPROACHES TO DEVELOPMENT AND LABOUR

This volume asks whether labour law can promote development. An important starting point, therefore, is to ask what we mean by 'development'. There is a great wealth of literature exploring the meaning and purpose

of 'development' reflecting the fact that development, as a concept, can be conceived of in a vast number of different ways. This section briefly canvasses something of the history of the concept in the post-war period in relation to labour, including the thinking of the ILO in this space.

3.1 What is Development?

Perhaps the dominant purpose development in the post-war period has been understood to be the *alleviation of poverty*. Although, as we shall see, this approach has its problems, the emphasis on increasing the per capita income of the poor remains vitally important. As Kaushik Basu puts it, privation is the norm rather than the exception (Basu, 2003). In 2014, the United Nations reported 'remarkable progress' towards the alleviation of extreme poverty – citing the fact that between 1990 and 2010 the absolute number of people living in extreme poverty decreased from 1.9 billion to 1.2 billion (United Nations, 2014: 9). The measure of 'extreme poverty', utilised by the World Bank, is taken according to the number of people living below an average daily income of $1.25 (United Nations, 2014: 8).[2] It is estimated that around a quarter of the world's population live in *extreme* poverty (United Nations, 2009). Over 2.1 billion people worldwide, or 35 per cent of the world's population, were living on less than US$3.10 a day in 2012, and 12.7 per cent of the world's population were living at or below $1.90 a day.[3] In international development discourse, the poverty line, with its associated measure of poverty incidence, has been a key concept in targeting, monitoring and evaluating interventions in the post-war period. For much of the post-war era, poverty reduction was associated with modern economic growth, which was promoted through varying degrees of state intervention. The idea was that as long as economic growth occurred poverty would be alleviated. In the 1980s, the markets were increasingly seen to be the primary mechanism for

[2] We note that the World Bank's definition of 'extreme poverty' has been heavily criticised by the UN Special Rapporteur on extreme poverty for failing to take into account 'the realities of poverty on the ground' (Alston, 2014: 4). A more popular measure of determining poverty levels is the 'Multidimensional Poverty Index', utilised by the United Nations Development Programme (UNDP) (United Nations Development Programme, 2014: 4). Going beyond a single indicator of income, the Multidimensional Poverty Index factors in a range of deprivations at the household level, including health, schooling and living conditions. In 2014, the UNDP reported over 2.2 billion people are either near or living in multidimensional poverty (United Nations Development Programme, 2014: 4).

[3] http://www.worldbank.org/en/topic/poverty/overview.

generating economic growth in the West. More recently, there has been a tempering of this view.

A more recent focus in development discourse has been on '*well-being*'; a holistic approach which includes health, happiness, dignity and social capital, in addition to the more basic development goals (Graham, 2005). The Wellbeing and Development approach, developed by the Centre for Development Studies at Bath, for instance, defines the well-being approach as one which considers what people *have or do not have* (material); what people *do or cannot do* with it (relational); and what people *think or feel* (subjective).

The *material* refers to the 'stuff' of well-being, such as food, bodies, shelter and the physical environment. In practical application this typically refers most immediately to economic assets and income, but it should not be restricted to this.

The *relational* concerns social interaction: the rules and practices that govern 'who gets what and why'. It involves power and identity, the connections between people and also the making of difference between them. It is the arena of action which brings the material and subjective to life.

The *subjective* concerns cultural values, ideologies and beliefs, and also people's own perceptions of their situation.

These three elements of well-being are not different areas of life, but interlinked aspects of a process (rather than a state or an outcome). Martha Nussbaum and Amartya Sen have referred to well-being as a person's ability to do valuable acts or reach valuable states (1995: 30). It is easy to see how decent work would contribute towards well-being.

Parallel to the 'poverty-alleviation' discourse, a long-standing strain in the development literature has been concerned with attainment of *freedoms*, either negative (freedom from . . .), focusing on procedural fulfilment of libertarian rights, or positive (freedom to . . .), and of justice, seen most famously in the Rawlsian theory of justice. For Sen, '[d]evelopment is understood as the process of removing the unfreedoms that people have to achieve the things they have reason to value' (Sen, 1999a). Nussbaum accepts 'substantial freedoms', such as the ability to live to old age in good health, engage in economic transactions or participate in political activities, as the constitutive parts of development, and understands poverty as an egregious form of capability-deprivation (Nussbaum, 2011a, 2011b; Nussbaum and Sen, 1995). Kolben (Chapter 3 of this volume) stresses the importance of freedoms in the domain of industrial citizenship. For Kolben, 'labour development' entails broad concepts of workplace democracy, expanding opportunities for political participation by workers' movements and developing an effective regulatory state, as well as non-state institutions of labour governance. A key area of exploration

here is to think about the linkages between workplace democracy and broader political democracy.

This theory has been extended by Sen and Nussbaum in their *capability approach*. According to this approach, human capabilities are directly relevant to people's well-being and freedom, while indirectly they have the capacity to influence social change and economic production (Sen, 1999a: 296). In the context of labour, 'capacity' refers to the skills, knowledge and values of people (workers), and how, in using these skills, they can take advantage of the labour market and other 'opportunities' available to them. In this sense 'labour market opportunities' means the alternatives available to people to use their capacity (their skills, knowledge and attitudes) as a way in which to gain financial or personal reward (Tipples, 2004).

Bob Hepple has also adopted the capabilities approach. He suggested that labour market regulation can be viewed as a tool to realise

> an equality of capabilities. This embraces the substantive freedoms that individuals need in order to survive and prosper, including freedom to pursue education and training and a career of their choosing, freedom of association and freedom to participate in economic and political decision-making that affects their lives as well as the capacity to obtain decent work. (2005: 31)

Some have stressed that development is a process of institutional and capability transformation. Joseph Stiglitz is a proponent of this view. For Stiglitz (2000) transformative change occurs in part through deliberation and the establishment of democratic processes and institutions. Stiglitz argues that such an inclusive, democratic process can, and should, occur at two levels: the micro-firm level and at the broader political level.

For its part, in virtue of its broad mandate, the ILO has always taken a broad view of development as it relates to labour. Langille argues that the link between social justice and peace in the ILO's 1919 Constitution can be understood as 'an early expression of what we now call a "comprehensive" or "integrated" view of development' (Langille, 2003). The 1946 Declaration of Philadelphia in turn marked a shift in international thinking, introducing the idea of the universal social rights of the individual, serving as the basis for the demand that economic policies be shaped by social objectives (Rodgers et al., 2009). In other words, economic growth was never seen as an end in itself, but rather as a means to further social justice and a better living for all the world's peoples (Jenks, 1969: 64).

The ILO's contributions to the evolution of the concept of development have consistently gone beyond the narrowly economic. The ILO challenged the trickle-down paradigm promoted by other international institutions. The ILO highlighted the significance of employment generation as a policy goal in addition to growth alone. Over time it moved beyond a

focus on the number of jobs to attention to the *quality* of the jobs created (see, for example, ILO, 2014a). In recent years the quality of jobs has come on to the agenda of other international institutions (OECD, 2014; UNDP, 2015; World Bank, 2013).

Whereas other institutions focused on the concept of the poverty line, the ILO argued for a focus on basic needs, because the notion of an absolute poverty line served to demonstrate the persistence of poverty even where economic growth had occurred (Saith, 2006). The basic-needs approach was critiqued for operating essentially in what Amartya Sen (1982) called commodity space. Moving beyond the focus on poverty, the ILO pursued the concept of social exclusion, which served to highlight the deeper causal and social dynamics of marginalisation. This in turn brought into the frame 'the notions of political participation, rights, dignity, social equality, citizenship, legal and customary frameworks of inclusion and exclusion' (Saith, 2006: 132).

In the late 1990s the ILO developed its Decent Work Agenda, with its four, interlinked components:

1. The promotion of labour rights;
2. The promotion of employment;
3. Social protection for vulnerable situations, and
4. The promotion of social dialogue.

The Decent Work concept and the associated policy agenda represent a major intervention in the discourse on deprivation and development. A key feature of the concept is that it is fundamentally about the recognition that '*all those who work have rights at work*' (ILO, 2002).

Although it can be criticised for trying to encompass too much due to its compound nature, with its four distinct components, there are benefits to its broadness. Saith argues that the decent work concept qualifies as an attempt at setting a new paradigm and 'opened up space for partially redefining the terms of the development debate, and in the process resurrecting important dimensions that had been obliterated by the neo-liberal bandwagon' (Saith, 2006: 133). As Saith observes, the Decent Work concept includes several key features that may enable it to make a major contribution to thinking about development. Among these are the continued insistence on the social aspects of development – beyond the economic – as ends in their own right, and the fact that the Decent Work concept is fundamentally labour-ist in nature. Its point of entry into current discourse and debate is through the status, rights and role of labour. This, too, is the premise of this book. The contributions here insist that work is a fundamental aspect of social and economic development.

The Decent Work Agenda has found expression in most of the significant coordinated international development approaches of the current period. Nine years ago, the United Nations' Millennium Goals, for instance, incorporated decent work as a goal (United Nations, 2009). From 2015 decent work has been included among the United Nations' Sustainable Development Goals, the eighth of which is to 'Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all' (United Nations General Assembly, 2015: 12).

In his address to the ILO Conference in 1999, Amartya Sen summarised many of the themes presented in this brief overview of labour development. He praised the Decent Work Agenda's goal of promoting 'opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity'. He also commended the universality of coverage of the Decent Work Agenda, as it includes 'not just workers in the organized sector, not only wage workers, but also unregulated wage workers, the self-employed and homeworkers' (Sen, 1999b). Sen suggested that the Decent Work Agenda extends beyond the need to adopt legal frameworks (Sen, 1999b):

> The invitation is not merely to fresh legislation, important as it is, since the realization of rights can also be helped by other developments, such as the creation of new institutions, better working of existing institutions and, last but not least, by a general political and social commitment to work for the appropriate functioning of social, political and economic arrangements to facilitate recognized rights.

In keeping with Sen's invitation, this book examines not only the possible content of labour legislation, but also its interaction with complexes or systems of institutions and the political commitments required to facilitate decent work for the betterment of human kind.

3.2 What is Labour Regulation?

The way that we conceptualise the relationship between labour market regulation and development depends importantly on the way that we understand labour market regulation. Deakin (Chapter 2) suggests that there have been three main strains of thought in relation to the relationship between labour law and labour markets which may be characterised, respectively, as 'neoclassical', 'new-institutional' and 'systemic'.

The *neoclassical* view sees labour law regulation as an external intervention in, or interference with, the market. Neoclassical economists are thus concerned that labour laws will distort the free and efficient

operation of the market. For neoclassical economists, the autonomous decision-making of economic agents – workers, employers, the managers of labour – can lead to an outcome which is in the interests of society as a whole. The regulation of labour relations is seen to be prone to capture by rent-seeking groups which will lead to less than optimal overall market outcomes for all involved, including labour. Left to their own devices, markets will self-adjust, reaching a labour market equilibrium. This view informs influential approaches such as those found in the World Bank's *Doing Business* reports.

This view of labour regulation as having a 'market limiting' function is not confined to neoclassical economics. Many proponents of labour law who view protective legislation as 'de-commodifying' also understand labour law to be market limiting. They, however, see this in positive terms.

The *new-institutionalist* view sees unregulated markets as being affected by a range of imperfections including transaction costs, imperfect and asymmetrical access to information, monopsonies (monopoly buyers) and negative externalities. For new-institutionalists, autonomous decision making *may* lead to societally beneficial outcomes, but only under certain conditions, and regulation may be required to bring these about or adjust for their absence. To the extent that markets are not perfectly competitive – relevant information concerning prices and quality is not costlessly and evenly available, and the factors of production are not completely mobile – there is scope for intervention on efficiency grounds.

Deakin points out that a problem with this approach is that it is difficult to know what the hypothetical equilibrium point would look like in practice within a labour market, so as to know how to design labour market regulation so it will act as a correction to market imperfections. What is the ideal market supposed to look like? There are, as Hirschman put it, many 'rival views of market society' (Hirschman, 1982). The same market could be seen as failing by some people whilst others regard it as normatively functioning, depending upon their respective theories of the market (Chang, 2002: 544). Labour law can therefore only be viewed as offering approximate solutions to the effects of market failure.

A third approach which Deakin outlines is one that is informed by new-institutionalist economics but takes an empirically informed, comparative and historical view of the development of economic institutions. This approach sees labour law as having a far-ranging market constituting role in which labour market regulations are endogenous governance mechanisms which emerge out of particular economic and political contexts. For this reason, Deakin calls the relationship between institutions and markets one of *system interaction*.

For this approach, like the new-institutional framework, rational economic behaviour depends on an institutional framework, part of which is legal in nature. Institutions arise when economic agents engage in a pattern of repeated economic exchange. Institutions are helpful in overcoming 'collective action' or cooperation problems which are created when parties are uncertain of, or unable to predict, the behaviour of others. Rules make it possible for the parties to engage in a form of complex cooperation which generates a surplus by comparison to other modes of work organisation (Deakin and Wilkinson, 2005). The forms of labour market regulation that arise may not be the most efficient. However, the transaction costs of searching from scratch for a new solution may be too great, even if, in theory, the search might result in a superior pay-off (Aoki, 2001). Economic players invest in existing institutions, and history shows that radical upheavals of economic institutions are difficult and have high financial and social costs.

Legal (regulatory) and economic systems have co-evolved in the sense of developing at the same time and in connection with each other in particular national or regional contexts. Indeed, economic institutions are underpinned by the legal or regulatory order in various ways. From this point of view, the core institutions of labour market regulation – the individual employment relationship, collective bargaining and social insurance – have co-evolved with the emergence of labour markets in developed market economies (Deakin and Wilkinson, 2005).

This understanding of labour market regulation as one of many that constitutes the market leads to two further insights which inform the contributions in the volume. One is the idea that institutions operate within the contexts of institutional systems or complexes. The other is that institutions have functions, and more than one institutional form may perform the same function. This idea is pursued further in the final chapter of this volume, in particular.

The contributors to this volume do not offer one particular conceptualisation of the relationship between labour law and development. The aim of the book is to offer a variety of understandings of the relationship between labour law and development in different geographical and institutional settings, in keeping with the third approach outlined in this section. In other words, they accept that the development of labour law institutions is path dependent, and that the operation of institutions depends on and is the consequence of interactions between institutions and economic and social patterns. These conceptions of labour law as an institution of development are explored further in the subsequent part of this introductory chapter.

4. CONTRIBUTIONS OF THE AUTHORS

This section of the chapter introduces in greater detail the contributions as they relate to the key themes and debates outlined in this introductory chapter. They approach these themes in a methodologically diverse manner. Some of the chapters draw on empirical data, such as Simon Deakin's, which discusses the empirical evidence to support different sides of debates around the functions of labour law, or Cheong and Ebert's which inspects the empirical literature that considers the relationship between labour standards, trade and employment levels. Others are more normative or theoretical, such as Kevin Kolben's, who sees labour market regulation as a key site for pursuing the fundamental goals of development. The chapters also focus on different regions of the world. Marlese von Broembsen and Shane Godfrey's chapter explores the themes of the book in the context of southern Africa. Kamala Sankaran does so in the context of India and neighbouring countries. Graciela Bensusán surveys the recent evolution of labour law and labour regulation in Latin America.

Chapter 2 (Simon Deakin) surveys different economic and development theory approaches to understanding the effects of labour regulation. This is a key contribution to the book overall. Other chapters – including this one – outline different approaches to development and to how labour regulation and development theories interact with each other. Some contributors (Kolben, Sankaran) articulate concepts of labour regulation that the authors argue could be positive in a developmental sense. Deakin places the debate in the context of how key theories of economic development have themselves imagined the impact and the role of labour regulation in the development project. In Deakin's view, major theories of development have tended to see the relationship between economic development and key institutions such as (labour) law and regulation as *linear*. In other words, that economic and technological developments will lead to institutional developments, including in the law (Datta, 1986); or, that key institutions, including law, are essential for economic development (New Institutional Economics). More recently, legal origins theory has challenged some of the assumptions of earlier development theories. Whereas Lewis or Kuznets might have predicted that the spread of economic and technological change would stimulate the development of more – and more sophisticated – institutions, in the view of legal origins theory, *less* institutional architecture should lead to *more* economic development. But it is still essentially a linear conception – and moreover one that rests on foundations that are at best empirically weak.

Thus what is needed is a way of understanding the interrelationship of law and other institutions with developmental evolution. Only such an

approach can overcome the signal weakness of the linear conceptualisation at the core of other theories: their inability to explain cross-country variation, and even occasional reversals of historical trends. In Deakin's view, what is needed is a systemic institutional approach to understanding labour regulation, as this enables us to explain 'how labour law rules can be understood as coevolving with economic institutions as a market economy develops' (Deakin, this volume, p. 34). To this end, Deakin outlines the key institutional functions that labour law can fulfil: economic coordination, risk distribution, and maintenance of demand. In common with Kolben, Sankaran and Bensusán (all this volume), he also argues that labour laws can be important in facilitating democratisation, social and civil dialogue, and empowerment. Deakin considers his arguments in light of the findings of leximetric studies of changes in labour laws and economic development. His conclusion: 'over the long run . . . labour law has acted as a developmental institution, that is, as a set of linked mechanisms and practices which has contributed to economic growth and to the achievement of complementary policy goals including poverty alleviation and social cohesion' (Deakin, this volume, p. 33).

Chapter 3 (Kevin Kolben) draws on current debates and literature in regulation theory and development theory, and engages with questions about the goals of development theory and policy. His project is the articulation of a theoretical basis on which to understand labour regulation as being not only positive for development, but as a key site for pursuing fundamental goals of development. Drawing on Nussbaum and Sen, Kolben argues that the core of the development project ought to be the promotion of human capabilities, in this sense taking the view that development should be understood as a process that is transformative of society and its institutions – as distinct from economic measures of changes in (for example) gross domestic product or poverty levels. A capabilities approach to development therefore 'seeks to remove the unfreedoms that exist that prevent people from achieving the functionings that they have reason to value, and . . . to ensure that people enjoy certain threshold capabilities' (Kolben, this volume, p. 64).

From this point of view, work is a central place to pursue the development project, as it is quintessentially a site of *un*freedom; it is a site 'where capabilities are both enhanced, and diminished' (Kolben, this volume, p. 64). From a strategic point of view, work is a key site at which to pursue a capabilities-enhancing approach to development, even if only from the simplistic perspective that so many people spend so much of their time working. In this sense the strategic value lies in the ability to reach so many people. In addition, this way of seeing things provides a further basis for regulatory intervention: recognising the freedom-promoting function of

labour regulation addresses the traditional liberal concern that work takes place within a private economic sphere that should be the subject of limited state intervention. On this basis it is possible to articulate specific goals for labour regulation, among them promoting non-discrimination, and 'facilitating mechanisms of worker engagement and participation in workplace governance such that workers exercise effective control and influence over their work lives' (Kolben, this volume, p. 73). In the capabilities approach, Kolben finds the basis to insist – as do others in this volume – on the significance for labour regulation and for the broader development project of promoting democratisation, and in particular mechanisms to express voice and to act collectively.

Chapter 4 (David Cheong and Franz Christian Ebert) explores the interrelationships of trade, labour standards, development and employment. Drawing on Blackett, Kolben and Stiglitz, Cheong and Ebert argue that labour law, rather than being inimical to the project of economic development, is needed 'to mediate people's participation in areas of the world of work where the market system does not lead to dignified or democratic outcomes' (Cheong and Ebert, this volume, p. 87). This conceptualisation locates their chapter firmly with Kolben in their emphasis on dignity and democracy, and with Deakin in their emphasis on labour regulation as a means to promote these objectives where the market alone does not do so. Indeed they go on to note some key economic arguments in favour of labour regulation: collective bargaining can promote effective information exchange and coordination; minimum wage standards can drive competitiveness and productivity improvement; safety and health regulation reduces the overall burden on individuals and society by requiring firms to internalise costs; and, more generally, labour regulation can serve as an incentive to invest in human capital.

Cheong and Ebert review the empirical literature that considers how labour standards affect trade, how trade affects labour standards, and how trade affects employment levels. Not surprisingly they, like Deakin in his chapter in this volume, stress the need for caution when drawing on or interpreting the results of empirical studies. A correlation between better compliance with core international labour standards and higher GDP may demonstrate nothing conclusive about the direction of causality. Studies of the development impact of freer trade are often focused on narrowly defined indicators of economic development. Studies of the impact of trade on employment, wages and other standard labour market indicators have produced varying conclusions. Given the emphasis in many chapters in this volume on fundamental freedoms, Cheong and Ebert give pause for reflection when they observe that notwithstanding the diversity of results, 'one possible conclusion is that trade liberalisation tends to be more

problematic for the labour standards related to freedom of association and collective bargaining and non-discrimination' (Cheong and Ebert, this volume, p. 95). They conclude that improved labour standards are unlikely to have adverse effects on trade, and indeed may be positive in the longer run, but that governments may need to devise policy carefully to ensure positive employment effects from trade.

Chapter 5 (Marlese von Broembsen and Shane Godfrey) moves the focus to case studies of labour law in operation in the clothing and textile industry, which is one of those most significantly affected by shifts in international trade. They explore the interconnected but divergent experiences of Lesotho and South Africa. As with other chapters in this volume, the authors argue that labour regulation may have a positive developmental effect. In Chapter 2, Deakin reminds us that labour law took shape in England in the late 19th century in part as a result of political developments: the extension of the franchise enabled the establishment of political parties that pushed for social legislation. In Chapter 5, Von Broembsen and Godfrey take the debate much further towards the question of the role of the political. They draw on Ha Joon Chang's institutional political economy perspective which, they argue, 'challenges the neoliberal notion of the market as natural, and renders visible the ways in which the political economy affects whether a regulation or labour market institution is regarded as interfering in the market or not' (von Broembsen and Godfrey, this volume, p. 138). Their emphasis on the significance of the political economy leads them to argue that if labour law is to be able to realise its potential to contribute positively to development, it must make two major shifts: it must move beyond regulating individual employment relationships to regulating value chains, and 'in each national/regional context, the goals of trade and industrial policy have to be aligned' (von Broembsen and Godfrey, this volume, p. 138). The consequence of overlooking either of these demands is that labour law's only redistributive effects will be *between workers*, rather than between capital and workers.

Lesotho and South Africa and their labour markets have long been interlinked, most notoriously with the history of men from Lesotho migrating for work in the South African mines. The two countries' clothing industries have also been interconnected. In South Africa the industry has declined since the shift to democracy and opening up to global economic participation, and despite the use of trade and industrial policy to support it. A key battleground has been the application of labour regulation and in particular the perceived cost of the extension of collectively determined working conditions to the whole industry through a collective bargaining council with roots back to the widespread unionisation of the industry in the early years of its development. Whereas bargaining

councils as a labour law institution were previously not a focus of concern for capital, the new industrial and trade policy conditions after 1994 exposed them to new attacks and pressures. At the same time, one effect of the decline in the South African industry has been the relocation of South African capital to lower wage Lesotho. There, labour law has retained its traditional focus on workers in formal employment and on the regulation, among other conditions, of minimum wages. Given the conditions in South Africa and the lower wages in Lesotho, the minimum wage as a labour institution has not come under the same pressure in Lesotho as was applied to the bargaining council in South Africa. But its capacity to have a redistributive impact (and to promote productivity improvement at firm level) is in very large measure a consequence of wholly outside influences: the growth of a clothing industry that owes its existence in the country to shifts in international trade policy that made it profitable to invest in a previously limited industry.

Chapter 6 (Graciela Bensusán) surveys the recent evolution of labour law and labour regulation in Latin America, drawing on an analytical framework for labour law and its role suggested by Simon Deakin. The goal is to consider the role that labour regulation has played in addressing inequality in the region over the long term. Her working concept of development is one articulated by the United Nations Economic Commission for Latin America and the Caribbean (ECLAC). This concept of 'inclusive and integrated development' has three dimensions: structural change, growth to reduce both internal and external income and productivity gaps, and the promotion of equality (Bensusán, this volume, p. 164). The author's own articulation is refined to a concept of labour regulation as a vehicle to spread quality employment with rights, to improve workers' capabilities including their bargaining power, and to address inequality gaps in incomes and working conditions. (Bensusán, this volume, p. 165). Here there are very clear overlaps with the key elements suggested by Kevin Kolben in Chapter 3, with emphases on participation, equality and the enhancement of capabilities.

Drawing on Huber, Bensusán identifies key development challenges in Latin America: low skills and productivity, trade unions with limited bargaining power, antagonistic relations between employers and workers, limited tripartite engagement, and paternalistic governments (Bensusán, this volume, p. 168–9). This leads to the specific imperative to address inequality, including through labour regulation: it is an impediment to development. Bensusán highlights some examples of labour market regulation in the region that may be positive for development: facilitation of industry or sectoral bargaining in Argentina and Uruguay; enhancing and improving labour inspection in Brazil; extending legal protection to

domestic workers in Argentina, Brazil and Uruguay; and attempting to address the challenges posed to labour law by changes in labour markets and in particular sub-contracting (Mexico and Uruguay). The chapter concludes that in some cases there have been significant changes that have modified earlier, neoliberal policy prescriptions. Nevertheless, labour regulation in the region is still doing less than it might to reduce inequality, especially given the interplay of high levels of informal employment and social protection systems that for the most part remain best suited to those in formal employment.

Chapter 7 (Kamala Sankaran) considers the role and potential of labour law/regulation from the perspective of the right to development, especially as enunciated in international declarations of the right. The chapter explores these issues in the context of South Asian labour markets, and the Indian labour market in particular. Turning to the international human rights framework adds further perspective to the arguments advanced elsewhere in this volume about the meaning of development. Thinking about a *right* to development brings attention to the role of the individual: it emphasises their agency and participation in the process, in addition to their role as a beneficiary of the development process. In turn, development is conceived of as 'a comprehensive economic, social, cultural and political process', founded on equal participation, that aims to improve 'the well-being of the entire population and of all individuals' (Sankaran, this volume, p. 208). For Sankaran, it follows that labour law should be inclusive; should enable workers to exercise some agency, including in how laws and policies are formulated and implemented; and should help to address inequality by giving workers voice through, for example, collective bargaining.

In exploring these arguments in the context of her home country, India, Sankaran argues for a re-conceptualisation of labour law. In particular, she identifies as problematic the origins of Indian labour law as an instrument to preserve industrial peace, in the context of a wider social compact that was expected to see major growth in formal employment and industrial development as a result of massive public investment. This in turn has led to a focus in the debate on labour law and its role in Indian development that largely ignores the fact that fewer than 10 per cent of Indian workers are working under conditions set by formal labour law. Bringing that fact to the centre of the debate leads Sankaran to argue (similarly to von Broembsen and Godfrey) for interconnection between labour law and other areas of policy, in this case, rural and urban development planning. This is particularly relevant for those in the informal economy, and for whom a major obstacle is access to land. Sankaran also considers the extent to which labour law can address the particular challenges faced by

other excluded groups including ethnic, racial and religious minorities. Like Bensusán, Sankaran points to the interrelationship of poverty and limited social protection schemes. In this, both can be seen implicitly to endorse Deakin's earlier arguments – based in large part on his previous work with Frank Wilkinson – that social protection systems have at times played a key role in creating the conditions in which effective wage labour markets could emerge (Deakin, this volume; Deakin and Wilkinson, 2005).

Chapter 8 (Colin Fenwick) provides an examination of the perspective and the role of the ILO in supporting its member states to revise their labour laws, including in ways that promote economic development. The chapter considers case studies of labour law reform in six countries where the ILO provided assistance: Cambodia, El Salvador, Liberia, Nepal, Romania and South Africa. A key aim of the chapter is to draw on practical experience of labour law reform in a variety of contexts, so as to explore how the ideas developed elsewhere in the volume could be made operational.

The chapter agrees with the broad thrust of the rest of the book, in particular that there is a pressing need to develop institutions and models of labour regulation that can be effective in developing economy environments. At the same time, the chapter raises questions about the assumptions that underlie the project of law reform in aid of development, in particular as concerns the capacity of actors at the national level to engage in the debates and processes that are envisaged. These questions arise naturally from the contexts considered in the case studies, which, in different ways, each raise the same fundamental question: how, and how quickly, can institutions be developed in environments that are institutionally very weak? Moreover – and in this sense connecting to von Broembsen and Godfrey's reminder of Chang's emphasis on the political economy – how will the political actors in any given institutional configuration interact, and will the outcome of their contestation redound to the benefit of labour regulation and the wider development project?

Chapter 9 (Shelley Marshall) concludes the book by assessing the ideas developed by the contributors to the present volume and elsewhere for ways that labour law could be reformed and augmented to better promote development in poor and middle-income countries. It begins from the premise that institutions of labour law were often transplanted from industrialised settings and thus new architectures better suited to those countries ought to be constructed. These proposals for reform are understood to be part of a broad toolkit which can be drawn on by those responsible for reforming labour laws in the interests of promoting development, rather than a clear formula. In keeping with the idea that economic and

social institutions are path dependent and operate in connection with one another, it proposes a template for examining existing labour laws and accompanying institutional complexes to design reform programmes that will attune with the existing institutional ecosystem.

5. CONCLUSION

This volume explores the role of labour regulation in the development project. The authors disagree with each other in some key respects. Von Broembsen and Godfrey, for example, question whether Deakin's highly developed arguments in favour of labour law in economic terms do not pose the risk of labour law being captured by the economic project (von Broembsen and Godfrey, this volume, p. 137; compare Dukes, 2014). Fenwick raises the question whether it is feasible, in purely practical terms, ever to take the lessons of economic and legal institutional evolution in some contexts, and attempt to draw on them in other, institutionally weak contexts.

But there are also broad and significant areas of agreement. All authors here make arguments in favour of labour regulation as a positive contribution to the economic and human development project. In particular, we see a common emphasis on the need to integrate the economic and the human. There is a strong theme of the need for and the value of using labour regulation to empower the disempowered, through voice and other mechanisms. There is a strong theme of using labour regulation to address fundamental inequality – but in this case not only because it is a human right, because it is fair, but also because it will have positive effects for the economic development project. Here, many of the contributions draw, explicitly and otherwise, on conceptions of development that emphasise the enhancement of human capabilities. Another common theme is the need to broaden the conceptual scope of labour regulation. In the immediate sense, the authors argue that labour law should be revamped to reach beyond the formal employment relationship so far as possible. But beyond this, they argue that the labour regulation project should also be re-conceived as having essential interconnections with other major areas of policy: social protection, industry and trade policy, urban and rural development and planning policy (compare Arup et al., 2006).

The chapters in this volume present a variety of socio-legal perspectives on development, and on the role of labour regulation in that project. In other words, while the authors in different ways engage with 'orthodox' or 'traditional' conceptions of development, for the most part they work explicitly in different – if sometimes related – scholarly

traditions. But at the same time, this is not a volume that takes issue with the underlying imperative of the human development project. For so long as huge numbers of the world's population live in poverty, for so long as so many have insufficient work, or insufficiently safe or insufficiently paid work, human development will and must remain a key goal of policy makers the world over. Given that imperative, it is to be hoped that the perspectives presented in this volume may make a positive – if small – contribution to our understanding of how to work towards this pressing goal.

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2. Labour law and development in the long run

Simon Deakin

1. INTRODUCTION

It is often claimed that labour laws of the kind which have characterised industrial economies since the middle decades of the twentieth century are of little relevance to the conditions of today's developing countries. Labour laws, this argument goes, can only operate where certain background conditions, including stable employment, effective worker representation and a high degree of state capacity, are met. The conjunction of informal work and ineffective enforcement in low and middle-income countries is likely to render labour law rules irrelevant in those contexts (Standing, 2011). Another view, not entirely consistent with the first since it presupposes at least some degree of effectiveness for worker-protective labour law, is that the application of labour law rules to emerging markets will harm their development (Langille, 2010). Various normative conclusions flow from these positions. One is that the extension of 'normal' or 'standard' worker protections to emerging markets should be delayed until they have reached the necessary level of development (Sunstein, 1997). Another, more radical, is that emerging markets would be well advised to avoid worker-protective labour laws as far as possible, given their supposedly negative implications for economic efficiency (Botero et al., 2004).

This chapter will seek to present an alternative perspective on the relationship between labour law and development. It will argue that over the long run of the emergence of industrial economies, beginning in western Europe and North America and then spreading across the world, labour law has acted as a developmental institution, that is, as a set of linked mechanisms and practices which has contributed to economic growth and to the achievement of complementary policy goals including poverty alleviation and social cohesion. Section 2 reviews two of the leading theories on law and development, structural adjustment theory and legal origin theory, and suggests that, while they may take different normative positions on the desirability of labour law regulation, they share a linear

conception of the relationship between legal and economic change. Section 3 presents a *systemic* perspective which explains, by contrast to the prevailing accounts, how labour law rules can be understood as coevolving with economic institutions as a market economy develops. Section 4 identifies the principal regulatory functions and techniques associated with labour law when it is viewed through a systemic lens. Section 5 presents empirical evidence on the recent operation of labour law rules in developed and developing countries, using longitudinal data from the Cambridge Centre for Business Research Labour Regulation Index (CBR-LRI). Section 6 concludes.

2. FROM STRUCTURAL ADJUSTMENT THEORY TO NEW INSTITUTIONAL ECONOMICS: THE LIMITS OF LINEAR MODELS

The 'structural transformation' models of Lewis (1954) and Kuznetz (1955) imply that labour law protections should follow the growth process, rather than vice versa. Developing economies benefit from a pool of low-cost labour which is associated with the transition from a subsistence economy to one based on market relations and wage labour. They will eventually reach a 'Lewisian turning point' when labour market institutions, such as social insurance and collective bargaining, emerge in response to growing wage dependence (Lewis, 1954). In a similar way, the inverted 'U' of the Kuznetz curve implies that inequality will increase in the initial stages of industrialisation, only to decline beyond a certain point, in part through the increased ability of organised labour to mobilise political support for social legislation (Kuznetz, 1955). A relevant assumption here is that the spread of manufacturing jobs, displacing agrarian ones, creates the conditions for worker solidarity, with knock-on effects for the political process; worker demands are accommodated firstly by the adoption of universal suffrage and then by the construction of a welfare state.

Kuznets's model was consistent with empirical evidence which indicated a correlation between cross-national levels of GDP and inequality. Then, as now, developed economies displayed lower levels of inequality, whether measured in terms of earnings or household income, than developing ones (Kuznets, 1955). Empirical evidence for the initial upward movement of the Kuznets curve is, however, less compelling; cross-sectional analysis of countries at different levels of development indicates falling inequality more or less from the start of the transition from rural and traditional economies to industrialised, market-orientated ones (Palma, 2011).

A different way of approaching the issue is to look at the experience of

individual countries over time. Whether inequality was increasing in the early stages of industrialisation in western European countries is a highly contested issue, in large part because the evidence base for this period is poor. It has, however, been established that a secular decline in inequality began in North American and Europe from the late 1910s and continued until the 1970s, when it was reversed firstly in the USA and UK and then more generally across industrialised economies (Piketty and Saez, 2003). Whether this reversal marks a refutation of the Kuznets curve is not clear given the relatively short period over which it has occurred by comparison with the long swing in favour of egalitarian outcomes which preceded it, but it plainly shows that progress towards greater equality under conditions of a market economy is not irreversible (Piketty, 2014).

A problem in applying the Lewis and Kuznets models to particular country contexts is their indeterminacy on the timing of the transition from one stage of market organisation to another. In the late 2000s this became a controversial issue in the analysis of wages and employment trends in middle-income countries. In the Indian context the debate has centred over why increased economic growth since the 1990s has not led to a sizable reduction in informal employment of the kind that would be implied by reaching the Lewisian turning point. The most recent data suggest that formal employment is increasing and may soon reach 10 per cent of the workforce (IHD, 2013), but even so this does not suggest that any kind of critical juncture has been reached. In China the debate has turned not so much on the extent of informal employment, although this is certainly a contested issue in terms of definitions and data, as on the existence or otherwise of trends towards wage equality and rising real incomes in urbanised regions and sectors (Kuruvilla et al., 2013).

The terminology of 'turning points' suggests that the long-run movement of societies towards greater equality is driven by economic and technological factors to which institutions, including the legal system, respond. It is not hard to see how, within the terms of the Lewisian and Kuznetsian approaches, labour law could be both cause and effect of egalitarian outcomes at particular points in the transition process, but neither model offers a clear account of the role of institutions in shaping the developmental process, in part because their focus is elsewhere.

New institutional economics ('NIE'), on the other hand, puts institutions centre stage by proposing that the legal system and related aspects of the regulatory framework can affect economic growth and development, depending on the approach that is taken to the governance of market relations. The assumption here is that a legal framework for an industrial economy is needed to reduce transaction costs associated with the operation of firms and markets (North, 1990, 2010). Markets are not, or at least

not entirely, self-sustaining; they rely on systems of private law to specify property and contract rights, the building blocks of exchange, and on commercial and corporate law more generally to underpin the operation of business firms. Although markets may operate at one remove from the legal system, and often do so autonomously from any particular mode of legal enforcement of contract and property rights, an appropriately framed legal regime can help build trust in market institutions and deepen the division of labour associated with the displacement by the firm and the market of traditional forms of economic organisation.

In principle the NIE approach is not antithetical to labour law. An efficiency-based case can be made for certain institutions of labour law, in particular the contract of employment, in underpinning managerial coordination and the division of labour within production, thereby assisting the emergence of vertically-integrated industrial firms, while worker-protective labour legislation in its various forms, including working time laws, unfair dismissal protections and laws providing for employee representation, can be understood as compensating for the effects of asymmetric information in labour markets and incompleteness in labour contracting (Deakin and Wilkinson, 1999). A growing behavioural literature has pointed to the effects of fairness norms in employment, which may stabilise long-term exchange relationships and enhance cooperation between workers and employers (Bartling et al., 2013).

However, these aspects of NIE appear to have had little influence on the field of development economics. In this context, NIE is associated with the view that worker-protective labour laws constitute rigidities or inflexibilities which hold back development and modernisation. This view is linked to the legal origins literature, which has become associated with a series of influential (if contested) empirical findings: firstly, that common law systems regulate the labour market less intensively than their civil law counterparts; and, secondly, that worker-protective labour laws have harmful effects on employment and growth. The principal empirical study to address labour law from a legal origins point of view, by Botero et al. (2004), claimed to show that more protective labour market regulation was associated with a smaller formal sector in developing countries, a finding supported by country studies such as that carried out by Besley and Burgess (2004) for India.

The legal origins approach turned on its head the earlier understanding of the relationship between developed and developing countries. As we have seen, structural adjustment theory envisaged development as a linear process involving the displacement of subsistence-based economies by market-based ones. As part of this process, developing countries would, if not immediately then at least in due course, adopt the wage labour system

and the complementary institutions of the labour market. It was recognised that this process could be hindered by the dependence of developing countries on access to the markets of already developed ones, and on the disadvantageous terms of trade which such dependence implied (Prebisch, 1950; Singer, 1950). Empirical support for the Singer-Prebisch hypothesis showed that developing countries were suffering deteriorating terms of trade with industrialised countries of the global north; one possible explanation for this trend was the higher share of national product captured by the labour in developed countries. Thus the spread of collective bargaining and the welfare state in the industrialised world could be interpreted as halting the emergence of the very same institutions in emerging markets. However, between the 1950s and the 1970s when the ILO was at the height of its post-war influence, the Singer-Prebisch hypothesis was understood as providing a justification for the spread of labour standards of the kind that had originated in Europe and North America to the rest of the world: a process of levelling up would, it was expected, cancel out some of the effects of unequal terms of trade.

Legal origin theory, and the Washington consensus with which it came to be associated, inverted this understanding in several ways. The first was to argue that, in the developed world, it was the systems with the lowest level of pro-worker regulation, the common law systems led by the USA and UK, which had the optimal labour law regimes from the viewpoint of economic efficiency and growth (Botero et al., 2004). This contradicted the view, implicit in the models of Lewis and Kuznets, that as market economies developed, they were likely to adopt more protective labour laws, not fewer. Secondly, legal origin theory saw the transplantation of labour standards originating in the national experiences of the 'global north', which typically make up the content of ILO conventions and recommendations, as actively harmful to prospects for development in the rest of the world. This was the view advanced by the World Bank through its *Doing Business* reports throughout the course of the 2000s (World Bank, various years).

The empirical core of legal origins theory, namely the claim that common law systems enjoy superior economic growth to civil law ones (La Porta et al., 1998; Mahoney, 2001), has not stood the test of time. Indeed, this claim is no longer accepted by those who first put it forward (La Porta et al., 2008; see also Klerman et al., 2011). Ancillary claims to the effect that laws of a particular kind favour economic growth – those supporting shareholder rights, in the case of company law, and managerial prerogative and flexible hiring practices, in the case of labour law – remain, at best, contested. The balance of evidence suggests that pro-worker labour laws, which generally promote equality, may do so without imposing efficiency

costs, at least under certain circumstances (Deakin et al., 2014a, 2014b). The theoretical foundation of legal origins theory, the claim that legal institutions have an exogenous effect on the economy, is also doubtful in the light of evidence for reverse causality, with labour laws responding to political conditions at country level and to the operation of the business cycle (Deakin and Sarkar, 2011).

3. BEYOND LINEAR MODELS: A SYSTEMIC VIEW OF LABOUR LAW AND DEVELOPMENT

The leading paradigms of law and development, while offering different predictions of the effects of legal change and different policy prescriptions, employ a linear logic. Structural adjustment models assume that wage labour and related labour market institutions will emerge in response to conditions of industrialisation. New institutional economics, through its legal origin variant, sees economic development as flowing from the institution of a legal regime favouring property rights and freedom of contract. The direction of causation is inverted, but the process is much the same: a linear movement culminating in a 'modern', market-based economy. Both theories find it hard to accommodate varied country-level experiences which do not conform to the expected pattern of development, and have difficulty explaining reversals of historical trends which contradict the hypothesis of a linear and teleological process towards modernity.

Labour lawyers in search of a theoretical framework capable of explaining the diversity of experiences of countries at different points of development could look instead to models, variously called 'evolutionary', 'reflexive' and 'systemic', which have been shown to have traction in the study of law in industrialised economies (Deakin and Rogowski, 2011) and may be applied to issues affecting emerging markets. These theories view labour law rules not as exogenous variables acting on a largely self-constituting labour market, but as endogenous governance mechanisms which emerge against the background of the long-run development of market economies. Thus the relationship between institutions and markets is one of *systemic interaction*.

Many labour lawyers, consciously or unconsciously, subscribe to a teleological view of the evolution of labour regulation, according to which the 'movement of progressive societies' from status to contract in the nineteenth century (Maine, 1861) was succeeded by a century or so of social development associated with the rise of labour law and the welfare state. We now know from historical research that this is not a good account of the rise of labour market institutions in the 'global North'. Wage

regulation and social insurance did not post-date the appearance of industrial society in western Europe and North America. Rather than seeing labour law and social security simply as a response to industrialisation, we should understand them as part of the constitutive preconditions for the rise of the market economy in the period of the *longue durée* following the end of feudalism.

In western European societies of the early modern period, the forerunner of social insurance was the 'poor law', a selective and coercive system but one which nevertheless addressed what we would now think of as labour market risks arising from wage dependence (Lis and Soly, 1979). The 'poor' were the wage-dependent, those who 'labour to live' and whose condition of propertylessness exposed them to 'mischance' in a semi-developed market order (Deakin and Wilkinson, 2005). To address these risks, embryonic forms of unemployment compensation and old age pensions existed in England prior to the industrial revolution. They were underpinned by a system of property taxation that was administered locally but organised through national legislation. State capacity may have been rudimentary by modern standards, but this was not an age of *laissez-faire* in anything more than a rhetorical sense; the early modern British state intensively regulated the emerging forms of wage labour. Poor law expenditure outstripped population growth during the sixteenth and seventeenth centuries, and in 1800 had reached seven times the level per head of population of Britain's continental neighbours and competitors (Solar, 1995). At a time when much employment was seasonal, in some regions around a quarter of all households would receive outdoor relief at some point in the year (Arkell, 1987). Replacement rates for unemployment-related payments were more generous in comparative terms than they were to be at many points in the twentieth century (Snell and Millar, 1987). This was not a system dependent, for the most part, on private charity: it was publicly instituted and legally regulated, to the extent that access to relief was seen, at various points, as the 'peculiar privilege' or right of the working poor (Snell, 1985).

It should not be a surprise that the first 'industrial nation' was also the first to have a comprehensive national system of labour market regulation that was appropriate for an economy in which the large part of the working population no longer had access to the land or the extended family as means of subsistence. This is not to say that industrialisation, on its own, satisfies the conditions for the emergence of labour law as a form of regulation constructed around the institution of the employment relationship. Labour law only came to fruition in Britain in the late nineteenth and early twentieth centuries when the extension of the franchise created working-class political parties which pressed for egalitarian and inclusive

forms of social legislation. Across Europe in this period, the arrival of democratic politics paved the way for laws which supplied a framework for collective bargaining and solidaristic forms of social insurance (Hepple, 1986; Wedderburn, 1980). But the more punitive aspects of the poor law were jettisoned for other reasons, one of which was the growing realisation that coercing the poor through the imposition of degrading conditions for the receipt of poor relief was both expensive in resource-use terms and also counter-productive, in the sense of actively contributing to the casualisation and under-employment that it was meant to address (Webb and Webb, 1909).

The emergence of the 'standard employment relationship' (SER) as the focus of labour law regulation in western Europe and North America in the early decades of the twentieth century very well illustrates the co-evolutionary character of labour law rules, that is to say, the sense in which they both respond to and initiate changes in the economic and industrial environment. The labour law institution of SER was a response to the rise of collective bargaining and to the vertical integration of the enterprise, but it also contributed to their normalisation and diffusion. The decline of the SER as a focal point for labour law regulation and economic organisation since the late 1970s is a trend common to all industrial societies, just as they were all affected, albeit in different ways, by its rise. However, declining collective bargaining coverage and the fragmentation of the risk-sharing mechanisms of the welfare state have not seen a return to pre-modern forms of wage labour. The large majority of labour hires in the global north continue to take the form of indeterminate employment relationships, and the SER remains a normative benchmark for labour law regulation even, or perhaps especially, in the area of the regulation of part-time, fixed-term and temporary agency employment (Deakin, 2013). The SER itself is evolving by way of response to changing patterns of workforce participation and industrial organisation (Bosch, 2004; Lee and McCann, 2008).

The SER remains a point of reference for labour law because, despite the changes which have taken place in the labour markets of industrialised countries since the 1970s, there has not been a fundamental change in the nature of the social and economic risks which characterise a market economy. On the contrary, exposure to the risks associated with wage dependence has intensified as wage bargaining and the welfare state have been restructured. The welfare state has not at all disappeared, but has become more selective in the protections it confers on high- and middle-income groups, who benefit disproportionately from fiscal subsidies to private consumption, and more punitive in its approach to the jobless and working poor. There have been similar reversals for labour law in the past,

and it is unlikely that contemporary technological and organisational changes signify a permanent shift away from the SER (Deakin, 2013).

To argue for the continuing relevance of the SER in the context of industrialised societies is not to assume that the institutions of labour law can be automatically transplanted into emerging markets. These institutions developed over many centuries in western Europe and North America; it is unrealistic to envisage their extension to developing countries in a matter of decades. In some low-income countries, continued access to the land or to the extended family may limit the need for some of the mechanisms of risk-sharing which characterise societies with a longer history of industrialisation. Yet as labour law is undergoing a period of stagnation, in North America, and a crisis of confidence, in western Europe, the process of constructing wage bargaining and social insurance systems to deal with the consequences of industrialisation is very much on the agenda of policymakers in Latin America (Fraile, 2009) and China (Cooney et al., 2013). Far from being concluded, the debate about the appropriate form of labour law regulation for industrial market economies is entering a new phase, characterised by experimentalism and innovation across different national and regional contexts.

4. REGULATORY FUNCTIONS AND TECHNIQUES ASSOCIATED WITH LABOUR LAW

Within the theoretical framework just set out, some more specific regulatory functions and techniques of labour law and related aspects of labour market regulation can now be outlined. Labour laws are multi-functional and are implemented through a wide and varied range of regulatory techniques.

4.1 Functions

Labour law facilitates *economic coordination* both at the level of individual firms or organisations and at the level of the market. The legal institution of the contract of employment provides a legal recognition of and underpinning for the exercise of managerial authority within the firm, a feature of organisations which is seen as saving on transaction costs (Williamson et al., 1975). Employment protection laws and minimum wage laws, by requiring employers to internalise certain costs, provide an incentive for them to use labour efficiently and to make related investments in technology and organisational design (Deakin and Wilkinson, 2011; Kaufman, 2009).

At inter-firm level, labour law rules help to overcome collective action problems which may arise from information asymmetries or free riding. The regulation of training offers an illustration of the potential costs to employers of the absence of labour law rules. Free riding, in the form of poaching of employees, can act as a disincentive for employers to provide training the value of which can be appropriated by competitors. Laws which require employers to invest a certain proportion of their operating turnover in training, or to contribute to a collective training fund through a training levy, are a common response to this kind of problem (Acemoglu and Pischke, 1999).

Risk distribution is one of the principal functions of social insurance. Social insurance schemes collectivise social risks by requiring employers and employees to pay into a common pool from which claims in respect of unemployment compensation and retirement pensions, for example, may be met. Schemes differ in the way in which they are financed and in the balance between public provision, which is normally based on the principle of 'pay as you go', and so-called funded schemes, which generally rely on fiscal supports of various kinds. Despite these differences, all insurance schemes depend on transfers, which are more or less explicit, from the active population to those receiving benefits. Because labour cannot be stored, this is just as true of funded schemes as it is of those based on 'pay as you go'. The principal difference between funded schemes and schemes based on social security contributions is in the degree of redistribution which they achieve between groups exposed to differential levels of risk.

Social insurance schemes are complementary to labour law regulations which have the effect of stabilising the employment relationship, such as minimum wage laws, extension mechanisms for sector-level collective agreements and employment protection legislation. In systems where these types of intervention are weak, social insurance systems tend to be destabilised, and to be displaced by means testing and reliance on needs-based social assistance. This particular mix of mechanisms – weak in-market regulation coupled with means-testing – can cut direct costs to employers (who may no longer have to pay minimum wages or high social charges) but shift them on to the state, in the form of higher welfare expenditures. Where these extend to the payment of in-work benefits to the low paid, further costs arise from moral hazard effects associated with employers cutting pay in response to the availability of wage subsidies (as is the case, currently, with the British tax credits system). Means-testing of benefits, particularly when coupled with the payment of wage subsidies, creates high marginal tax rates for the low paid which can have a potentially negative impact on labour supply (Deakin and Wilkinson, 2005: ch. 3).

The *maintenance of demand for goods and services* is another of the goals

addressed by labour law regulation. For example, the introduction of minimum wage legislation and duty to bargain laws in the US New Deal of the 1930s was partly motivated by the aim of maintaining purchasing power under conditions of economic depression (Kaufman, 2009: 38–41). Labour law rules which seek to stabilise wages in the face of temporary fluctuations in demand, for example, by requiring employers to absorb the costs of lay-offs, or by providing short-time working compensation (a widespread response among continental European systems in the late 1970s and early 1980s, and again in response to the recession of 2008–09), operate in a similar way, as do rules governing economic dismissals, which rarely impose a bar on redundancies but impose procedural requirements designed to make them a matter of last resort.

Democratisation, in the sense of the encouragement of participatory forms of governance and decision-making, is an important aspect of labour law regulation. Labour law is, in one sense, the consequence of democratisation (Wedderburn, 1980). The recognition of trade union rights and the extension of social insurance schemes were coterminous in western European societies with the advance of universal suffrage in the nineteenth and early twentieth centuries. As the right to vote was extended, interest groups capable of benefiting from labour law protection could be more easily be mobilised.

But labour law can also contribute to democratisation. The legitimacy of labour law rules continues to depend, to a large extent, on the role of democratic processes in the formulation of legislation. As noted above, labour law mechanisms involve distributional trade-offs even in contexts where they make a net positive contribution to societal well-being. Under these circumstances, inclusive forms of deliberation can provide a mechanism for achieving legitimacy around particular distributional compromises. The evolution of collective bargaining towards more broadly based forms of *social and civil dialogue*, which involve the inclusion of a wider range of affected parties than those represented within traditional forms of wage determination, are relevant in this context.

Labour law rules which aim to promote economic opportunity and greater social cohesion contribute to *empowerment*. While potentially conducive to economic growth, these measures also directly address a wider range of human development goals. These can be understood by reference to the concept of capabilities, that is, the positive freedom of individuals to achieve a range of desired activities or outcomes through (in this context) employment (Sen, 1999). Minimum wage laws, which improve the opportunities of low paid workers to find stable and well remunerated employment, and discrimination laws, which enhance access to the market on the part of excluded or disadvantaged groups, are among the types of labour

law regulation which can be seen as addressing a capability-based agenda for social policy (Deakin and Wilkinson, 1999). Social insurance schemes also have a role in enhancing capabilities, by promoting social cohesion and thereby facilitating occupational and employment mobility, hence the high degree of correlation between the extent of social security provision and human development outcomes (Ahlering and Deakin, 2007).

4.2 Techniques

The techniques of labour law regulation can also be understood in a systemic perspective. In the economic literature, labour law regulations tend to be seen as imposing mandatory terms on the parties to employment contracts or as otherwise qualifying their contractual autonomy. While this is not an inaccurate description of certain labour law mechanisms (such as minimum wage regulations), it is not true of most of them. Labour law regulations make wide use of 'reflexive' techniques for the promotion of self-regulatory mechanisms. These include setting *default rules* of various kinds, which apply only in the absence of contrary agreement by the parties, in preference to mandatory norms; allowing *controlled derogations* from statutory norms through collective or (less usually) individual bargaining or through administrative action, thereby creating a space for laws to be adapted to firm- or industry-level conditions; and providing *fiscal subsidies* for contractual arrangements on condition that they comply with relevant protective standards.

Working time is an area of regulation which illustrates the variety of techniques used within labour law systems. In the UK system, laws going back to the early twentieth century controlled night work by women not by imposing an outright ban but by allowing employers to seek exemption from the legal restrictions in return for accepting conditions (such as health and safety checks and provision of transport) set by factory inspectors. In the 1990s and 2000s working time reforms in France, associated with the introduction of the 35-hour working week, were accompanied by provisions enabling employers to vary hours up and down and to take advantage of more flexible annualised working schedules on the basis of negotiations with trade unions at plant and firm level. In Germany, similar adjustment of labour standards has been achieved through the use of so-called 'opening clauses' in sector-level collective agreements. The technique of using legislation to promote 'bargaining in the shadow of the law' has informed the European-wide standards set by the EU Working Time Directive, which in this respects draws on the experience of the member states.

Social insurance provides another example of regulatory diversity. In

several systems, state retirement pension schemes allow for contracting out by employers on condition that private, occupational schemes meet certain conditions relating to the level and security of benefits. Private schemes receive, in effect, a fiscal subsidy, which is conditional on them at least meeting the standards of the state scheme (Baldwin, 1990; Esping-Andersen, 1991).

Where formally *mandatory norms* are imposed, they still leave scope for strategic choices to be exercised by employers. For example, firms can respond to minimum wage legislation by improving productive and organisational efficiency, and to unfair dismissal legislation by screening applicants more carefully. In this context labour law rules can operate as 'beneficial constraints' (Streeck, 1997) which have positive efficiency effects.

The minimal or 'floor of rights' character of most labour law rules also influences the way they operate in practice. While, in most systems, downwards derogation from wages and working time standards is not (in principle) permitted, employers and workers (or their representatives) are not prevented from contracting for superior benefits or protection. In practice, many if not most firms in a given industry or country will not be directly affected by minimum wage or working time laws, as they will already comply with the relevant legal standards. By ruling out competition between firms on the grounds of low pay or excessive working time, labour standards of this kind implicitly encourage bargaining above the 'floor' and so can be seen as having a reflexive dimension (in the sense of encouraging self-regulation) notwithstanding their mandatory form.

Labour law systems vary considerably in respect of *modes of enforcement*. In addition to civil liability claims before specialised labour courts, which are the normal type of enforcement mechanism, use can be made of criminal sanctions, administrative action and self-help through industrial action. The mix of enforcement devices which can observed across systems is the consequence of diversity in legal traditions and in the organisational capacity of interest groups beyond the legal system. The effectiveness of enforcement regimes cannot be straightforwardly gauged from the severity of sanctions available, or by reference to indicators such as the volume of litigation or levels of expenditure on specialised institutions. Coercive enforcement can be counter-productive, and high levels of compliance or acceptance of labour standards can often be achieved by other means. Compliance is linked to perceptions of the legitimacy of labour standards. Thus the involvement of affected groups in the process of formulating or negotiating the content of laws, through processes of social and civil dialogue, may be a better way of ensuring implementation than top-down approaches based on formal sanctions. This point of view

stresses the value of deliberative forms of law-making within a 'decentred' or 'multi-level' governance framework. The practice of 'negotiated labour laws' has become more common. The development of transnational social dialogue in the EU context from the early 1990s, enabling representatives of employers and workers to take part in the formulation of the content of social policy directives, represented an extension of national-level practices of tripartite bargaining ('concertation') which developed in member states in the course of the 1970s and 1980s.

From a human development perspective, the provision of economic opportunities for individuals is the principal criterion for evaluating labour law rules. The formal expression of 'social rights' in legal and constitutional texts has been regarded with scepticism in parts of the capabilities literature. To some degree, this criticism may have been overplayed. The constitutional expression of social rights can play a 'reflexive' role in steering judicial decision-making and legislative action, particularly at the point where labour law rules come into conflict with principles of international economic law which govern the process of transnational economic integration. Social rights can play a countervailing role, offsetting the influence of free movement and competition law jurisprudence (which is not to say that the way courts seek to strike a balance between these competing considerations is likely to be free of controversy) (Browne et al., 2004). The capability approach, conversely, can be seen as providing a valuable interpretive benchmark when clarifying the content of labour law rights in particular contexts (Deakin and Supiot, 2009).

In addition, *international labour standards* can also be seen as operating in a reflexive way. A general feature of instruments such as ILO conventions and recommendations and EC directives is that, to varying degrees, they provide member states with discretion over modes of implementation and enforcement. They can be understood as informing and steering processes of regulatory competition between states, aiming to avoid a 'race to the bottom' in favour of a coordinated raising of standards.

The absence of direct enforcement mechanisms may not prevent international instruments having considerable influence in practice. This is a question of the legitimacy with which they are regarded. Thus quintessential 'soft law' measures such as ILO conventions may have specific 'hard law' consequences at national level. A recent example of ILO intervention having far-reaching repercussions in a developed member state is the repeal of the French law exempting new hirings from employment protection legislation (the *contrat de première embauche*) following an ILO ruling. In the EU context, 'soft law' measures such as framework agreements made by the social partners at transnational level, but not incorporated into binding measures such as directives or regulations, have

led to implementation via legislation in some of the member states (as in the recent case of the agreement on working conditions in telework).

In some contexts relevant to labour law, *open coordination* techniques which rely on information exchange, audit and benchmarking are currently being used to achieve compliance with social or economic policy objectives. The best-known example is that of the European Union's employment strategy, but this is far from being an isolated case. Because many aspects of labour law regulation have a similar, reflexive dimension, open coordination methods are best seen as part of a continuum with labour law rather than representing a fundamental divergence in governance techniques (Deakin and Rogowski, 2011). The potential of open coordination to achieve positive outcomes is dependent on a number of factors including the quality of information contained in the indicators which are used to benchmark performance. Indicators are not value-neutral, and the processes by which they are constructed have been questioned. Given increasing questioning of their legitimacy, it is not clear that open coordination techniques are in a position to displace labour law regulation.

In short, labour law systems deploy a large variety of regulatory techniques, many of which are concerned with 'steering' self-regulation or 'channelling' market outcomes rather than directly imposing redistributive outcomes. Labour law rules have the procedural or reflexive aim of promoting conditions or contexts within which workable solutions can emerge on the basis of collective learning on the part of market actors.

5. EMPIRICAL EVIDENCE ON THE EFFECTS OF LABOUR LAWS IN DEVELOPED AND DEVELOPING COUNTRIES

There is a growing body of empirical evidence looking at the impact of labour laws and regulations on economic outcome variables, such as unemployment and productivity, as well as assessing the extent to which labour law institutions are endogenous to particular market settings and national economic and political contexts. Much of this work is comparative in nature. Interest in the comparative dimension of labour regulation has been stimulated by theoretical developments (including the emergence of legal origins theory and the variety of capitalism approach) and the availability of comparative data on labour law systems (including the legal indices prepared by the OECD and the World Bank). Despite the growth of this field of research, data on the content and operation of labour laws remain limited, and, to a degree, such data as exist are contestable. The

empirical literature also has to be assessed by reference to methodological issues concerning the interpretation of econometric analyses, particularly on the issue of causation (Deakin and Sarkar, 2011), and on the reliability of data, in particular where time-series analysis is undertaken (Aleksynska, 2014).

The labour index constructed by Botero et al. (2004) appeared in the context of a series of papers operationalising the legal origins hypothesis. This index codes for the labour laws of over eighty developed and developing countries, and contains over forty indicators which between them cover the areas of 'employment law', 'collective labour relations law' and 'social security law'. For each indicator, a score is given to indicate the strength of worker protection in the country concerned, with higher scores (on the whole these are normalised on a 0–1 scale) reflecting more protection. An algorithm shows, in each case, how the scores are worked out; in some cases, assumptions are made about the operation of the law on the basis of its formal content, in others cardinal variables (such as amounts of redundancy pay or the maximum permitted duration of working time) are used to arrive at the final score. The sources for the coding are simply described as 'the laws of each country' with reference also being made, in general terms, to relevant secondary sources; there is no attempt to provide specific legal sources for individual scores. The index reports the laws of the countries concerned at a loosely-defined point in the late 1990s. The methods used by Botero et al. are broadly similar to those employed in the first legal origin studies, which focused on shareholder and creditor rights (La Porta et al., 1998), but the labour index is more extensive, in terms of its coverage, than its predecessors.

The methodology used in the legal origins literature forms the basis for the *Doing Business* reports of the World Bank. For this purpose the World Bank has developed an 'employing workers index' (EWI) which consists of three sub-indices: a 'rigidity of employment index', which among other things covers hiring, working time and other terms and conditions of employment; an index of non-wage labour costs; and an index of firing costs. These sub-indices, in their turn, are broken down into a series of individual indicators. The scores are on a scale of 0–100 with a higher value indicating 'more rigid' regulation. The sources for the codings include surveys of regulations carried out by local lawyers and officials, and the dataset is in the form of a time series updated annually, going back to 2004 (World Bank, various years). The Manuel Commission, which reported in 2013, made various suggestions for improving the methodology used in constructing the EWI (World Bank, 2013).

The main alternative to the Botero et al./World Bank index is the

OECD's index of the strictness of employment protection legislation ('EPL'). This covers only part of the labour law field, and has until recently been confined to charting the law in 28 OECD member states, but goes back further than the World Bank studies, being based in part on an index first developed in the early 1990s by Grubb and Wells (1993). Three main data-gathering exercises have taken place, referring respectively to the late 1980s, the late 1990s, and 2003. The index, in its current form, consists of three components: rules affecting dismissal of workers with regular (that is, indefinite or indeterminate) employment contracts; rules governing fixed-term and temporary agency work; and collective dismissal procedures. The scores are expressed on a 0–6 scale, with 6 representing maximum 'strictness'. An overall strictness indicator for each country is arrived at by combining the three sub-indices, with the collective dismissals indicator weighted at 40 per cent of the other two to reflect the extent to which it consists of rules which operate in a supplementary way to those of the other two (OECD, 2004).

The two datasets tell a broadly similar story on the extent of cross-national variation in the content of labour laws. Botero et al. (2004) find that labour regulation is highly correlated with legal origin, with countries of French-law origin having the highest scores (indicating more protection for workers) and those of English-law origin the lowest (indicating less protection). The OECD index records Anglo-Saxon countries as having the lowest scores, with those in East Asia, northern Europe and the Nordic systems in the middle, and the highest scores being recorded by southern European countries. The main source of variation is the law governing fixed-term and temporary agency work. The OECD index indicates relatively little change in the content of the law in the period covered, the most noticeable trend being a limited degree of convergence brought about by deregulation since the early 1990s.

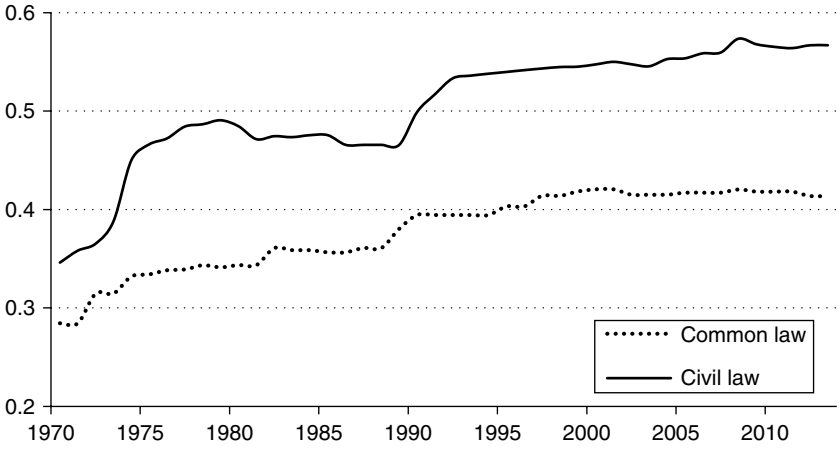
Despite their widespread use, it is not clear that these indices are providing accurate measures of the phenomena they purport to be capturing. It is doubtful that the World Bank datasets measure actual costs to firms of different legal regimes, as they purport to do. The values reported in the indices reflect estimates of the costs of regulation as they apply not to the average enterprise, but to larger firms employing workers on standard (indeterminate) employment contracts; thus they take as their focus the most protective or 'rigid' case (Lee and McCann, 2008). Since it is assumed that the firm strictly abides by the relevant law but does not go beyond the level of protection mandated in the relevant legislation, not only is the issue of non-enforcement overlooked, but no account is taken of the extent to which firms would observe the standards set out in the law in any event (which 'standard' firms would in practice be the most likely to

do). In general, then, the emergent or endogenous character of labour law regulations is completely overlooked in this approach.

The authors of the OECD index accept that it contains limitations which are 'inherent to most synthetic indices', including 'problems of subjectivity, the difficulty of attributing scores on the basis of legal provisions that may be applied differently in practice, and the choice of the weighting scheme used to calculate the summary indicator from the various sub-components' (OECD, 2004: 99). Over time, increasing attempts have been made to deal with the problem of the gap between the form of the law and its operation in practice by incorporating information on court practice and industry-level self-regulation through collective bargaining (OECD, 2013). However, the OECD has accepted that reliable data on some of these issues are not available for all countries (OECD, 2004: 66). Notwithstanding changes made to the coding method over time, the OECD index still does not provide a consistent time series, making longitudinal analysis problematic (see Adams and Deakin, 2015).

The labour regulation index developed by the Cambridge Centre for Business Research (CBR-LRI) provides an alternative approach to legal coding which attempts to address some of these methodological issues (Adams and Deakin, 2014; Armour et al., 2009b; Deakin et al., 2007). Informed by a systemic theoretical framework (see above), it sees legal regulation as one of a number of possible sources of governance in the labour market. Thus information from collective agreements and other self-regulatory mechanisms which operate as the functional equivalents to formal laws in some systems is included. The reflexive nature of labour law regulation is also captured in the Cambridge index. Thus algorithms are developed which allow for the codings to reflect the extent to which labour laws take the form of default rules, applying unless the parties agree otherwise, as opposed to being either completely mandatory or non-applicable. Explanations for codings, providing the primary legal source in each case, are provided (this is not the case with the World Bank index and is only partially achieved in the OECD one). The Cambridge index is in the form of a continuous time series, going back to the early 1970s, and currently covers 117 countries (see Adams and Deakin, 2015; Adams et al., 2016).

Figures 2.1 and 2.2 present in graphical form two of the sub-indices in the Cambridge index, those relating to employment protection and employee representation (the basis for the coding of these data, including the choice of indicators and the coding algorithms used, is set out in Deakin et al. (2007) and Adams and Deakin (2015)). It can be seen that there is a high level of convergence between developed and developing systems, in terms at least of the formal content of protection for workers. When employment protection laws and codetermination laws (including



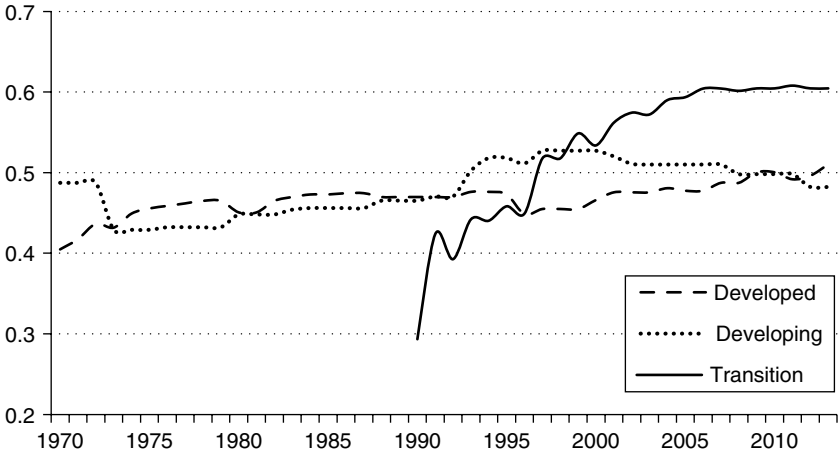
Note: The countries in the dataset are Argentina, Austria, Belgium, Brazil, Canada, Chile, China, Czech Republic, Cyprus, Estonia, France, Germany, India, Italy, Japan, Latvia, Lithuania, Malaysia, Mexico, Netherlands, Pakistan, Poland, Russian Federation, Slovenia, Sweden, South Africa, Spain, Switzerland, Turkey, UK, USA. The scale used is 0–1.

Source: CBR-LRI, CBR Leximetric Database: (http://www.cbr.cam.ac.uk/research/projects/project2-20output.htm).

Figure 2.1 Dismissal protection and codetermination in 30 countries, 1970–2014, comparing developed, developing and transition countries

laws on employee consultation) are considered together, as they are in the OECD index, developed countries are on average more protective than developing ones, but the gap is not large. In the case of employee representation laws, developed countries have a slightly higher level of protection. A striking feature of the data is the high rate of adoption of worker-protective laws in transition systems. These countries may have a cost advantage over developed economies because of their relatively recent move to an economy based on waged labour, but policymakers in these systems have not, it would seem, sought to avoid the adoption worker-protective labour laws. In part this reflects the process of countries in central and eastern Europe adopting labour standards legislation as one of the conditions for accession to the European Union, but the trend also reflects the tendency of other transition systems, in particular China, to adopt protective labour laws.

These data do not purport to go beyond a formal, text-based account of the law, in contrast to the World Bank and OECD data, which depend



Source: See Figure 2.1.

Figure 2.2 Employee representation in 30 countries, 1970–2014, comparing developed, developing and transition countries

on a mix of country reports, surveys, and reviews of laws and collective agreements. Because they mix up content analysis with survey evidence in ways which are often hard to decipher, it is not always what the World Bank and OECD datasets are reporting. The Cambridge index avoids this problem and can be used in conjunction with other datasets which provide evidence on the effectiveness of the law in practice, such as the World Bank's Rule of Law index, which aim to get some traction on the question of how legal change impacts on economic and developmental outcomes.

Because of the long time series they offer, the Cambridge data can be analysed using vector auto regression and vector error correction models which can seek to distinguish between long-term and short-term effects of a change in the economic environment. These models analyse economic data as short-run variations around moving longer run equilibria (Juselius, 2011), making it possible to test whether a change in the law, for example, a tightening of dismissal protection, has a short-run effect which is, over time, absorbed by firms and workers, implying a return to an equilibrium state or, alternatively, has a more decisive, long-term effect of shifting the economy on to a new equilibrium path. These time-series models also make it possible to test for bi-directional causation, that is, the possibility that law, as well as influencing the behaviour of firms and workers, responds to general changes in the economic environment and to fluctuations in the business cycle.

Deakin and Sarkar (2011) use the Cambridge dataset to test for the impact of changes in Indian labour law in Part V-B of the Industrial Disputes Act, which saw regulation become more protective in relation to dismissal rights in 1976 and in 1982, eventually producing a situation in which state authorisation was required for retrenchments (economic dismissals) in establishments of more than 100 workers. This law has been identified as a possible cause of rigidities in the Indian labour market, associated with the slow growth of formal employment, and with avoidance by employers. Time series analysis shows that after controlling for changes in the level of industrial production over time, increases in worker protection were correlated with lower unemployment, with the direction of causation running from the economy to the law: in other words, lower unemployment led to the enactment of worker-protective laws, reflecting the greater strength of organised labour in periods of upswing in the economic cycle (Deakin and Sarkar, 2011). Thus changes in labour law rules in India in this period were largely endogenous to the growth path of the economy and to the business cycle. There is no evidence from this study to suggest that the enactment of worker-protective labour laws, including those contained in laws governing retrenchments, caused unemployment to rise in India.

Deakin et al. (2014b) carry out a dynamic panel data analysis on the CBR-LRI for six OECD countries (France, Germany, Japan, Sweden, the UK and the USA), using a range of different approaches for dealing with unobserved cross-country heterogeneity. They find that higher scores on the sub-indices for alternative employment contracts, working time protection and employee representation are correlated with a higher share of national income for labour (the 'labour share', which is conventionally associated with equality). The dismissal law sub-index is not correlated with higher equality using the labour share as a measure, but nor is it correlated with higher unemployment. There is a positive impact on employment of stronger laws for employee representation.

These findings, pointing to the effects of labour regulation in terms of reducing inequality, are consistent with other research which has demonstrated the role of collective bargaining and union presence in narrowing the earnings dispersion (Freeman, 2005). However, existing studies mostly relate to developed countries. The Cambridge dataset can be used to study the issue in the context of developing countries. Deakin et al. (2014a) use it to study the impact of collective labour laws on inclusive development in the BRICS countries (Brazil, Russian Federation, India, China and South Africa), using a panel data approach with fixed-effects and random-effects models to deal with cross-country heterogeneity and changes over time.

They find that higher scores on the employee representation sub-index are correlated with greater equality, as indicated by a lower Gini coefficient, and higher scores on the Human Development Index, with no disemployment effects.

These early results from the Cambridge dataset point to a research agenda which has the potential to re-orientate the debate over law and development. They show that developing countries generally have high levels of formal worker protection, and that there has been no general trend towards deregulation of labour laws in either developed or developing countries since the early 1970s. Transition systems which are adjusting to the demands of a market-orientated economy based on wage labour have some of the most formally protective labour law systems. At a time of growing earnings inequality in all systems, worker-protective labour laws play a moderating role, helping to maintain the labour share in the face of pressure on wages from the diminished effect of collective bargaining, and lowering the Gini coefficient. There is little or no evidence that labour laws achieve these egalitarian effects at the expense of higher unemployment in a developing country context, or more generally.

6. CONCLUSION

This chapter has argued that a 'systemic' conception of labour market institutions is useful in understanding how labour can facilitate development. Labour law rules have coevolved – that is, developed in parallel – with certain economic and political institutions. The core labour law institution of the standard employment relationship (SER) was in part a response to the rise of collective bargaining and the vertical integration of industrial enterprises in the late 19th and early 20th centuries, but it also helped to shape the subsequent development of labour markets in the global north, and continued to evolve, outgrowing its origins in particular forms of workplace organisation and enterprise structure. In a similar way, the SER and related labour law institutions are both a response to democratisation and the rise of working-class politics, and also a mechanism for empowering workers both in the firm and more generally in society.

Thus the answer to the question of how labour law can facilitate development depends on the pre-existing state of economic and political institutions in the particular context considered. A certain level of economic development is probably a precondition for a functioning labour law system. However, there is also evidence that certain types of labour law

rules can be highly effective in stimulating development and do not depend on the prior existence of mature economic institutions.

The state of the art on the empirical effects of labour laws is becoming more advanced, but the widely used datasets of the World Bank and OECD focus on 'costs to business' in a narrow and literal sense of firms' compliance costs. This omits consideration of the costs to employers of the absence of labour law rules, which might take the form of lack of access to skilled labour, weak domestic demand for goods, and weak governance. The Cambridge index provides a continuous time series for forty-five years or so of data from the early 1970s to the present day, in a form which permits longitudinal econometric analysis of the impact of changing labour law across developed and developing countries. First results from the analysis of the dataset suggest that labour laws generally promote earnings equality and improved human developmental outcomes. Their effect on employment is either positive or neutral. We are far from having heard the last word on the developmental effects of worker-protective labour laws.

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3. Labour regulation, capabilities, and democracy

Kevin Kolben

1. INTRODUCTION

This chapter argues that labour law and labour market regulation can and should be grounded in a development framework. The conception of development used here draws on the capabilities approach, originally developed by Amartya Sen and Martha Nussbaum, which is oriented towards expanding the capabilities of individuals to do and be that which they wish and have reason to value (Nussbaum, 2011: 18; Sen, 1999). Whereas, for example, a narrowly construed and economistic approach to development and labour regulation might primarily seek to increase employment through increasing labour market flexibility,[1] a wider notion of development is argued for here that grounds labour regulation in freedom, capabilities, and democratic principles.

This chapter makes two central claims. First, labour law and labour law reform ought to be oriented towards targeting and developing workers' capabilities. Work and the workplace, it is argued, are central loci of 'unfreedoms' and capability deprivations of workers, and consequently labour regulation can be a key strategic tool to promote freedom by enhancing workers' capabilities to (a) be and do the things that they have reason to value, and (b) develop key threshold capabilities. Second, the chapter argues that labour regulation can and should promote another, and related, developmental goal – the promotion of democracy and citizenship, both in the workplace and in society. Democratic workplaces, it is argued, are important for reasons that are both intrinsic and instrumental. They are intrinsically important because workers value more democracy in their workplace, and they are instrumentally important because more

[1] For a review of this approach to development, particularly related to the legal origins literature and new institutional economics, see Deakin in this volume, Chapter 2.

democratic workplaces can potentially facilitate and improve democratic functioning in society at large.

2. WHAT IS DEVELOPMENT?

In order to address the question of how labour regulation can facilitate development, we must first ask, 'What is development?' Whereas economists have traditionally understood development to primarily mean income or GDP growth,[2] such a 'thin' conception of development has lost favour among a number of development scholars and practitioners (Stiglitz, 2000). While GDP growth may be a useful rough proxy for economic development, it is an insufficient measure of the full range of transformation required or desired for human development. In its stead, more human-centred notions have taken root, both in academic literature and in the work of development agencies. A number of influential scholars have articulated a broader notion of development as a transformative process (Stiglitz, 2000) that seeks to develop civil society and political institutions (Golub, 2005: 274), protect human rights (Uvin, 2004: 101), and expand freedoms (Sen, 1999).

Traditional neo-classical approaches to development, previously known as the 'Washington Consensus', have focused, in part, on eliminating regulatory and other impediments to the free functioning of the market. In many developing countries, one of the markets often in need of liberalisation, according to this account, is the labour market. Rather than promoting the kind of substantive freedoms that we will discuss below, labour market freedom focuses on promoting the freedom of workers to seek employment, with its corollary: freedom of employers to hire and fire workers at will (see Santos, 2009; Stiglitz, 2000: 1). Neo-classical approaches to labour market regulation are also often sceptical of freedom of association and collective bargaining rights, which are both ILO core labour standards and are foundational to labour regulation and industrial relations regimes. The scepticism is grounded in both the purported impact of labour flexibility and trade unions on economic growth, as well as in the moral and philosophical legitimacy of collective bargaining and freedom of association as core labour and human rights values (Anner and Carraway, 2010). The promotion of labour market flexibility and the disinterest in freedom of association and collective bargaining has been particularly

[2] For a discussion of the competing paradigms of development see von Broembsen and Godfrey in this volume, Chapter 5.

acute in the international financial institutions, including the World Bank and the IMF. While the World Bank has slowly and cautiously accepted the legitimacy of the core labour standards, both institutions have continued to advocate for more labour market flexibility as a vehicle for achieving economic growth (Anner and Caraway, 2010; Santos, 2009).[3]

However, regardless of the validity of economic arguments about the link between flexibility and economic growth, this narrow focus on labour market flexibility ignores how labour regulation can serve as a vehicle to achieve the broader conception of development relied on here. A richer account of the relationship between labour law and development, it is argued, should be grounded in a capabilities-based approach, as well as in the traditional goals and values of labour regulation and industrial relations – in particular, workplace democracy and labour citizenship.

In contrast to a labour market flexibility approach and its narrow focus on promoting economic growth by permitting employers maximum flexibility to hire and fire given the business exigencies of the moment, a labour law and development approach would have another emphasis. It would ask, 'how does and should the workplace provide opportunities to enhance human flourishing and human development?' In other words, such an approach would be grounded in a capabilities framework. This does not mean that labour market flexibility cannot be an element of such an approach, for in fact if flexibility does lead to more employment and more income, then that might lead to a potential capability enhancement for an individual worker because he or she has access to employment that she might not have otherwise had. This, in turn, would provide income that can lead to greater capabilities to achieve a desired set of functionings.[4] Of course, on the other hand, greater labour market flexibility could lead to decreased capabilities for workers who would have fewer job protections and who might consequently lose their jobs. This is particularly acute if those workers have no alternatives for work because their skills are limited and the state does not provide for transitional assistance to upgrade skills and find new employment.

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[3] Labour market flexibility had traditionally been the main focus of the World Bank's labour market regulation indicator in its *Doing Business* report. However, it has gradually expanded the scope of this measure to take into account a number of ILO conventions. See World Bank, *Doing Business, Labor Market Regulation Methodology* (http://www.doingbusiness.org/methodology/labor-market-regulation). For a critique of both the *Doing Business* report and the conception of Flexibility see Santos (2009).

[4] For an argument that labour market flexibility does not in fact result in lower employment, see Deakin in this volume, Chapter 2.

3. THE CAPABILITIES APPROACH

Amartya Sen's and Martha Nussbaum's pioneering work on capabilities and development has been among the most influential development theories in recent years.[5] Sen, an economist, and Nussbaum, a political philosopher, argue that what matters for the purpose of assessing development is the degree to which a society enables its members to have the opportunities to be and do what they wish to be and do, regardless of whether or not they in fact so exercise those opportunities (Nussbaum, 2011: 18).

For Sen, mainstream economics has adopted an overly narrow definition of what constitutes development, focusing on GDP growth, personal income growth, industrialisation, technological advances, or social modernisation (Sen, 1999: 3). Instead, development should be conceptualised as the process of increasing people's freedoms or capabilities to achieve a given set of 'functionings', which are defined as the various things that a person may value doing or being (Sen, 1999: 75). Freedom is, in Sen's conception, both the primary ends and the primary means of development (Sen, 1999: 36–37). Development, therefore, is the 'process of removing the unfreedoms that people have to achieve the things they have reason to value' (Sen, 1999: 86). Higher incomes and industrialisation are not necessarily ends in themselves, as more traditional understandings of development would have it, but are rather instruments to achieve a set of individual functionings. Thus poverty, within Sen's framework, for example, should be understood primarily as a capability deprivation. That is, poverty is not necessarily intrinsically bad, but is *instrumentally* bad because it deprives people of the freedoms to achieve various functionings that they have reason to value (Sen, 1999: 78). Rather than enumerating a set of universally generalizable capabilities, Sen enumerates several instrumental freedom types that aid individuals in developing these capabilities. These include: (1) political freedoms; (2) economic facilities; (3) social opportunities; (4) transparency guarantees; and (5) protective security (Sen, 1999: 38).

While Sen's project is primarily geared towards changing the way development institutions and economists measure and evaluate development, Nussbaum's approach to capabilities is more prescriptive and explicitly political. Her project is 'to provide philosophical underpinning of an account of basic constitutional principles that should be respected and implemented by the governments of all nations, as a bare minimum of what respect for human dignity requires' (Nussbaum, 2000: 5).

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[5] In addition to his academic influence, the UN Development Index is directly based on Sen's capabilities theory of development (see Nussbaum, 2000: 233).

Nussbaum defines capabilities to be 'what people are actually able to do and to be – in a way informed by an intuitive idea of a life that is worthy of the dignity of the human being' (Nussbaum, 2000: 5). Her theory emphasises the role of the nation-state (Nussbaum, 2000: 103), and argues that governments should explicitly aim towards realising what she terms the 'threshold' capabilities of citizens. She contends that such a goal should be constitutionalised, so that the 'structure of social and political institutions should be chosen . . . with a view to promoting at least a threshold level of these human capabilities' (Nussbaum, 2000: 75).

In contrast to Sen, who prefers not to give any specific capabilities that are central or universal and instead leave that specification to individuals and to community and political debate and discussion, Nussbaum provides a useful working list of ten universal central human capabilities. These are: (1) Life; (2) Bodily Health; (3) Bodily Integrity; (4) Senses, Imagination, and Thought; (5) Emotions; (6) Practical Reason; (7) Affiliation; (8) Other Species; (9) Play; and (10) Political and Material Control over One's Environment.

To recap, a capabilities approach thus seeks to remove the unfreedoms that exist which prevent people from achieving the functionings that they have reason to value; and from a Nussbaumian perspective, it aims to ensure that people enjoy certain threshold capabilities. The task here, however, is to apply the capabilities approach to work and the workplace, and to recognise that work and the workplace are central loci, sources, and reflections of unfreedoms. Work and workplaces are thus sites, it is argued, where capabilities are both enhanced and diminished.

It is notable, however, that neither Sen nor Nussbaum extensively discuss how labour and/or labour rights fit, or do not fit, into their theories, although labour is addressed in different ways by both scholars. In the case of Sen, he specifically identifies several of what he considers to be key freedoms, and these could be extended to the realm of labour regulation. A central work-related freedom for Sen focuses on what is a traditional concern of development economics – expanding opportunities for work and labour market freedom. Sen argues that we intrinsically value the freedom of markets, and this includes the freedom to seek employment. He highlights four examples of labour freedoms that are instrumental in enabling people to work should they desire to: (1) freedom from labour bondage; (2) the freedom to seek certain kinds of employment, which was particularly lacking in former socialist countries; (3) the freedom from child labour, which he believes is embedded with bondage and slavery; and (4) the freedom of women to seek employment outside of the family (Sen 1999: 113–114). These market freedoms are valuable in themselves because work is likely a functioning that people generally have reason to

value. Moreover, work also enables us to generate income, which in turn can enable us to increase our capabilities to achieve other valuable functionings, such as better health or obtaining an education.

There are also notably no explicit references or discussions of trade unions or workplace collective organisation in Sen's work. Indeed, in an essay entitled, 'Work and Rights', published in the *International Labour Review*, Sen does not explicitly engage with the question of how freedom of association or collective bargaining might or might not fit into his framework, although he does refer to and note the importance of the ILO Declaration on Fundamental Principles and Rights at Work (Declaration), which explicitly makes reference to these rights (see Sen, 2000).

Sen's relative silence on labour and labour rights, and particularly collective labour rights such as the right to freedom of association, does not necessarily indicate that he believes labour market freedom to be the only substantive freedom that is important to work. Indeed, as we have seen, Sen is generally reluctant to identify *any* specific list of capabilities. However, his reluctance to even mention the rights or capabilities of workers to form unions or engage in collective activity suggests that these capabilities are not particularly central to him, despite his recognition of 'the need for open discussion of social issues and the advantage of group activities in bringing about substantial social changes' (Sen, 1999: 116).

What is more, his focus on the freedom of individuals to engage in work free from coercion is potentially an overly constricted notion of labour freedom that leaves some ambiguity as to how trade union rights might conflict with individual liberties. For example, does the right to participate freely in the labour market mean that unions should *not* be permitted to engage in certain labour market restrictive practices, such as negotiating closed shop agreements with employers?[6]

Some scholars have attempted to enrich and apply Sen's capabilities framework to the workplace and to labour regulation. Brian Langille, for example, argues that the Declaration on Fundamental Principles and Rights at Work, despite its explicit inclusion of freedom of association and collective bargaining rights, is consonant with Sen's focus on individual freedom and agency. In particular, he highlights the role of freedom of association and collective bargaining as both a key ends and means of development. As he writes in a defence of the salience of the ILO's core rights and principles,

[6] Closed shop agreements provide that as a condition of employment, employees must be members of the union that has representation rights.

> . . . [O]n a view of human freedom as the end and the key means, the core rights sound in what labour law theory has long known – that while there is much room for and need of other laws and institutions to make for a just workplace, the most valuable legal technique (instrumentally and as an end in itself) has always been, and is, to unleash the power of individuals themselves to pursue their own freedom. Removing barriers to self-help is a core concern. The history of the labour movement and its relationship with the creation and provision of the other elements we value (substantive statutory entitlements for example) is, as Sen predicts, one of human freedom advancing its own cause. (Langille 2005: 433–434)

But Langille's procedural and collectivist account of freedom, which conceptualises the right to freedom of association and trade unions as prior and necessary in some sense to the development of statutory entitlements, is an unsatisfying account for some scholars. Judy Fudge (2007: 58), for example, is critical of Langille's procedural analysis, calling it a 'thin' account of capabilities. She argues that due to pervasive workplace gender inequality, it may be insufficient to rely solely on freedom of association on its own. Instead, she draws on Simon Deakin and Frank Wilkinson's sophisticated account of capabilities and labour market regulation (Fudge, 2007: 58) to argue for a stronger role for robust statutory entitlements and social rights. Deakin and Wilkinson argue that labour market regulatory interventions should be considered a kind of social right (2005: 351). These social rights can take the form of (1) 'immediate claims to resources' such as welfare payments or sick pay, or (2) 'particular forms of procedural or institutionalized interaction'. The latter include freedom of association rights as well as antidiscrimination laws. According to this conceptualisation, social rights should be understood to be social 'conversion factors' that enable individuals to participate effectively in the labour market (Deakin and Wilkinson, 2005: 350). Conversion factors, in Sen's theory, are factors that prevent or enable individuals from converting basic goods into actual capabilities. Thus for Deakin and Wilkinson, the goal is to use social rights, particularly the procedural or institutionalised interactive forms, to enable individuals to convert their skills and talents into productive capabilities and functionings. One such conversion factor might include freedom of association, but it is not the only or even preeminent conversion factor.

Notably, Deakin and Wilkinson's application of the capabilities approach to labour regulation does not prescribe a particular distributive allocation or outcome; rather, it enables workers to have the ability to make choices in order to achieve his or her given set of preferred functionings and to effectively participate in the labour market (Deakin and Wilkinson, 2005: 353). As such, social rights facilitate labour markets rather than hinder them, which is a clearly articulated goal of Sen.

Sen's highly conceptual account of capabilities and his reluctance to be too concrete in identifying core capabilities means that it can, despite valuable efforts by scholars such as those described above, be somewhat difficult to apply his theory to concrete contexts such as labour regulation. This is why Nussbaum's more concrete account of central threshold capabilities is particularly useful in helping identify the key links between work and capabilities. Indeed, several of Nussbaum's threshold capabilities are easily applicable to the workplace, and some draw close parallels with the core rights and principles articulated in the Declaration. These capabilities include: 'life', 'bodily health', 'bodily integrity', 'play', the 'ability to control one's environment', and 'affiliation' (Nussbaum, 2000: 78–80).

To begin our analysis, at least three of Nussbaum's threshold capabilities are closely related to workplace health and safety and working hours, which are central subjects of workplace regulation. These are 'life', 'bodily health', and 'play.' 'Life,' in Nussbaum's account, refers to the ability to live a life of normal length without dying prematurely, while 'bodily health' concerns the ability to have good health, which includes reproductive health (Nussbaum, 2000: 78). Workplace health and safety is an essential element of the ability to lead a life of normal length and impacts bodily health (Lee et al., 2007: 143). This is particularly so in developing countries where workplace health and safety is often poor. According to the ILO, there are approximately 2.3 million work-related deaths annually around the globe, and only 5 per cent of these are concentrated in so-called 'established market economies' (Takala, 2005: 10).[7] There are also some 317 million accidents every year at work,[8] and about 160 million cases of non-fatal work-related diseases per year (Takala, 2005: 10). Long working hours are also an important component of 'life' and 'bodily health' capabilities. For example, Burke and Fiksenbaum find in a review of the literature that long working hours lead to a variety of physical and psychological ailments, as well as increased risk of injury at work (Burke and Fiksenbaum, 2008: 9–12).

Play is also closely related to the first two capabilities in this sub-group because it, too, is closely related to working hours regulation. Play requires leisure, and to have leisure, one must have leisure time. Leisure time is of course directly related to work and working hours. Nussbaum

[7] See also ILO, Safety and Health at Work, http://www.ilo.org/global/topics/safety-and-health-at-work/lang--en/index.htm.

[8] Ibid.

explicitly notes that maximum-hour protections are an example of providing workers with the capability to play (Nussbaum, 2000: 88). However, according to one 2007 estimate, although extreme working hours have declined overall over time, one in five workers around the world work more than 48 hours a week (Lee et al., 2007: 301). Extreme working hours are of course particularly prevalent in specific industries, sectors, and countries, and are certainly not unique to developing countries or the manufacturing sector, where workers often desire extra hours and the associated overtime pay. Indeed, long working hours and work addiction are also prevalent among the professional and managerial classes in both developing and developed economies (Burke and Fiksenbaum 2008).

A fourth central capability, 'bodily integrity', concerns the ability to be secure against sexual assault and violence. Sexual harassment and gender discrimination are pervasive in the workplace (McCann, 2005). This is true in both developed and developing countries, but the nature of harassment can have different characteristics and challenges in developing country environments. Firstly, in developing countries women might have fewer institutional channels to speak out or protest against discrimination because the law and its enforcement mechanisms are undeveloped; many countries do not have legal regimes that can adequately address or that even recognise sexual harassment as a violation of the law, although the number that at least recognise sexual harassment as a rights violation is growing (McCann, 2005: 17). A second challenge is cultural. In some environments, the notion of sexual harassment is new, undeveloped or simply variable (Merkin, 2008: 277, 278). In many situations, the risk of shame from community and family might suppress opportunities for women to speak out and seek recourse (Zimbroff, 2007: 1318).

Finally, at least two of Nussbaum's capabilities, 'affiliation' and the 'ability to control one's environment', are closely associated with the rights to freedom of association and collective bargaining, as well as with rights to be free from discrimination. The importance placed on 'affiliation' for Nussbaum is apparent when she notes that she understands 'affiliation' (along with 'practical reason') as '*archetonic*' in the sense that it 'organize[s] and pervade[s]' the other capabilities (Nussbaum, 2011: 39). Affiliation has two components. First, it refers to

> [b]eing able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech). (Nussbaum, 2000: 79)

The second component is:

> [h]aving the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails, at a minimum, protections against discrimination on the basis of race, sex, sexual orientation, religion, caste, ethnicity, or national origin. (Nussbaum, 2000: 79)

In other words, recognition of humans as social beings whose interactions and contributions are equally valued and protected in a variety of contexts should be promoted and protected. Explicit in the second part of her definition are non-discrimination protections that, interestingly, seem to derive from affiliations with others who occupy a similar category. Also central to the notion of affiliation is dignity, which is a core concept in Nussbaum's theory more broadly. As she puts it, '[in] general, then, the Capabilities Approach, in my version, focuses on the protection of areas so central that their removal makes a life not worthy of human dignity. When a freedom is not that central, it will be left to the ordinary workings of the political process' (Nussbaum, 2011: 33).

The second capability in this sub-group, 'Control over One's Environment', is composed of a 'political' as well as a 'material element.' The political element is '[b]eing able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association' (Nussbaum, 2000: 80). The material aspect relates to 'having the right to seek employment on an equal basis with others . . . In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers' (Nussbaum, 2000: 79–80).

When we pair 'affiliation' with the 'ability to control one's environment', we see strong support for freedom of association and workplace democracy as derivative and constitutive of central capabilities. The underlying logic of freedom of association as a core human right is very similar to Nussbaum's justifications for these two capabilities. First, while freedom of association may often be conceived as primarily an instrumental vehicle to achieve economic benefits, in fact a stronger underlying logic is grounded in a humanistic and philosophical foundation. That is, workers engage in social and collective interactions that are protected by law in efforts to achieve dignity at work, and to exercise some degree of control and practical reason in their work lives, which generally are highly undemocratic environments where power imbalances are acute.

The connections between capabilities and the Declaration's core principles and rights are also strong. Langille argues in his work that freedom of association rights are tightly bound with the priority placed by Sen on

freedom as the ends and the means of development (Langille, 2005). We have also seen Sen's emphasis on the freedom to participate in labour markets as a freedom that we value. He specifically notes the rights to be free from child and forced labour – two of the Declaration's core principles and rights at work – as being constitutive of this freedom. When we pair Sen's account with Nussbaum's identification of central capabilities, which include protections against various forms of sex and other forms of discrimination, and other central capabilities that are deeply connected to workplace issues, we see strong support for the Declaration's core principles and rights as capabilities, as well as for other workplace issues that go beyond the Declaration's limited scope.

We have just examined how a number of freedoms and capabilities are deeply connected to work in various ways. Work, it is argued, is thus a substantively important locus for development. But work is also an instrumentally and strategically important access point for improving people's capabilities to be and do the things that they have reason to value because of the simple fact that, as we have seen in the discussion of the capability of play, workers spend many of their waking hours engaged in processes of work, whether formal or informal (Bruton and Fairris, 1999: 6). In developing countries, people tend to work longer hours in order to offset low earnings (ILO, 2009b: 7). However, the large amount of time spent at work does not only imply a trade-off or cost in terms of the ability to play. It also demonstrates that work is a central site of human interaction and functioning (Estlund, 2003: 4). Labour regulation, which structures the rules of that interaction and functioning, is therefore a strategically fruitful mechanism to promote human development due to its capacity to affect a large number of people during a significant part of their waking hours.

A final point relates to labour regulation's capacity to address inequality in the workplace. Because workplace inequalities are both sources and reflections of inequality in other social spheres, work is thus potentially a key leverage point for rectifying those inequalities in society at large (Tomaskovic-Devey, 1993: 4). Labour regulation can thus play an important role by increasing the capabilities of classes of people who are discriminated against both at work and in society at large.

Gender inequality is an example of this. There are many examples of gender inequality in the workplace that constitute or reflect social inequality in society (Tran-Nguyen, 2004: 25–26). Work-based gender disparities include, for example, wages gaps (Tran-Nguyen, 2004: 13), sexual harassment (McCann, 2005), disparities in labour market participation (ILO, 2009a: 9), skill differentials (Tran-Nguyen, 2004: 21), and the burden of having primary child care duties (Nussbaum, 2000: 1). There is a two-way

relationship between these workplace inequalities – they are reflections of inequalities that exist in society at large, but they are also sources of social inequalities. Such inequalities limit women's ability to be and do the things they have reason to value both inside and outside of the workplace.

Other forms of workplace inequality also exist that are not gender based, such as caste inequalities found in India (Heller, 1999: 168).[9] There, workplace stratification particularly in the unorganised sector often replicates that of the larger society (Heller 1999: 168). In India, as elsewhere, the relationship between work and inequality cuts both ways: people might obtain jobs considered to be 'lowly', but people are considered to be lowly because of the jobs that they have. This dynamic is surely not limited to India, where garbage pickers and sweepers occupy low rungs on the social hierarchy. Such relationships surely exist everywhere, albeit with different social resonance. If we recognise this relationship – that work status impacts social status and vice versa, which in turn affects one's ability to be and do the things that one has reason to value – then we can conceptualise work as an important source and reflection of capability deprivation, and a strategic access point for capability enhancement.

4. DEMOCRACY

Central to a development approach to labour regulation is the promotion and recognition of workplace democracy, and the complex relationship between workplace democracy, political democracy, and development. Democratisation and democracy promotion have long been central themes and objectives of development theory and practice.[10] This prioritisation is reflected in the work and programming of many government development agencies (USAID, 2013: 8–9) and international organisations, including the ILO (2004: 8–10), as well as a variety of scholars who have put forth

[9] Particular kinds of work are caste specific, and thus a caste, or *dalits* who are without caste, that traditionally engages in 'lower' forms of work are locked into particular forms of work that reflect their low status in society (Heller, 1999: 168). Similar dynamics can be found along ethnic and racial lines, where specific jobs, often those considered undesirable, are populated by minorities.

[10] For essays on the relationship between democracy and development, see Ramaswamy and Cason (2003). For a discussion of democratic themes in the law and development literature, see Chua (2003: 145–167) (claiming that most law and development literature can be divided into marketisation or democratisation literature); and Trubek (2006: 84) (describing the rise of rule of law as the confluence of two forces: the project of democracy and the project of markets).

a number of arguments for its instrumental value in achieving economic development (Chua, 2003: 147–148; see, e.g., Lal, 2003).

The link between democracy and labour regulation is hardly a new one. Workplace democracy and democratic values permeate the objectives and *raison d'être* of labour regulation and industrial relations (see Barenberg, 1994: 762; Estlund, 2005: 402–403; Van Wezel Stone, 1981). The conceptual definition of workplace or industrial democracy is wide-ranging and expansive, and it can have variable and even contradictory meanings depending on the agenda of those wielding it (Montgomery, 1996). Scholars have argued for democratic institutional arrangements that might include, for example: outright employee control and ownership (Dahl, 1985: 91); co-equal governance rights to those of management without ownership rights (Hsieh 2008: 82); and what in the contemporary American context has developed into the institution of workplace union representation and collective bargaining (Lichtenstein and Harris, 1996: 6).

Some scholars prefer the theoretical frame of citizenship to ground labour law scholarship and institutions in a democratic footing. Jennifer Gordon, for example, has argued for a labour citizenship approach, which, according to her, encompasses the normative expectation of solidarity among workers and active participation by them in the democratic governance of their own institutions (Gordon, 2007: 505). In contrast to industrial democracy theories and traditional labour law approaches, Gordon's labour citizenship approach focuses on the creation of democratic worker organisations that seek to improve working conditions and achieve dignity at work, largely outside of the framework of the state (Gordon, 2007: 510–511). Other scholars, such as Judy Fudge, have argued for what she calls an industrial citizenship framework, emphasising democracy at work and extending concepts of political rights to the relationship between employer and employee (Fudge, 2005: 636–637).

In practice, the ways in which democratic industrial relations institutions take shape are variable and context specific (see, e.g., Jacoby, 1996: 206). Some industrial relations systems, such as Germany's, have co-determination regimes (Weiss and Schmidt, 2008). While other systems, such as the pluralist system in the US, have created mechanisms of self-governance where collective bargaining is a mode of workplace governance for those workers that choose it (Van Wezel Stone, 1981: 1511); although some commentators have urged for workplace democracy in the United States to be expanded to allow workers to freely deliberate and choose various modes of workplace governance (see Barenberg, 1994: 947). Regardless of the system, in many countries, particularly developing ones, institutions of workplace democracy and collective bargaining

are weak, and in need of strengthening (see Bensusán, Chapter 6 in this volume). It is in these contexts that a development approach to labour regulation can be particularly fruitful.

Given the potential diversity of labour law regimes, the concepts of workplace democracy and labour citizenship are deployed here in ways that are not institutionally prescriptive. The general principle is that labour law and regulation, and institutions that seek to develop labour law and regulation, should be broadly oriented towards facilitating mechanisms of worker engagement and participation in workplace governance such that workers exercise effective control and influence over their work lives. The institutional forms of democratic governance that are possible are thus dependent on a given political context as well as on the particular governance forms that workers might choose to adopt (see, e.g., Barenberg, 1994: 956–983). Statutorily enforced freedom of association rights that permit collective representation of interests are an important aspect of democratic work arrangements. However, other forms of participation and democratic functioning are also possible, particularly where such rights do not exist or where clear employer/employee relationships are not established, such as in informal work environments.

Capabilities theory is well suited to be applied to labour law because of the central role played in it by democracy and democratic process. Sen argues that strengthening democratic institutions and processes is an essential component of a freedom-oriented approach to development for three reasons: (1) democracy and civil and political freedoms are *intrinsically* or *directly* important to people; (2) democracy plays an *instrumental* role by making it more likely that there will be a policy response to people's claims to political attention (including their economic needs); and (3) democracy is *constructively* important to help people form values through communication and argument (Sen, 1999: 148). Democracy for Sen cannot be seen as something separate from development. It is, like substantive freedoms more generally, constitutive of development itself. Democracy in Sen's account therefore is a good in itself, and cannot be evaluated solely by the degree to which it leads to economic growth, although he argues that there is no evidence that suggests political liberalism leads to slower economic growth in developing countries (Sen, 2011: 346–348). In what follows, we apply the capabilities theory framework, with some modification and edification from other scholars, to labour law and in particular to workplace democracy, which we have seen is a core element of labour regulation, and that can be justified using a similar logic that is deployed in capabilities theory for democracy in general.

4.1 Intrinsic Value of Labour Democracy

Proponents of labour democracy have long argued that democracy in the workplace, as facilitated and constructed by law and legal institutions, has a similar intrinsic value as political democracy. That is, workers generally value participatory rights at work as a means of retaining some form of autonomy over themselves in a sphere in which autonomy is often denied.

Labour scholars and advocates have long drawn parallels and pointed out linkages between labour democracy and political democracy (Gordon, 2007: 512), arguing that if democracy in the form of representative government is desirable in the political sphere, it should be equally appropriate and necessary in the industrial sphere (Dahl, 1985: 111; Harris, 1996: 48, 50). In debates in the US congress over the passage of the Wagner act in 1935, the sponsoring senator, Senator Wagner, stated that, 'democracy in industry must be based upon the same principles as democracy in government. Majority rule, with all its imperfections, is the best protection of workers' rights, just as it is the surest guaranty of political liberty that mankind has yet discovered' (cited in Gordon, 2007: 521).

Workers tend to believe that having a voice in their workplace is fundamentally important to them. This is borne out in studies that have shown that workers want influence and say – a voice – in company decisions affecting the workplace (see Bruton and Fairris, 1999: 14; Freeman and Rogers, 1999: 68). In an oft-cited study by Freeman and Rogers, workers were evenly divided about whether this should be effected through collective voice or individual voice: 87 per cent believed that they would enjoy their jobs more with more control over production and operations; three-quarters believed the company would be stronger against competitors; and 79 per cent believed that product quality would be better if they had a say in how workplace problems were solved (Freeman and Rogers, 1999: 42).

4.2 Instrumental Value of Labour Democracy

While democracy in the workplace appears to be intrinsically valuable to workers, there are also important instrumental arguments for workplace democracy as a goal of labour regulation that is grounded in a development framework.

One instrumental argument is that workplace democracy is an important vehicle to increase an individual's capability for democratic functioning in society, which we have already noted is an important overall development objective. A number of scholars have argued that labour democracy and

citizenship can have important socio-political development effects on individual workers. Gordon argues in her work on transnational labour citizenship, for example, that:

> [f]rom the union perspective, bounded citizenship aids in the development of democracy and solidarity within the union, and enhances the capacity of union members to realize full and equal citizenship outside the workplace as well. From the perspective of the nation-state, it is often said to be a precondition for the creation of community and the flourishing of democracy. (Gordon, 2007: 506)

Furthermore, political theorist Robert Dahl has noted that a number of political scientists argue that there are key linkages between economic and political democracy. He describes the arguments as follows:

> Workplace democracy, it is sometimes claimed, will foster human development, enhance the sense of political efficacy, reduce alienation, create a solidary community based on work, strengthen attachments to the general good of the community, weaken the pull of self-interest, produce a body of active and concerned public-spirited citizens within the enterprises, and stimulate greater participation and better citizenship in the government of the state itself. (Dahl, 1985: 95)[11]

If democratic workplace institutions can potentially help workers develop capabilities to participate in the political system and can assist workers to form values that are applicable and relevant to their political lives, how might this occur? It is suggested here that there are at least two means: the first means is subjective and related to workers' political consciousness and skills; the second means is through the creation of what are termed here as workplace bridge institutions.

4.2.1 Workers' subjectivity

First, democratic processes and institutions in the workplace can potentially serve what Sen calls a 'constructive' role, helping shape individual consciousness and expectations about democracy at the larger political level through discourse, and helping to train workers to formulate and articulate those demands and to become more 'self-governing'.

Second, as Dahl and Gordon suggest, it is also possible that creating

[11] Dahl, however, is sceptical that the empirical data supports arguments that workplace democracy will lead to greater political democracy. He instead bases his argument on the proposition that the principles justifying political democracy also apply to economic enterprises (Dahl, 1985: 111–135).

democratic processes and institutions in the workplace could help facilitate and catalyse democratic reform at the political level, as well as within social institutions, by developing the ability of workers to be effective participants in democratic governance (see Adman, 2008: 117; Burns et al., 2001; Pateman, 1976). One way in which this can occur is through educating workers to participate in otherwise hierarchical environments. That is to say, through the creation of institutions that promote or facilitate industrial democracy, workers can become accustomed to, and develop expectations of, control of other hierarchical institutions (Pateman, 1976: 97). The workplace thus becomes a 'training ground' for opposition and participation in societies with non-democratic or highly non-egalitarian social and political systems (Pateman, 1976: 97). This is particularly valuable to women workers in many developing societies where women constitute a majority of the workforce in certain industries, particularly the export-oriented garment industries. In some countries where there have been active efforts to develop trade unions, particularly 'independent' trade unions that seek to have internal democracy, women have assumed leadership roles (Saxena, 2014).[12]

Once women take leadership positions in workplace institutions or become accustomed to participation and to more equal workplace relationships, they may be able to rise from the shop floor to take leadership roles in other civil society organisations. This can provide them with political power in societies that, if not fully democratic, have some degree of active and influential civil society where civic organisations can exercise political power.

Third, Cynthia Estlund, drawing on the generally high levels of workplace and social diversity in America, has argued that the workplace and workplace regulation can enrich democratic political life because the workplace can be a unique locus of connection between different communities and social groups. Workplace regulation that mandates equality through, for example, bans on racial and gender discrimination, she argues, can create bonds between workers and other members of society, and it can play a mediating function that facilitates cooperation and communication in people's personal and civic lives (Estlund, 2003: 16).

[12] While rates of female union leadership are low worldwide, in Bangladesh, for example, the Bangladeshi Independent Garment Union Federation (BIGUF) is under female leadership and the majority of its members are women. See Rahman (2007: 84, 92).

4.2.2 Workplace bridge institutions

Whereas one instrumental function of labour democracy is to increase the individual capabilities of workers to engage as equal citizens in political communities, a second instrumental function of labour regulation lies in its potential to create or assist in the development of institutions that can serve as bridges to political democracy. Just as some advocates and scholars make the argument that workplace governance should reflect democratic political governance, the argument should also work in reverse – that the political system can and should reflect democratic institutions in the workplace. This might occur through the creation of trade unions, other workplace and deliberative institutions such as worker committees, or civil society organisations that emerge out of workplace interaction and solidarity. While such bridge institutions may be less effective in highly undemocratic political regimes that actively resist robust political activity, they might help lead to processes of democratisation. They also would likely have a greater impact in already nominally democratic systems where democratic functioning is low because of a weak civil society, cultural constraints, or weak interest-group mobilisation.

Indeed, it has long been noted that civic organisations are crucial to a vibrant democratic politics (de Tocqueville, 2003; Estlund, 2003: 105), and unions and workplace organisations can constitute an important component of civil society (see Fick, 2009). Even when these organisations are not explicitly political or politically affiliated, they create important bases of political mobilisation around issues of interest to workers. Because they are membership organisations, they have greater capacity to mobilise their members in support of a given issue.

Of course, unions are not always necessarily forces for democracy. While one stream of literature argues that unions are powerful external forces for political democracy, particularly when those unions operate democratically themselves (Collier, 1999: 165; Fick, 2009; Wood, 2004: 398),[13] another branch of literature argues that trade unions are not necessarily monolithic democrats. They are, rather – at least in a study of Latin American unions – 'contingent democrats' that fight for democracy when it is in their material and organisational interests (Levitsky and Mainwaring, 2006: 21). Thus while it is not completely clear that in all contexts unions work towards democratic ends in society, a large amount of evidence places them in correlation as long as certain conditions are satisfied.

A second institutional outcome can also serve as a bridge towards a

[13] See also Rueschemeyer et al. (1992).

better functioning democracy: the development of workplace democratic institutions and unions can help workers channel complaints through formal institutions and discursive engagement rather than through spontaneous strikes. In Cambodia, for example, the number of wildcat strikes decreased as the number of unions increased and workers learnt to voice their dissent through formal channels, developing institutions to do so (ILO, 2011: 24). Strikes occur, in part, when the industrial relations system and workplace institutions fail to provide an adequate channel for redress of grievances. A similar dynamic can occur in non-democratic regimes where there are few outlets for influencing the political system and decisions affecting citizens. Pent-up pressure can result in general strikes and sometimes violence, which can occasionally be met with violent repression.

5. CONCLUSION

This chapter has argued that labour regulation can and should be oriented towards achieving development goals. Development in this context requires labour regulation to be directed towards decreasing the unfreedoms that people experience at work, and increasing their capabilities to do and be the things that they have reason to value. It means creating democratic regimes in which workers can meaningfully participate. It recognises and develops the linkages between democracy and citizenship at work, and democracy and citizenship in society and polity. My primary goal has not been to prescribe a specific institutional design but, rather, to articulate the linkages between development theory and labour regulation, and to argue that labour regulatory regimes ought to advance labour and development goals, which include expanding individual capabilities, organisational capacity, and democratic functioning.

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4. Labour law and trade policy: What implications for economic and human development?*

David Cheong and Franz Christian Ebert

1. INTRODUCTION

In July 1900 at an international congress that was to establish the International Association for the Legal Protection of Workers,[1] Eugen von Philippovich, a professor at the University of Vienna, recounted the following anecdote:

> In Austria, for example, where the 11-hour work day has been imposed by law with success (and where the work day is often shorter in practice), there remains only one exception made for the silk mills in the south of Tyrol. There, the work day has continued to be 13 hours for all, young people and adults, who are part of the industry. The population there has the same characteristics as the neighbouring Italian population, which is active in the same industry with a 13- to 14-hour work day. It was necessary to place the industry in a position to withstand this competition.[2]

This anecdote reminds us that the links between labour regulation and international trade have been a subject of concern well before the era of

* Sections 2 and 3 of this chapter were drafted by David Cheong while Section 4 was drafted by Franz Christian Ebert.

[1] The International Association for the Legal Protection of Workers, established in 1901, is considered to be the forerunner of the International Labour Organization (ILO). See Servais (2009: 23).

[2] This extract was translated by the authors from a report in French by A. Lichtenberger, *Congrès International pour la Protection Légale des Travailleurs tenu à Paris du 25 au 29 Juillet 1900. Compte Rendu Sommaire* (1900: 33). To provide some context, gross domestic product (GDP) per capita in 1890 was about 60 per cent higher in Austria than in Italy. By 1924, the average income levels of both countries had practically converged, and, interestingly, both countries ratified in that year the very first International Labour Organization (ILO) convention, which limited hours of work to eight per day.

globalisation as we know it. The example reflects the worry among 19th-century European proponents of labour reform – such as Owen, Hindley, and Le Grand – that cross-border economic competition would jeopardise the introduction of laws and institutions intended to ease the plight of workers (Servais, 2009, 22). More than a century later, this example is still pertinent as sweatshop conditions persist, especially in the segments of the global textiles and garment industry located in developing countries (see Pickles, 2012).

The labour–trade debate has been and continues to be a long and heated one, with a multitude of arguments and proposals from various points of view.[3] While some perceive labour law as a potential impediment for export competitiveness and, hence, for trade, others have voiced concern that trade liberalisation without proper safeguards may give rise to a 'race to the bottom' in terms of labour standards, and may, in the long run, hamper social progress.

In this chapter, we contribute to the literature by evaluating labour and trade regimes in terms of their development impact. Our approach is based on the following two elements. First, for our analysis, we take a broad approach to development and consider both its economic and human aspects.[4] Although economic growth is considered to be a strong driver of development,[5] changes in material welfare are only one dimension of development and many authors caution against assessing development simply by growth in GDP per capita (see Sen, 1999; Stiglitz et al., 2010; Deakin, Chapter 2 in this volume). There is increasing recognition that development encompasses also the advancement of social opportunities and social protection, among other things (Sen, 1999: 38–40). Second, as instruments of governance, we suppose that labour law and trade policy have separate purposes, which differ mainly in the extent to which each instrument addresses the economic or human aspects of development. Labour law is primarily intended to correct injustices in the world of work, but it may also alleviate failures in labour markets, raise labour productivity, and facilitate economic production (Deakin, Chapter 2 in this volume). Trade policy, by regulating cross-border flows of goods and services, is meant to raise efficiency and income and provide more consumption possibilities, but there is little in trade that is, as such, supposed to promote domestic social cohesion. Instead, trade is expected to disrupt

[3] For discussions of the issues from historical, legal, economic, and policy perspectives, see Sengenberger and Campbell (1994), particularly the section on labour standards and international trade. A practical overview of the issues can be found in Barry and Reddy (2008).

[4] Our approach is informed by Kolben (2010a; and this volume).

[5] See, for example, the Growth Commission (2008).

economic activity by inducing reallocation, and it may aggravate inequalities by creating winners and losers (Polaski, 2006a).

As labour law and trade policy tend to focus on different developmental objectives, it is important to not only examine their individual impact on development but also the development effects of their interaction. The key issue is to understand how labour law and trade policy complement or conflict with each other in reaching development goals. Understanding the development impact of the interaction between labour law and trade policy is crucial to achieve policy coherence for development. As such, the main aim of this chapter is to clarify the relationship between labour law and trade policy through a development lens. The remainder of this chapter is structured as follows. Section 2 is a brief description of the subjects of our inquiry: labour law and trade policy. Section 3 provides an overview of the relationship between the two, examining both the implications of labour law for trade and the impact of trade policy on labour standards. Section 4 then turns to the 'social clause' debate and reviews the extent to which the incorporation of labour provisions into trade arrangements has influenced human development through changes in the world of work and economic development through changes in trade between the respective parties. The chapter concludes by highlighting key features of the trade–labour relationship as revealed by the analytical review and provides recommendations on developing a comprehensive approach to ensuring that trade instruments foster development.

2. LABOUR LAW AND TRADE POLICY

2.1 Labour Law and Standards

There are multiple ways to think about labour law, as evidenced in this volume. To operationalise the concept of labour law for this chapter, we refer to Deakin and Wilkinson (1999) who state that the defining elements of labour law are its regulatory object (i.e., the employment relationship), the distinct forms of regulation, and the existence of specific regulatory institutions in the field (e.g., labour courts, trade unions, employers' associations, wage-setting mechanisms, or arbitration). Almost all countries have promulgated laws that define basic labour standards and regulate employment conditions such as pay, working hours, and workplace health and safety. The scope and content of labour law, however, differ in terms of the specific rights, rules, and benefits provided to workers. The choice of a country's labour law regime is informed by national norms and

values, which are reflected in the characteristics of a country's legal traditions, religious beliefs, and general political orientation.

The considerable heterogeneity in the scope and content of labour law across countries poses certain analytical challenges. In order to go beyond case-study analysis and produce more generalisable results,[6] some researchers have attempted to devise numeric indicators for the analysis of labour law,[7] particularly indicators of *core labour standards*,[8] given their widespread use in the international labour standards regime.[9] These numeric indicators of labour standards are then analysed together with economic data in order to identify statistical relationships between legal and economic institutions and outcomes. This is the case for many empirical studies on trade and labour, in which analytical results are derived from correlations between trade statistics and numeric indicators of labour standards. These studies on trade and labour are discussed and summarised later in this chapter.

2.2 Trade Policy and Flows

International trade is governed by various national-level policies, of which many are in turn regulated by agreements at the multilateral, regional, and bilateral levels. A country may, in principle, apply instruments that restrict imports (e.g., import tariffs and quotas, antidumping and countervailing duties, safeguards, import bans, import licensing, etc.) or exports (e.g., export taxes and quotas, export bans, and local

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[6] See Spamann (2009).

[7] For a discussion of methodological issues in coding labour law, see Compa (2003); Deakin et al. (2007); and Deakin (Chapter 2 in this volume).

[8] See Kucera (2007). Kucera notes that the conceptual and methodological difficulties lie in the basic distinction between *de jure* and *de facto* aspects of a labour standard; choosing a single method given the many possible methods for constructing an indicator; and implementing the chosen method when the necessary data to assess compliance with a labour standard is unavailable or incomplete. He also emphasises the importance of orienting the construction of labour-standards indicators towards their intended use. If, for example, labour-standards indicators are to be used for a statistical analysis of the relationship between labour standards and trade, Kucera suggests having separate indicators for specific labour standards, such as those on child labour and trade union rights, as combining them would make untangling causal channels implied by the results difficult, if not impossible (Kucera, 2007).

[9] This concept of *core labour standards* is contained in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, which were adopted by the International Labour Conference at its 86th Session in Geneva on 18 June, 1998. Further, see Alston (2004) and La Hovary (2009: 259 et seq.).

content requirements) or that encourage trade (e.g., import and export subsidies, cheaper trade finance, and export promotion). However, all countries that are members of the World Trade Organization (WTO) or signatories of regional and bilateral trade agreements are subject to international disciplines on trade policy, particularly import restrictions and non-discrimination. These international trade disciplines have markedly reduced developing countries' policy space in practice.[10]

The view that trade liberalisation is amenable to economic growth holds sway among policymakers and the current rules in the multilateral trading system have, at least in part, been devised to promote trade liberalisation.[11] Members of the WTO are bound by these rules, and any unilateral imposition of trade protection by one WTO member may meet with countermeasures by other members.[12]

International trade has become freer and more transparent as average tariff levels around the world are at a historic low. Historical data show that the current secular decline in global import tariffs began in the 1940s. By taking the ratio of import duties to import value of each country in a sample of 35 countries, Clemens and Williamson (2004: 5–46) computed a measure of the average import tariff level of these countries for the period 1860 to 2000. They showed a clear spike in this measure of tariff levels between 1920 and 1940 from just under 10 per cent to almost 25 per cent (coinciding with the Great Depression) followed by a gradual fall afterwards to around 7 per cent in 2000 (ibid.). Successive trade negotiations since 1947 within the framework of the General Agreement on Tariffs and Trade (GATT) and since 1994 within the WTO have reduced the set of trade policy instruments that countries can use and restricted the manner in which they are used, resulting in substantial import liberalisation.

However, while tariff protection has clearly decreased, there has been growing use of non-tariff barriers, especially since 2008, primarily in the form of technical barriers to trade (TBT) and sanitary and phyto-sanitary

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[10] The implications of WTO law for countries' policy spaces are discussed in DiCaprio and Gallagher (2006) and Grosse Ruse-Khan (2008). For an overview of the relevant requirements under WTO law, see Trebilcock et al. (2013: 28–33).

[11] The members of the WTO aim, e.g., to 'enter into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations', Third Recital of Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154. See on the WTO's objectives relating to trade liberalisation, Petersmann (2012: para. 1026).

[12] See Palmeter and Alexandrov (2002) on this subject and how the WTO's dispute settlement mechanism brings about compliance with WTO law.

measures (SPS). The rise in the utilisation of TBT and SPS measures has been attributed to growing concern for the quality and safety of imported products and the environmental impact of trade (WTO, 2012: 126).

3. THE MUTUAL DEVELOPMENT IMPACT OF LABOUR LAW AND TRADE POLICY: AN OVERVIEW OF THE EVIDENCE

3.1 The Impact of Labour Law: A Driver of Human Development but a Drain on Comparative Advantage?

At a basic level, labour law can be considered to promote the human aspects of development through the protection of fundamental human rights (e.g., the rights to freedom of association and expression, an adequate standard of living, health, education, non-discrimination, etc.). Labour law codifies and customises these basic rights for the world of work, in which a large number of a country's citizens are occupied and from which they earn a livelihood. Blackett (2001: 418–419) argues that labour law and standards are needed to mediate people's participation in areas of the world of work where the market system does not lead to dignified or democratic outcomes. According to Stiglitz and Kolben, this mediation may be important, since freedom and democracy in the workplace are thought to have similar positive developmental effects as broader rights to freedom and democracy (Stiglitz, 2000; Kolben, 2010a). Besides providing choice and 'voice', labour law promotes equitable opportunities and outcomes. By supporting the human aspects of development, labour law is supposed to create conditions of stability and security that allow a society to realise not only its economic potential but also its human aspirations.[13]

The analytical evidence on the socio-economic impact of labour regulation (i.e., minimum wages, job security regulations, and social security) is mixed and inconclusive, not least because of the many methodological questions that arise. Botero et al. find that:

> more protective collective relations laws (but not others) are associated with a larger unofficial economy, that more protective employment, collective relations, and social security laws lead to lower male (but not female) participation in the labour force, and that more protective employment laws lead to higher unemployment, especially of the young. Finally, there is some evidence that more generous social security systems are associated with higher relative wages of privileged workers. (Botero et al., 2004: 1378)

[13] See also Kolben (Chapter 3 in this volume).

However, their results hold among the richer countries but generally not the poorer countries. They interpret this evidence as being consistent with the view that labour laws have adverse consequences in countries where they are more likely to be enforced, namely the richer ones. They conclude that their results provide evidence that the effects of labour regulation are antithetical to social interests.[14] In contrast, Palley (2005) finds that higher labour standards lead to improvements in political governance, reduced corruption, and income distribution. Freeman states that the only strong result from the empirical literature on this topic is that 'countries that rely on institutions to set wages and working conditions have lower rates of inequality or dispersion of earnings' (2008: 651). The implication is that countries should build and operate such labour-market institutions to the extent that equity is considered an important objective and condition for development.

In purely economic terms, labour law and standards can have utilitarian value to society and can contribute to the material aspects of a country's development. Labour standards can contribute to economic efficiency in at least four ways.[15] First, standards for collective bargaining produce efficiencies in information exchange and coordination within firms and between workers and management (Freeman and Lazear, 1995). Second, standards on wages shift the focus of management to competitiveness in terms of worker productivity and quality of output rather than labour cost. Third, standards on health and safety conditions in the workplace prevent workers and society from bearing the cost of illness and accidents and can raise worker productivity. Lastly, standards can induce firms to invest in the formation of human capital and workers to invest in their own skills, thus contributing to long-run efficiency.[16]

Empirically, one observes that countries that have better compliance with the core international labour standards tend to also have higher GDP per capita. This begs the question of whether this is simply a correlation[17] or

[14] However, Baker et al. (2005), Baccaro and Rei (2005) and Howell et al. (2006) are sceptical of the robustness of the models used to test the impact of labour regulation on socio-economic performance. In particular, the evidence on employment protection legislation appears to be mixed and time-varying.

[15] Deakin (Chapter 2 in this volume) analyses how labour law can facilitate development by playing a 'market-constituting' role and correcting market failure.

[16] Schrank (2006) finds that, following the adoption of a new labour code in the Dominican Republic in the 1990s, there was a positive relationship between the degree of labour law enforcement and the propensity to upgrade human resources across the country's 30 provinces net of other factors.

[17] Campos and Nugent (2012) find that the relationship between employment protection legislation and per capita GDP growth becomes statistically

cause-and-effect. If the latter, do labour standards lead to economic growth or vice versa? Studies on the relationship between labour standards and per capita GDP find causation in both directions. On the one hand, Flanagan (2006) finds that the effects of GDP per capita growth on compliance with core labour standards are positive, involving less use of child labour and forced labour and smaller net gender wage differentials. However, other factors such as property rights, democracy, and ethnic heterogeneity turn out in some cases to have a stronger positive impact on compliance with core labour standards than GDP per capita. On the other hand, Bazillier (2008) finds that stronger compliance with core international labour standards, apart from other factors such as investment and human capital, can raise a country's long-run GDP per capita growth rate. Putting aside methodological issues, the bidirectional results of these two studies could be interpreted as evidence of a virtuous circle: economic growth improves employment conditions, improved employment conditions facilitate the adoption and enforcement of labour standards, labour standards promote better employment conditions and raise economic efficiency, and increased economic efficiency feeds back into economic growth. The implication is that labour law is reinforced by and reinforces economic development, which is consistent with Deakin (Chapter 2 in this volume) and his concept of the co-evolution of labour law with economic outcomes.

As is well known, the links between labour standards and trade have been the subject of much controversy. Part of the controversy hinges on the impact of labour standards on a country's comparative advantage, which is the basis for its trade position. The comparative advantage of most developing countries lies in their relatively abundant and cheap labour. The key argument against labour standards is that they could rob poor countries of their comparative advantage in the production of labour-intensive goods. More specifically, compliance with higher labour standards might require higher payments to workers or capital expenditure, which would raise a country's production costs and reduce its competitiveness on world markets. On the other hand, adherence to labour standards might enhance the productivity of workers and lower production costs. According to Hepple (2005), labour standards that are redistributive may discourage trade and investment, but those that improve skills and productivity may add to dynamic comparative advantage. However, as noted by Blackett (2010: 104), labour standards considered to be redistributive (for example, standards on the minimum

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insignificant with the addition of standard growth determinants such as investment and human capital variables.

wage, occupational health and safety, and parental leave) are likely to also be dynamic, implying that the effects on trade of these specific labour standards are ambiguous.

The evidence is mixed but less supportive of the assertion that labour standards are a drain on comparative advantage. Among studies of the effects of labour standards on production costs, Gould and Flanagan (2003) found that the ratification of labour standards by countries had no impact on labour compensation between the early 1980s and late 1990s. Even the core standard of freedom of association and collective bargaining did not seem to have any effect on labour compensation.[18] However, Palley (2005), using the OECD index of freedom of association across several countries, found that union rights in the period 1985–1994 were associated with higher wages. Barry and Reddy (2008) performed accounting exercises to show that labour costs in a 'Southern' country would need to increase by a multiple of at least three in order to eliminate the country's comparative advantage in labour-intensive goods vis-à-vis a 'Northern' country. They argued that labour standards would have to be very stringent in order to increase production costs to the point where competitiveness would be lost. They did not consider competition among 'Southern' countries, but they argued that decisions to source from or invest in 'Southern' countries would be more dependent on factors such as infrastructure quality, supplier reliability, and the 'Southern' country's access to international markets than on labour costs. Furthermore, there is evidence that increased labour costs would have little negative impact on jobs. Pollin et al. (2004) found only a weak relationship between changes in real wages and employment in a study of 45 countries in the global apparel industry.

Studies on the impact of labour standards on trade flows show mixed results. These studies have found that labour standards had: (1) negative effects on trade; (2) no effect on trade; and (3) positive effects on trade. Table 4.1 summarises the results of several studies on developing countries and groups them according to their results. Much of the evidence indicates that labour standards, measured by ratification of and/or compliance with core ILO conventions, had no impact on trade flows, particularly on exports of unskilled-labour-intensive goods. Studies showing that labour standards had negative effects on trade tend to be from the earlier literature when many methodological issues were still unad-

[18] Gould and Flanagan (2003) interpret these results as showing that the ratification of core international labour standards is mainly a symbolic act and pursuant to already-improved labour outcomes and employment conditions.

Table 4.1 Summary of studies on the effects of labour standards on trade flows in developing countries

Labour standards had no effect on trade	Labour standards had negative effects on trade	Labour standards had positive effects on trade
• Rodrik (1996) found that labour standards did not have a statistically significant effect on the share of a country's textile and clothing exports in its total exports in a sample of 84 countries. • Busse (2002) found that ratifications *per se* of ILO conventions and union rights did not have a statistically significant effect on the share of unskilled-intensive manufactured exports in total exports. • Gould and Flanagan (2003) found that the number of ILO labour standards ratified by a country had no statistically significant impact on a country's export share of GDP nor its share of world FDI inflows. • Samy and Dehejia (2009) found that for the period 1990 to 2001 none of the indicators of	• Mah (1997) found that the ratification of conventions related to freedom of association and collective bargaining, as well as non-discrimination were associated with a deterioration of export performance in his sample of 45 developing countries in the earlier part of the 1990s, but particularly among the poorer half of his sample. • Busse (2002) found that better compliance with labour standards in the areas of child labour and forced labour was correlated with a lower share of unskilled-intensive manufactured exports in total exports • Dehejia and Samy (2004) found the ratification of core ILO conventions to be negatively associated with the export share of GDP in their sample of developing countries.	• Busse (2002) found that less female discrimination raised the share of unskilled-intensive manufactured exports in total exports. • Kucera and Sarna (2006) found that during the period 1993 to 1999 stronger trade union rights were associated with higher total manufacturing exports in a sample of 165 countries. • Samy and Dehejia (2009) found that for the period 1990 to 2001 the prevalence of child labour in a developing country was negatively related with its export share of GDP. • Bonnal (2010) found that labour standards improved export performance.

Table 4.1 (continued)

Labour standards had no effect on trade	Labour standards had negative effects on trade	Labour standards had positive effects on trade
labour standards had a statistically significant impact on the export share of GDP in developing countries (except for child labour). • Bakhshi and Kerr (2010) found that reducing labour standards compliance related to child labour and gender discrimination did not affect the level of a country's unskilled-intensive exports in a sample of developing countries.	• Bakhshi and Kerr (2010) found that lower labour standards compliance related to forced labour and union rights was associated with a positive but small increase in developing countries' unskilled-intensive exports.	

dressed. Nevertheless, more recent studies have still found some negative but small effects on trade especially in relation to union rights and forced labour. Despite the methodological problems with these studies, one can infer that the impact of labour standards on trade will vary according to the specific labour standard, type of country, and type of traded products under examination.

3.2 The Impact of Trade Policy: Engine of Growth but Encumbrance on Labour Standards?

Trade liberalisation, besides being an underlying objective of the WTO, is also strongly advocated by other international organisations such as the World Bank, the International Monetary Fund (IMF), and the Organisation of Economic Co-operation and Development (OECD). The economic growth experiences in the second half of the 20th century of East Asian countries, which were largely based on liberal trade

policies, are frequently cited as evidence for the positive role that trade openness plays in development.[19] Yet, the evidence for the positive impact of trade liberalisation on development is mainly in terms of economic growth, and the empirical literature related to other measures of development, especially social indicators such as the poverty rate, inequality, civil liberties, educational attainment, and life expectancy, is rather thin.[20]

There is an abundance of studies that show a positive relationship between trade liberalisation and GDP since the 1970s.[21] However, these studies have been criticised for the ways in which trade openness is measured, the assumed direction of causation, and problems with isolating the effects of trade openness in the presence of other policy reforms.[22] In the 2000s, empirical studies shifted to studying the effects of trade on productivity. Increased foreign market access for exporters was found to raise average sectoral productivity through a compositional effect (Pavcnik, 2002). Import competition and access to better

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[19] World Bank (1993). In contrast, there is evidence that countries with higher tariffs had faster growth in the pre-World-War-II period, according to Clemens and Williamson (2004). As this was a protectionist period in which all countries were raising tariffs, the authors suggest that their findings may hold only in such a world environment.

[20] In a review of studies analysing the impact of trade on poverty, Winters et al. (2004) concluded that economic growth generated by trade openness had at least the same positive impact on the incomes of the poor as other sources of economic growth. In relation to trade and inequality, Pavcnik (2011), drawing from the literature, inferred that increases in inequality in both developed and developing countries since the 1980s were attributable mainly to skill-biased technological change rather than trade liberalisation, but, given trends in outsourcing and trade in sophisticated intermediate inputs, the relative impact of technology and trade on inequality needed to be examined more closely. There is very little literature on the effects of trade on civil liberties, educational attainment, and life expectancy.

[21] For a survey of the empirical literature on the relationship between trade openness, productivity and growth in developing countries, see López (2005). Trade liberalisation also appears to raise investment, according to other studies.

[22] To remedy the measurement and identification problems related to openness, many studies have resorted to geographic variables. Ades and Glaeser (1999), for instance, concentrate on openness in terms of access to the rail network and coastal ports. Their findings suggest that less-developed, open regions tend to have a high growth rate and develop into advanced regions. More specifically, Ades and Glaeser do not only measure the degree of openness but also take into account the initial level of development and conclude that growth is particularly fast when there is a combination of openness and low initial development.

and more imported intermediates were found to raise firm productivity (Topalova and Khandelwal, 2011). Although the positive impact of trade on economic growth has not been completely proven, these recent findings have sustained the view that trade liberalisation is good for (or at least does not harm) economic growth.

From a development perspective, the primary aim of most countries with regard to labour markets is both to increase the number of jobs and to improve working conditions, including the wages paid to workers. To the extent that trade liberalisation raises domestic efficiency and creates higher foreign demand for a country's output via reciprocity, trade liberalisation would create jobs and raise wages. The effects of trade liberalisation on labour markets have mainly been studied in terms of employment and wages. In an early World Bank study of trade reforms in nine developing countries, Papageorgiou et al. (1990) found that in eight out of the nine countries manufacturing employment was higher during and one year after the liberalisation period compared to before. Rama (1994), in contrast, found a negative effect of trade liberalisation on employment in his analysis of trade policy reform in Uruguay in the late 1970s and early 1980s. Harrison and Revenga (1995) found evidence of increases in manufacturing employment following trade liberalisation periods in Costa Rica, Peru, and Uruguay, but a fall in manufacturing employment in the former Czechoslovakia, Poland, and Romania. As a caveat to the results on the latter three countries, the authors noted that in the transition from planned to market-based regimes these countries underwent other reforms besides trade liberalisation in the same period. In a study of 48 developing countries, Hasan and Devashish (2003) found that on average trade liberalisation had a weak positive effect on manufacturing employment but a stronger positive effect on wages. They also found that in countries with more flexible wages trade liberalisation induced more employment and high wages. Lee (2005) reviewed the evidence from ILO studies on Brazil, China, India, Malaysia and Mexico and found that in the Asian countries trade growth increased employment in both the export-oriented and import-competing sectors and there was more of an increase in the real wages of low-skilled workers than high-skilled workers, thus reducing wage inequality. He also found that the generally favourable effects of trade on employment and wages in manufacturing in the Asian countries did not occur in the Latin American countries, attributing the divergent results to differences in initial wealth distribution, macroeconomic management, and dependence on external resources

Concerning the effects of trade policy on outcomes related to core labour standards, some studies have found that trade liberalisation

results in better compliance with labour standards.[23] For example, Flanagan (2006) found that more open trade policy was associated with higher wages, greater workplace safety, more civil liberties (including workplace freedom of association), and less child labour. Only in the case of gender wage discrimination was there an indication of an adverse effect from free trade policies, and openness appeared to have a neutral effect on measures of forced labour. In a study of 140 countries over the period 1960 to 2004, Campos and Nugent (2012) found that trade liberalisation in the previous five-year interval was associated with more employment protection legislation in the current interval. They interpret this finding as being consistent with the view that – since employment protection legislation only applies to formal workers by definition – the negative anticipated and actual effects of import liberalisation and a large presence of formal workers in import-competing sectors induce more calls for job protection and legislative change in this direction (Campos and Nugent, 2012: 25). In addition, Edmonds and Pavcnik (2006: 115–140) found that countries that traded more had less child labour, but they attributed this relationship to the positive effect of trade on income.

However, some studies show a negative impact of trade on labour standards, particularly on union rights (Busse, 2004; Mosley and Uno, 2007). In addition, case studies tend to also uncover negative effects. The ILO, in examining principles and rights at work in export processing zones in several countries, noted discrepancies between ratified conventions and compliance with standards on freedom of association and collective bargaining as well as non-discrimination (ILO: 2003). Turnbull and Wass (2007) investigated the effects of globalisation and reforms in ports and found that these caused a deterioration in dock workers' terms and conditions of employment. Lee and Eyraud (2008) showed that globalisation and deregulation in East Asia came at a social cost in terms of reduced job quality and security and increased income inequality. Despite the diversity of results, one possible conclusion is that trade liberalisation tends to be more problematic for the labour standards related to freedom of association and collective bargaining and non-discrimination. The findings of Greenhill et al. (2009) are interesting in this regard. They found that strong legal protections of collective labour rights in a country's

[23] Neumayer and De Soysa (2006) found that trade openness was associated with lower FACB (Freedom of Association and Collective Bargaining) rights violations. Busse (2004) found that trade openness was associated with better outcomes in terms of gender equality and the reduction of child labour.

export destinations are associated with more stringent labour laws in the exporting country, suggesting that labour standards can be transmitted from importing to exporting countries.

4. THE INTEGRATION OF LABOUR STANDARDS INTO TRADE ARRANGEMENTS: WHAT IMPLICATIONS FOR DEVELOPMENT?[24]

4.1 The 'Social Clause' Debate

A large part of the debate on trade and labour law has dealt with the question of whether – and if so how – to insert obligations on labour standards into trade arrangements, often referred to as a 'social clause'.[25] The rationale behind this proposal is to submit violations of certain internationally recognised labour standards not only to 'soft' monitoring mechanisms, such as supervisory mechanisms of the ILO, but to subject them to trade sanctions, thus linking these violations to palpable economic consequences (Vandaele, 2005: 313–315).

The question of whether such a link is politically and economically desirable has been fiercely debated and continues to be controversial. The proponents of this approach include the United States, France and other industrialised countries' governments, as well as (especially Northern) trade unions and labour rights activists.[26] Many have contended that such labour provisions are necessary in order to prevent a race to the bottom of labour law and consequently working conditions.[27] A related argument is that countries should not be able to obtain short-term economic benefits from labour standards violations (Munck, 2002: 130) as this amounts to unfair competition (see, e.g., Servais, 1989: 423)[28] and that such violations should be sanctioned in the same way as other illegitimate trading practices (see Granger and Siroen, 2009: 158 and ILO, 2013: 6–7). Others, while

[24] This chapter partly draws on ILO (2013), a study prepared by one of the present authors.

[25] See on this terminology Granger and Siroën (2005: 182).

[26] It should be noted that some European industrialised countries, e.g. Germany and the United Kingdom, opposed the insertion of such a social clause; see Orbie et al. (2009: 150). On the more diverse views of trade unions in the global South see e.g. Griffin et al. (2002: 4 et seq.).

[27] See on this argument Sutherland (1998: 99). On the alliances behind the different positions in this debate see Chan and Ross (2003: 1014).

[28] For a critical perspective on both approaches see Trebilcock et al. (2013: 718–721).

not necessarily endorsing the unfair competition and race-to-the bottom arguments, argue that the human rights nature of certain labour standards, including the ILO's *core labour standards*, renders it not only justifiable but 'also arguably imperative' to apply trade sanctions in the event of certain labour standards violations (Trebilcock, 2004: 173–174). In this view, inserting provisions on labour standards (hereinafter 'labour provisions') into trade arrangements would provide the system of international labour standards with the necessary leverage to enforce labour standards, which it is otherwise lacking (see, e.g., Kaufmann, 2007: 169–170).

This position has been met with fierce criticism. Especially, developing countries' representatives[29] and multinational companies (see Greven, 2012: 74), supported by prominent trade economists (e.g. Bhagwati, 1995), have opposed the inclusion of labour standards within trade agreements (see De Wet, 1995: 444–450). The main concern put forward by the supporters of this view is that such labour provisions are likely to be utilised for the protectionist interests of industrialised countries to shield their high-cost economies against low-cost competition from the South.[30] This, so the argument goes, would, in the worst case scenario, hamper exports from developing countries and economic development – while not addressing the underlying reasons of non-compliance – and, thereby, also thwart the improvements of labour standards that these clauses aim at (see Dasgupta, 2000: 124–125; Panagariya, 2001: 13–14). Commentators have also raised concerns regarding policy coherence given that certain countries that demand trade sanction mechanisms for certain labour standards are themselves in violation of certain other labour standards (Bhagwati, 1995: 754–757). Finally, some also call into question the appropriateness of trade sanctions for addressing labour standards violations given the complex nature of these issues (Maskus, 1997: 66–67; Addo, 2002: 297–298).

Much of this debate has so far focused on the multilateral level. An early attempt to include a comprehensive labour provision into the multilateral trade framework was undertaken with the Havana Charter on the International Trade Organization of 1947,[31] which, however, never

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[29] As Weiss (2002: 79) notes, the views of developing country elites do not necessarily coincide with those of the workers and trade unions in these countries.

[30] For an overview of developing countries' arguments in this regard see Salazar-Xirinachs (2000: 380–381).

[31] This Charter provided: 'The Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements [and] that unfair labour conditions, particularly in production for export, create difficulties in

entered into force. Instead, the ensuing multilateral treaties, the General Agreement on Tariffs and Trade (GATT) of 1947 and the WTO Agreement of 1994, expressly took into account labour standards concerns only in an exception from the GATT obligations regarding prison labour.[32] In the context of the adoption of the WTO Agreement, a controversial debate unfolded on whether to include more comprehensive labour provisions in the form of a 'social clause' into the WTO framework (see McCrudden and Davies, 2000: 46). The compromise found at the Singapore Ministerial Conference that took place in 1996 essentially referred labour standards issues to the ILO, thereby implicitly rejecting the inclusion of labour provisions into the WTO framework.[33] Suggestions of inclusion of labour standards were blocked anew at the Ministerial Conferences in Seattle and Doha (see Vandaele, 2005: 394–400).

Yet, despite the strong resistance of certain actors, labour standards have increasingly been put on the trade negotiation agendas of many key trading partners, namely at the regional and bilateral levels. Given the deadlock at the multilateral level,[34] certain trade actors have continued to pursue the inclusion of labour provisions at the unilateral, bilateral and regional levels,[35] which will be analysed in the following sections.

4.2 The Decentralised Proliferation of Trade-Related Labour Provisions

It is helpful to bear in mind that the insertion of labour standards concerns into trade arrangements is not a recent trend (see Leary, 1996: 192 et seq.). Already on the eve of the 20th century, some countries, first and foremost

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international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory'. See Article 7(1) of the Havana Charter for an International Trade Organization (adopted 24 March 1948) UN Doc E/CONF.2/78, 3.

[32] See Art. XX(e) of the General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 187. Also the rest of the WTO framework does not contain specific labour provisions, see e.g. the Marrakesh Agreement establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154.

[33] See Singapore Ministerial Declaration Adopted on 13 December 1996 WT/MIN(96)/DEC, available at: http://www.wto.org/english/theWTO_e/whatis_e/tif_e/bey5_e.htm (accessed 26 September 2012).

[34] The main document in this regard is the Singapore Ministerial Declaration which declares the ILO to be 'the competent body to set and deal with [labour] standards'. See the Singapore Ministerial Declaration, WTO Ministerial Conference, Singapore, 9–13 December 1996, available at: http://www.wto.org/english/theWTO_e/whatis_e/tif_e/bey5_e.htm.

[35] See on this process Supiot (2009: 136–137).

the United States, had introduced elements of labour conditionality for their imports through their domestic trade legislation. This development started mainly with clauses banning the import of products made with prison and forced labour[36] as well as provisions defining certain labour practices as dumping, allowing for the application of counter-measures such as the increase of tariffs.[37]

In 1984, the United States also inserted labour provisions into its preferential trade arrangements granting unilateral trade preferences to developing countries, most prominently the US Generalized System of Preferences (GSP) (see Amato, 1990).[38] These arrangements allow for the withdrawal of trade preferences[39] in the event of non-compliance with a broader set of labour standards.[40] The labour provisions of the US GSP is vested with a petition mechanism and is thus – unlike certain other labour provisions in domestic trade legislation[41] – not exclusively subject to the surveillance

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[36] Such provisions were included by the United States in relation to prison labour in 1890 which were extended, in 1930, to forced labour. Similar provisions, relating to prison labour, were also enacted by Canada, New Zealand, and South Africa, among others. See Charnovitz (1987: 570).

[37] One year on after the adoption of the ILO Forced Labour Convention, 1930 (No. 29), Argentina included forced labour as a ground for anti-dumping measures. In 1934, a similar provision, concerning forced labour and prison labour, was inserted into the Spanish anti-dumping legislation. Anti-dumping duties are also foreseen by the Austrian trade legislation in the event of the respective good being produced under violation of working hour standards. See Charnovitz (1987: 569–570, 576–577).

[38] The United States has also included labour provisions in certain region-specific instruments, such as the Caribbean Basin Recovery Act (1990), the Andean Trade Preference Act (1991)20 and the African Growth and Opportunity Act (2000) (see further Greven, 2005: 11–13).

[39] The labour standards covered by these provisions are '(A) the right of association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children, and a prohibition on the worst forms of child labor . . . ; and (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health'. See 19 United States Code § 2467.

[40] US trade legislation also links the continuous denial of the labour standards included in the GSP labour provisions to trade sanctions (Section 301(b) and (d) of the US Omnibus Trade and Tariff Act 1974, as amended in 1984) and has prohibited goods made with child labour being imported into the United States (Bonded Child Labour Elimination Act 1930, as amended in 1997).

[41] See the examples provided above. Note, however, that petitions may also be filed under Section 301 of the Omnibus Trade and Competitiveness Act, allowing the US Government to take appropriate trade measures against certain 'internationally recognized labour rights', see further Perez-Lopez (1990: 228–234).

of the authorities themselves.[42] A different approach was adopted regarding the European Union's GSP in the 1990s. Instead of focusing on the withdrawal of preferences only, an incentive mechanism for additional preferences was also included (Tsogas, 2000; Harrison, 2005: 1667–1668). The eligibility requirements for the additional preferences are that the relevant countries ratify and meet certain requirements related to the ILO's fundamental conventions and 19 other human rights and good governance conventions.[43] Also, the basic preferences under the EU's GSP can be withdrawn from a country that is in 'serious and systematic' breach of the principles of the relevant human rights conventions.[44]

More significant, at least from a quantitative view point, is however the proliferation of trade agreements with labour provisions, the number of which has increased rapidly in the last two decades.[45] This development seems to have been spurred on by the stalemate of the WTO negotiations which made numerous trade actors shift their attention to the bilateral level, which provides more policy space for the introduction of labour provisions, given the different power and interest constellations. Indeed, trade agreements with labour provisions have spread significantly since the 1990s, which partly corresponds to the general proliferation of bilateral and regional trade agreements given the stalemate in the Doha round (see, e.g., Fiorentino et al., 2006: 3 et seq.). According to the ILO, from only four trade agreements with labour provisions in 1995 this number had risen to 21 in 2005 and to almost 60 of such agreements in 2013, out of the 248 trade agreements listed in the WTO's Regional Trade Agreements Database (ILO, 2013: 19). This concerns agreements concluded by the United States, Canada, the European Union, and New Zealand, but

[42] The enforcement of labour provisions in domestic trade legislation allowing for import bans is often challenging given that the customs authorities usually do not have the necessary means to ascertain whether a given good was produced with forced or child labour. See on this already Charnovitz (1987: 570).

[43] Certain conditions, economic and otherwise, have also to be fulfilled. See Article 9(1) of Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, ECR L 303/1 of 31.10.2012.

[44] See Article 19(1)(a) of Regulation (EU) No 978/2012.

[45] In this regard, two main models are apparent. While some provisions exempt trade parties from their trade-related obligations in the event of another trade party violating labour standards, others obligate the trade parties to comply with certain labour standards and provide for trade sanctions in the event of non-compliance. This difference in approach comes with practical implications: under the first one it is the violating country that would have to commence proceedings under WTO law against the sanctioning country. In the second case, it would be the other way around. See on this also Bartels (2015).

also certain trade agreements concluded exclusively by developing countries, with Chile being the main driving force.[46] Also the Trans-Pacific Partnership (TPP) between the United States and 11 other countries bordering the Pacific, the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, and the Transatlantic Trade and Investment Partnership (TTIP) between the United States and the EU, none of which were in force at the time of writing, contain or will in all likelihood contain some sort of labour provisions.[47]

Thereby, the regulatory approaches regarding these labour provisions vary considerably.[48] While labour provisions are often included in the body of the trade agreement itself, in other cases they are contained in side arrangements, as is the case of the North American Agreement on Labour Cooperation (NAALC), attached to the North American Free Trade Agreement (NAFTA).[49] With regard to legal content, labour provisions may commit the state parties to complying with a minimum floor of labour standards or require them to enforce or maintain the labour standards provided for by their own national labour law.[50] Labour provisions establishing an absolute minimum standard often refer to the standards set out by the ILO instruments, in particular the ILO's 1998 Declaration on Fundamental Principles and Rights at Work, although others establish such requirements in an idiosyncratic manner (see Agustí-Panareda et al., 2015: 354–360). In terms of implementation mechanisms, trade agreements – similar to unilateral trade arrangements – can link labour standards requirements to trade sanctions or trade incentives. Mechanisms in labour provisions for trade sanctions, at least as a measure of last resort, have so far mainly been inserted into the trade agreements or related side agreements concluded by the United States or Canada. These arrangements submit the obligations under the labour provisions

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[46] See on this trend, emphasising the experience of Chile, Lazo Grandi (2009: 23 et seq.).

[47] See Chapter 19 TTP; Chapter 23 CETA; European Commission (2013).

[48] Other than the aspects mentioned below, labour provisions can differ with regard to the nature of the instruments where the labour provisions are included (into the FTA itself, or an accompanying document, such as a memorandum of understanding), the legal value of the labour provisions, and the scope of the application of the provisions (only trade-related labour issues or any labour issue within the jurisdiction of the parties).

[49] North American Agreement on Labor Cooperation between Canada, the United Mexican States and the United States of America (signed 14 September 1993, entered into force 1 January 1994) (1993) 32 ILM 1499.

[50] For a conceptualisation of different labour provisions in trade agreements dealing with domestic labour law see Häberli et al. (2012: 15).

to a dispute settlement mechanism and often also provide for a complaint mechanism which allows trade unions and other actors to formally raise problems regarding the application of the labour provisions with a national contact point (see, e.g., Doumbia-Henry and Gravel, 2006: 191 et seq.). Typically, these labour provisions also include institutional arrangements for dialogue and cooperative activities on labour standards issues (see, e.g., Ebert and Posthuma, 2011: 2–3).[51] Other trade agreements focus on mechanisms for dialogue and cooperation on labour standards and do not, typically, link the labour provisions to trade or other sanctions (Lazo Grandi, 2009: 12 et seq.). This is, for example, the case with the labour provisions linked to New Zealand's and the EU's trade agreements as well as most labour provisions contained in 'South-South' trade agreements (see ILO, 2013: 32–35, 71–72).

An interesting case is, furthermore, the US–Cambodia Multi-Fibre Agreement,[52] which regulated the quota for access of Cambodian apparel products to the US market from 1999 to the end of 2004 (Wells, 2006: 360–361).[53] This agreement provided for a labour-related incentive arrangement in the sense that an increase in the established quota was to be granted depending on the labour standards record of Cambodian textile and apparel companies.[54] In order to facilitate the implementation of this arrangement, a local ILO office would carry out monitoring activities on the relevant labour standards directly in the relevant factories under a programme known as Better Factories Cambodia (BFC) (Kolben, 2004: 86). Furthermore, the results of the monitoring would be communicated to the relevant buyer companies concerned such that the latter could obtain information on the labour standards record of their potential providers and choose their business partners accordingly. A company where labour standards issues had been identified would be granted a certain period of time to address the situation. BFC would then issue a report listing

[51] Other issues on which labour provisions differ are the nature of the instruments where the labour provisions are included (into the FTA itself, or an accompanying document, such as a memorandum of understanding), the legal value of the labour provisions, and the scope of the application of the provisions (only trade-related labour issues or any labour issue within the jurisdiction of the parties).

[52] See also Fenwick (Chapter 8 in this volume).

[53] Given that Cambodia was at that time not a member of the WTO, its access to the US apparel market was subject to significant quantitative restrictions. See Kolben (2004: 89).

[54] See Article 10(D) of the Agreement Relating to Trade in Cotton, Wool, Man-made Fiber, Non-Cotton Vegetable Fiber and Silk Blend Textiles and Textile Products Between the Government of the United States of America and the Royal Government of Cambodia.

the names of the factories and indicating their respective shortcomings (Polaski, 2006b: 923). The Agreement eventually expired at the end of 2004 along with the phasing-out of the Multi-Fibre Arrangement, which had allowed WTO members to impose quotas on certain textile imports (Kolben, 2004: 89).[55]

Overall, far from a uniform model, a variety of approaches to integrating labour provisions into trade arrangements have emerged. The legal and institutional implications of these approaches differ significantly. Given the increasing integration of labour provisions into trade arrangements, the question arises as to what practical implications the different labour provisions have for labour standards, trade, and related measures of development in the countries concerned. This shall be addressed in the following section.

4.3 The Effects of Labour Provisions in Trade Arrangements: A Look at the Evidence

The potential of labour provisions in trade arrangements to contribute to improving and maintaining labour standards remains a controversial issue. While some commentators have placed high expectations on the impact of these labour provisions, others maintain that these labour provisions boil down in practice to window dressing to appease relevant stakeholders.[56] As noted, opponents have voiced concern that labour provisions could be used for protectionist purposes and thereby hamper the economic development of developing countries. While it may still be too early to answer this question definitively, the following sections provide a sketch of what is known of the practical application of these labour provisions. The focus is on four dimensions, namely: (1) the effects on domestic labour legislation; (2) the effects on the enforcement of labour standards; (3) the effects on

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[55] Cambodia acceded to the WTO on 13 October 2004, see the WTO's membership information at: http://www.wto.org/english/thewto_e/countries_e/cambodia_e.htm. It is worth noting that the BFC programme subsequently led to the creation of the Better Work programme, co-sponsored by the ILO and the International Finance Corporation (IFC), the World Bank's private sector investment arm. While not being linked to trade agreements, this programme uses a similar approach regarding the monitoring of labour standards. See further at: www.betterwork.org.

[56] The view that labour provisions of bilateral and regional trade agreements have been largely ineffective in terms of improving labour standards and are ill-designed for that purpose is, among others, held by Kolben (2007: 204–205) even though this author contends that these agreements 'hold the most promise for the creation of effective trade and labour regimes' (2007: 205).

the capacity of labour institutions and workers' organisations; and finally (4) the effects on trade and economic development.[57]

4.3.1 Effects on labour legislation

Interventions of one party to a trade agreement to change the domestic labour legislation in another one are likely to be met with resistance by the latter. That being said, some interesting effects have been triggered by the trade negotiations of certain trade agreements concluded by the United States. The United States Congress has, since the early 2000s, required the other parties to these trade agreements to improve their labour legislation or practice approving ratification. In other words, the 'carrot' of obtaining a trade agreement with the United States has been used to induce countries to improve on certain labour standards issues. In a number of countries, this has contributed to raising the level of labour standards, in particular in the area of trade union rights. For example, with regard to Morocco, Bahrain, and Oman, countries with significant statutory restrictions of workers' freedom of association, amongst others, it appears that trade negotiations with the United States have contributed to advancing the inclusion of labour standards into national legislation and doing away with certain earlier restrictions (Cammet and Pripstein Posusney, 2010: 264–265, 267–268; ILO, 2013: 37–39).[58] Some effects of the United States' ratification conditions are also apparent for a number of Latin American countries, such as Colombia, Peru, and Panama (ILO, 2013: 39–42; Vogt, 2014: 130–135). It should be noted, however, that imposing labour-related conditions for the ratification has not developed into a uniform policy of the United States. In some cases, such as the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR)[59] and the US-Republic of Korea Trade Agreement,[60] improving on labour standards issues was not a condition for the ratification of the respective

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[57] This section draws in part on the findings of the research project carried out by the International Institute of Labour Studies on the practical implications of labour provisions in bilateral and regional trade agreements.

[58] A particularly palpable impact of the trade negotiations on domestic labour standards is apparent in the case of Oman where the United States Congress and trade unions raised issues regarding various labour standards, most notably the absence of the workers' right to form trade under Omani labour law. On Oman see also Hafner-Burton (2009: 149).

[59] Central America-Dominican Republic-United States Free Trade Agreement, 5 August 2004, 43 I.L.M. 514.

[60] Free Trade Agreement between The United States of America and the Republic of Korea, 30 June 2007, available at: http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text.

agreements – despite considerable labour-standards-related concerns in those countries.[61]

Some effects on domestic legislation can also be discerned with regard to the special incentive arrangement of the EU's GSP (GSP+) which have mainly consisted of incentivising countries to ratify certain international conventions related to labour standards. Orbie and Tortell (2009: 673) report five cases where a link between the GSP+ incentives and the ratification of certain conventions can be detected.[62] This relationship is particularly palpable in the case of El Salvador, which was granted additional preferences on a provisional basis on the condition that it ratified ILO Conventions No. 87 and 98 within a given timeframe (Orbie and Tortell, 2009: 673; Fenwick, Chapter 8 in this volume). However, the effects of GSP+ on the actual compliance of domestic laws with the conventions ratified are less palpable,[63] which may in part be due to the incoherent application of the GSP+ requirements by the European Commission.[64]

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[61] See Luce and Turner (forthcoming). In the case of CAFTA-DR a 'White Paper' with commitments regarding the improvement of labour standards was adopted, which was, however, not a condition for the ratification of the agreement by the US Congress. See Working Group of the Vice Ministers Responsible for Trade and Labour in the Countries of Central America and the Dominican Republic, and the Inter-American Development Bank (CAFTA-DR Trade and Labour Ministers) (2005).

[62] These countries are Bolivia, Colombia, El Salvador, Mongolia, and Venezuela.

[63] The only major discernible effect in this regard relates to freedom of association issues in El Salvador. Further to a Supreme Court judgment that declared the recently ratified ILO Convention No. 87 unconstitutional – and therefore inapplicable – to the extent it applied to public sector workers, the European Commission initiated an investigation under the GSP+. The threat of having its preferences withdrawn seems to have been at least one of the main reasons for the Salvadorian Government to amend the relevant constitutional provision. See Commission Decision of 31 March 2008 providing for the initiation of an investigation pursuant to Article 18(2) of Council Regulation (EC) No 980/2005 with respect to the protection of the freedom of association and the right to organise in El Salvador (2008/316/EC), ECR L 108/29 18.4.2008. Given the steps taken by El Salvador, the European Commission eventually concluded that the preferences should not be withdrawn. See Commission Notice pursuant to Article 19(2) of Council Regulation (EC) No 732/2008 of the termination of an investigation with respect to the protection of the freedom of association and the right to organise in the Republic of El Salvador (2009/C 255/01), ECR 255/1 of 24.10.2009.

[64] In particular, the European Commission admitted various countries to the GSP+ that had a clear record of violating the relevant requirements, such as Colombia, Guatemala, El Salvador, and Georgia. See Orbie and de Ville (2010: 502) and Ebert (2009: 22–24).

4.3.2 The effects on compliance with labour standards

Much of the debate regarding the labour provisions in trade arrangements has revolved around the question of whether these arrangements can help to improve compliance with labour standards in practice. The main features in this regard are the complaint and, in the case of trade agreements, dispute settlement mechanisms of the trade arrangements which the labour provisions may be subject to. The following sections highlight a number of tendencies regarding the labour provisions' practical implications, primarily concerning the complaint, dispute settlement, and sanction features.

4.3.2.1 Unilateral trade arrangements Most evidence about the practical application of labour provisions under unilateral trade arrangements is available on the US Generalized Systems of Preferences (GSP). Under the EU GSP's general withdrawal clause only three labour-related cases are apparent (Orbie and Tortell, 2009: 668). Meanwhile, labour-related complaints under the United States GSP have been filed more frequently, amounting to more than 100 petitions just in the first decade after entry into force of the GSP labour provisions in 1984 (Elliott and Freeman, 2003: 155, 157).

The effects of these complaints appear to be mixed, although some positive effects on the enforcement of labour laws did occur (Humbert, 2008: 11). Based on an extensive analysis of cases filed between 1985 and 1996, Elliott and Freeman conclude that out of 47 cases accepted for review by the US Trade Representative, 15 were found to have resulted in palpable progress in terms of labour standards that could at least partly be attributed to the GSP petition (Elliott and Freeman, 2003: 76–77). In this regard, it appears that progress regarding labour standards did not only (or necessarily) occur where the trade preferences were actually withdrawn but also where there was a credible threat of withdrawal; indeed out of the petitions analysed by Elliott and Freeman only 12 led to a withdrawal (2003: 155, 157). For example, in cases concerning the Dominican Republic and Guatemala in the 1990s and Swaziland in the late 1990s and early 2000s, dealing with widespread labour standards violations especially regarding trade unions, the risk of having the US GSP trade preferences withdrawn appears to have prompted the countries to address the issues of the respective complaints (Douglas et al., 2004: 277–293).[65] These cases also suggest that the improvements due to labour provisions in the US GSP materialise through a rather lengthy and arduous process

[65] Davis (1995: 1213–1214) makes a similar point regarding El Salvador, underlining, however, the limitations of these effects.

and may take repeated initiatives from the petitioners (Harvey, 1995: 6; Frundt, 1998: 212–224). At the same time, the experience with the EU GSP illustrates that even where sanctions are applied, positive effects on the matters at issue are by no means guaranteed: research suggests that in the two cases where the trade preferences had actually been withdrawn, involving forced labour in Myanmar and trade union rights violations in Belarus, this did not give rise to any significant policy change regarding labour standards (Kryvoi, 2008; Zhou and Cuyvers, 2011).[66]

The effects of the cases under the GSPs seem to depend on a variety of factors. Various authors have argued that complaints and trade sanctions will be less effective in cases where labour standards violations are not (only) due to economic reasons, e.g. in export processing zones, but entrenched in the country's political system, as the governments will be reluctant to make changes even if their trade benefits are at stake (Kryvoi, 2008: 220–221, 243; Elliott and Freeman, 2003: 76). In this regard, also the political context, such as the degree of democracy and civil society involvement, in the country where the violation takes place seems to matter (Elliott and Freeman, 2003: 76; Schneuwly, 2003: 135).[67] In other cases, economic factors have been central. Regarding the US GSP, countries whose share of exports to the United States was relatively high were found to be more likely to address issues raised by the petitions than countries with rather small exports to the United States (Elliott and Freeman, 2003: 158). On the other hand, the EU GSP cases regarding Belarus and Myanmar show the limitations of labour-related trade sanctions in scenarios where the target country is not economically dependent on the sender of the sanctions, in this case the EU (Kryvoi, 2008: 220–221, 243). In these cases, the countries affected by the sanctions were able to rely on significant economic and political ties with other countries, such as China and Russia, which seems to have reduced both the economic and political effects of the sanctions (Zhou and Cuyvers, 2011: 76–77).

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[66] Some authors recognise though that other positive outcomes can arise from sanctions and withdrawals of GSP that can be relevant to labour provisions. '[Sanctions] can contribute to the international definition, promulgation, recognition, and demonstrate the political commitment to a particular set of values and norms such as core labour standards' (Zhou and Cuyvers, 2011: 78). Introducing sanctions or withdrawing preferences 'may also deter other countries from committing violations' (Zhou and Cuyvers, 2011: 78).

[67] This is in line with more recent general research on sanctions that suggests that their effects are highly dependent on the political institutions of the targeted country and, notably, on the country's degree of democracy. See, e.g., Lektzian and Souva (2007: 849).

4.3.2.2 Trade agreements Most trade agreements containing labour provisions are still relatively recent and only allow for a preliminary evaluation. Yet it seems clear that any expectations regarding sweeping improvements of the labour standards situation in the countries concerned are highly unrealistic, although some effects can be noted. Some examples regarding available complaints may serve to illustrate this point.

Instructive in this regard is the experience with the oldest trade agreement linking the labour provisions to a complaint and sanction-based dispute settlement mechanism, the North American Agreement on Labour Cooperation (NAALC).[68] Since its entry into force in 1994, about 40 complaints have been filed under the NAALC. However, none of these cases, including those where the National Administrative Offices (NAOs) found serious problems in terms of labour standards, led to the activation of the dispute settlement mechanism, let alone to sanctions.[69]

That does not mean, however, that the NAALC complaint mechanism has not had any effect at all on the problem raised by the different cases.[70] As the abundant literature on the NAALC shows, the pressure emanating from the complaint proceedings was, at least in the early years of the NAALC, a factor that led to various independent Mexican trade unions being recognised, among other outcomes (see, e.g., Singh and Adams, 2001: 8 et seq.).[71] There is also some evidence that certain NAALC complaints have prompted Mexican authorities to take some action regarding occupational health and safety issues[72] and, in one instance, regarding

[68] North American Agreement on Labor Cooperation between Canada, the United Mexican States and the United States of America (signed 14 September 1993, entered into force 1 January 1994) (1993) 32 ILM 1499. Note that only three areas of labour standards are, under the NAALC, subject to dispute settlement.

[69] It should be noted that the NAALC allows for dispute settlement only with regard to three labour standards, such as child labour, occupational health and safety, and technical minimum wage issues. For the other labour standards protected by the NAALC the procedure ends with the establishment of an Evaluation Committee of Experts whose recommendations cannot be enforced with economic sanctions.

[70] The effects noted below are also identified in ILO (2013: 47).

[71] A case in point is the 'Maxi-Switch' case of 1996, where the political pressure created by the NAALC complaint is reported to have contributed to make the local labour board recognise an independent Mexican trade union (Graubart, 2008: 92).

[72] This seems in particular to have occurred in the 'Han Young' case of 1997. See, e.g., Compa (2001: 456).

gender discrimination.[73] Conversely, another complaint seems to have triggered the US Government to address problems regarding migrant workers, especially in the fruit industry (Delp et al., 2004: 18; Compa, 2001: 462–464). That being said, even where the complaints have had positive effects on labour standards, these have usually not been able to fully resolve the problems at issue. In a number of cases, labour standards violations continued or re-emerged in a different form once the scrutiny of the NAALC institutions declined (Williams, 2003: 44). Also, while there is palpable evidence of positive impacts of complaints in the first years after the NAALC's entry into force, it seems that such effects decreased significantly in later cases, notably those filed after 2000 (see also Compa and Brooks, 2009: 47 et seq.). This can to some extent be explained by a decreased interest in the complaints by the three countries' respective NAOs, in particular after the change in the United States administration in 2000. By and large, the impacts of the complaint mechanisms on labour standards have, where they occurred, so far been of a limited nature. It remains to be seen what effects, if any, will be triggered by the complaints that have recently been filed under other US trade agreements, notably CAFTA-DR.[74]

More palpable effects on the compliance with labour standards seem to have been brought about by the incentive arrangement of the former US–Cambodia Multi-Fibre Agreement. While a number of compliance problems remain (Miller, 2009: 27), labour standards appear to have improved in the Cambodian textile companies covered by this agreement, especially regarding compliance with occupational health and safety

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[73] This case concerned mandatory pregnancy tests in the Mexico's *maquila* sector. The NAALC helped activists to create pressure supporting their campaign against discriminatory practices (e.g. Bremer, 1999: 574), in particular by bringing the issue to a broader public attention (Andrias, 2003: 555) with – albeit limited – results in both government policy and the attitude of multinational companies sourcing from Mexico as to pregnancy testing. See, e.g., Adams (1999: 37–38) and Weiss (2003: 746).

[74] Under this agreement, four complaints have been filed since 2008, alleging labour rights violations in Guatemala, Costa Rica, the Dominican Republic, and Honduras, respectively. While the complaint against Costa Rica was withdrawn and terminated, respectively, the other cases are still pending; see ILO (2013: 51–52). In autumn 2014, the US Government took the case regarding Guatemala to dispute settlement due to insufficient progress on labour standards. See Initial Written Submission of the United States In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR of 3 November 2014; available at: https://ustr.gov/sites/default/files/US%20sub1.fin_.pdf.

standards (Robertson et al., 2011: 12).[75] Improvements were found to be particularly significant for reputation-sensitive buyer companies, although improvements occurred in other companies, too (Robertson et al., 2011: 19). Researchers generally consider the incentive-character of the labour provisions under the US–Cambodia Multi-Fibre Agreement one of the decisive factors underlying these improvements (see, e.g., Wells, 2006: 368; Adler and Woolcock, 2010: 542). Also, the Cambodian Government's decision to make the companies' participation in the monitoring programme a condition for obtaining an export licence has been considered pivotal in reducing the risk that companies enjoy the benefits of the regime while not making efforts to improve relevant labour standards (Oka, 2010, 2011; Wells, 2006: 369). An additional factor in the arrangement's success seems to have been the monitoring mechanism implemented by the ILO, the results of which were used by reputation-sensitive companies for their business decisions.[76]

4.3.3 The effects on the capacity of labour institutions and workers' organisations

Some labour provisions contained in trade agreements have also had an effect on the capacity of labour institutions and workers' organisations, in particular through the technical and development cooperation furthered by these labour provisions.[77]

Thereby, the nature and amount of cooperative activities varies considerably across the different agreements (see ILO, 2013: 79–92). Under some agreements, such activities consisted especially in exchange of information, expertise, and experiences in the area of labour standards. For example, the cooperation mechanism of the NAALC, at least during the first decade of its existence,[78] led to a variety of workshops,

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[75] Furthermore, Robertson and Rossi argue that the monitoring under the Better Factories Cambodia project has played an important role in improving the conditions for sound industrial relations in the Cambodian textile sector (Rossi and Robertson, 2011: 241).

[76] See Oka (2010, 2011) and Wells (2006: 369).

[77] Such cooperative activities have taken place under 'North-South' agreements but also, albeit so far to a lesser extent, under 'South-South' trade agreements, in particular the recent trade agreements concluded by Chile. See on this Lazo Grandi (2009: 32–33). By contrast, labour provisions in unilateral trade arrangements do not seem to have provided for or triggered any cooperative activities regarding labour standards, even though in some cases technical cooperation projects may have a political link with cases under the GSP labour provisions.

[78] Since the early 2000s, the cooperative activities of both the NAALC Secretariat and the NAOs have declined significantly, see Nolan García (2011: 102–106).

conferences, and research publications on labour standards issues in the state parties (Finbow, 2006: 195 et seq.). Some authors have, however, noted that the activities' effects have, overall, been limited given that many of these activities were carried out in a rather isolated manner without a comprehensive underlying capacity building approach (Polaski, 2004: 23–24).

Under other agreements, especially of the United States and Canada, an emphasis has been put on institutional capacity building.[79] The most prominent example in this regard is CAFTA-DR under which capacity building activities with a financial value of more than 85 million US dollars have been dedicated to labour capacity building (U.S. DOL, 2009: Annex 2). Carried out by consultant firms, NGOs, trade unions, and the ILO, these projects have dealt with an array of subjects related to workers' organisations and public labour institutions (U.S. DOL, 2009: 8–12).[80] These projects have notably contributed to a modernisation of the equipment and electronic infrastructure of labour inspection and labour judiciary in these countries. In addition, a number of projects aiming to raise workers' awareness of their labour standards and providing free legal assistance to workers were put in place, which also seems to have helped to draw the attention of NGOs and academics on labour standards issues (González Arroyo and O'Brien, 2011: 30). At the same time, these projects seem to have changed little with regard to the underlying problems concerning labour standards compliance in the respective countries. This has been attributed to, among other things, a lack of political will of the relevant political actors to enforce labour standards and a general hostility towards trade unions' and workers' concerns in several of these countries (González Arroyo and O'Brien, 2011: 30–31).

Finally, it should be noted that the continuous use of the NAALC complaint mechanism has, despite its limited outcomes in the concrete cases, given rise to some indirect effects, especially the strengthening of independent trade unions in Mexico. The main reason for this is the creation of alliances between workers' rights organisations of the three state parties to the NAALC. While the cross-border contacts of these organisations were, before the NAALC, usually limited to specific occasions and the level of leadership (Kay, 2005: 717), the transnational nature of the

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[79] On cooperative activities under Canada's labour provisions see in particular ILO (2013: 81, 82–84).

[80] Similar – although less extensive – capacity-building activities were undertaken under various other United States' trade agreements, including those with Peru, Oman, Bahrain, and Morocco as well as under some of Canada's trade agreements, including those with Chile, Costa Rica, and Peru. See ILO (2013).

NAALC complaints procedures facilitated more intensive and continuous relationships between the respective workers' right organisations (Compa, 2001: 459–460; Kay, 2011: 194–195). As various authors have shown, this has also led to cooperation and capacity building beyond the NAALC and has provided the independent trade union movement in Mexico with new legitimacy at the domestic level and increased political weight (Kay, 2011: 262–264).[81]

4.3.4 The effects on trade: evidence of a protectionist application?

As mentioned above, one key concern of opponents of labour provisions in trade arrangements has been that such provisions could amount to protectionism in disguise, by allowing countries to shield their economy against imports from another country. The concern is that this could drain the comparative advantage of developing countries and prevent them from gaining benefits from the international trading system, thereby weakening their economic development perspectives. The vigour and perseverance with which this concern has been put forward is not surprising in light of the historical record of industrialised countries in protecting their economic interests at the expense of developing countries (see, e.g., Blackett, 2010: 94), and given that some trade policy instruments, regardless of labour issues, indeed lend themselves to a protectionist application.[82]

The question arises thus as to what effects the labour provisions in trade arrangements have had or may have on the bilateral trade between the relevant countries.[83] In particular, labour provisions could be used as a pretext to curb the import of goods from another country, for example,

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[81] Similarly, Athreya (2011: 59–60) argues that the filing of petitions under the US GSP has led to an increase of capacity in related civil society organisations, including on tactical and legal issues.

[82] For some examples, see Sykes (1999: 4–5).

[83] In addition to concerns pertaining to import restrictions, some scholars have argued that trade-related labour provisions could also increase the production costs for a given good in another country which may lead to a decline in competitiveness in the long run. See Bhagwati (2001: 5) who refers to this phenomenon as 'export protectionism' as opposed to 'import protectionism'. This argument ignores, however, the evidence suggesting that higher labour standards are not necessarily related to the positive effects labour law may have on economic development, as stated above and in Deakin (Chapter 2 in this volume), which implies that higher labour standards do not necessarily entail a loss in terms of competitiveness. Besides, both the legal content of labour and their application in practice tend, with few exceptions, to focus on trade union rights and other ILO core labour standards rather than 'cash standards' such as minimum wage and working time issues. See Perez-Lopez (1990: 223–224) and Ebert and Posthuma (2011: 10–12), and, on the distinction between 'core' and 'cash' standards, Freeman (1997: 99).

through tariffs or quantitative trade restrictions (cf. Sykes, 1999: 7). However, so far there is little evidence of a protectionist application of the labour provisions resulting in import restrictions. This is particularly true for labour provisions in bilateral or regional trade agreements. If at all, trade agreements allow for sanctions due to labour standards issues only after a lengthy consultation and a dispute settlement procedure involving an arbitral panel which is independent from the parties and decides according to strictly legal criteria (Polaski and Vyborny, 2006: 102–103). Cases where unfounded labour standards issues are used as a pretext for protectionist action would thus be unlikely to succeed. It is therefore not surprising that no case is so far apparent where labour provisions were used to protect the economic interests of an industrialised country (see also DiCaprio, 2004: 28–32). Indeed, at the time of writing trade sanctions for labour reasons had been applied in none of the cases in the first place (Elliott, 2011: 428), and industrialised countries seem in general anxious to prevent a case even reaching the stage of dispute settlement.

The situation is somewhat different in the case of unilateral trade arrangements, given that here it is the granting trade actor and not an independent body which decides on possible labour-related sanctions (see Amato, 1990: 102–105). Also, while the EU GSP labour provisions incorporate the ILO's conventions and are thus linked to the relevant multilateral standard and the findings of the relevant supervisory bodies, the US GSP relies on unilaterally defined labour standards, including 'acceptable conditions of work'. The legal content of this clause is rather vague and seems as such more susceptible to an opportunistic application than that of the US trade agreements, which has led one author to term this approach 'aggressive unilateralism' (Alston, 1993: 2). This is, however, contrasted by the US GSP's application in practice. Reportedly, trade preferences were withdrawn in less than 10 per cent of the petitions filed with the United States Trade Representative (DiCaprio, 2004: 23). Furthermore, this study shows that these cases concerned mainly small and poor countries, which are usually not the main competitors of the United States, and involved issues of particular gravity (Elliott and Freeman, 2003: 83–84). A protectionist application is thus – even for the US GSP – not apparent (see also Athreya, 2011: 3 with further references). By and large, the risk of a protectionist application of other provisions often found in trade agreements and domestic laws, such as provisions on anti-dumping and safeguard measures and counter-veiling duties (see on

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This suggests that the concern that labour provisions might lead to significant increases in production costs is overstated.

this Krueger, 1999: 107), therefore seems considerably greater than that of labour provisions.

5. CONCLUSION

This chapter has strived to shed some light on the relationship between trade and labour standards as well as its implications for economic development. It has been emphasised that this linkage is highly complex and many of its facets have yet to be fully ascertained.

As indicated above, labour standards are only weakly related to comparative advantage. While there are varying results among the studies on the topic, the evidence shows on the whole that the effects of improved labour standards on production costs and trade flows tend to be negligible. In the long-term, improvement in certain labour standards even seem to be positively related with trade and may thereby contribute to economic development.

With regard to the effect of trade on labour standards and employment, the evidence is mixed. While studies at the aggregate level show that trade flows tend to be positively related with labour standards, several case studies show that the impact of trade liberalisation on labour standards, especially in the short and medium term, can be negative. This suggests that governments need to be cautious and to consider possible social outcomes when entering into further trade agreements in order to ensure that trade is conducive to human development. One preventive measure to avoid or limit any harmful effects of trade liberalisation through bilateral and regional agreements is to carry out social and human rights assessments, which will, however, only be effective if they live up to high methodological standards and are carried out in an independent manner (Harrison and Goller, 2008: 589; Blanco, 2006: 291). Also, it seems crucial to consult with relevant stakeholders, including trade unions, employers, and relevant NGOs prior to signing such agreements. Once an agreement is adopted, flanking measures may need to be introduced in order to ease adjustment to ruptures caused by trade liberalisation.

Besides the relationship between trade liberalisation and labour standards, the role of labour provisions in trade instruments, especially trade agreements, has also been fiercely debated. While the insertion of a 'social clause' into the WTO legal framework continues to be unlikely in the near future, labour provisions have proliferated outside of the multilateral trading system, especially in bilateral and regional trade agreements. Contrary to what critics had posited, no significant evidence for protectionist effects of labour provisions is so far apparent. Such

provisions, therefore, do not seem to impede the expansion of trade or any trade-induced economic development in developing countries. At the same time, the effects of labour provisions on human development seem by and large to be limited. In some cases, labour provisions in trade agreements – as well as the conditionality applied prior to the agreements' ratification – have led to positive developments in terms of domestic labour legislation, the enforcement of labour standards, and the capacity of labour institutions and organisations. Yet, these positive developments are highly dependent on the political and economic contexts in which the labour provisions are applied and, in a number of cases, the labour provisions have remained a dead letter despite serious problems in the country concerned. On the whole, it seems clear that labour provisions in trade arrangements are, on their own, unable to counter-balance any potentially harmful effects of trade liberalisation. A more comprehensive approach is therefore needed to ensure that trade instruments foster rather than impede human development. In this regard, greater awareness among civil society could help to incite governments to take appropriate measures.

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5. Labour law and development viewed from below: What do case studies of the clothing sectors in South Africa and Lesotho tell us?

Marlese von Broembsen and Shane Godfrey

1. INTRODUCTION

Labour law is in a liminal space. Its normative premises are being called into question by the neoliberal hegemony, as is its contribution to economic development. Labour law scholars are embracing the challenge in numerous ways. Some are responding by rewriting labour law's normative goals.[1] Others argue that its normative goals of redistribution and social justice[2] need to be realised through 'constituting narratives'[3] other than collective bargaining, such as constitutionalism,[4] human rights[5] and development.[6] Still others are exploring ways of extending labour law's coverage to include non-standard work and workers in the informal economy.

This chapter analyses the relationship between development and labour regulation through case studies of the clothing sector in two neighbouring developing countries: South Africa and Lesotho. Our argument is that if labour regulations are to be developmental, particularly in developing countries, the labour law and development project needs to incorporate the following foci into its agenda.

[1] See, for example, Deakin (2011), or Langille (2006) who argues that redistribution should not be a goal in and of itself. Instead, he argues, the normative function of labour law should be redistribution as a means of enabling workers to live lives that they have reason to value.

[2] See Hepple (1986), Fudge (2011), Davidov (2007) and Weiss (2011) for different articulations of these goals.

[3] This term was first coined by Langille (2006: 13).

[4] See Arthurs (2011).

[5] See, for example, Alston (2004) and Sankaran (2011).

[6] See, for example, Langille (2006), Kolben (2010) and Deakin (2011).

First, labour regulation must be integrated on equal terms with trade, investment and industrial policy at national and regional levels. The case studies clearly illustrate Arthurs' contention 'that market dynamics are often a more powerful determinant of decent labour standards than regulatory legislation; that states shape labour markets and the relations of market actors as effectively by trade, fiscal, monetary, immigration, social welfare, and education policies as by labour laws' (2011: 18). In South Africa (which has a comprehensive labour regime) the conflicting goals of labour regulation, on the one hand, and of trade and industrial policy, on the other, have had the effect that labour regulation has reconstituted the labour market but in such a way that redistribution occurs between the workers themselves, rather than between capital and labour.

Second, labour law must develop a regional and global framework, since the development project is a global one. Notably, it must move away from models focusing on the employment relationship and sector-based collective bargaining between employers and employees (essentially a national model) to models that (a) focus on regional and global value chains (often straddling sectors), and (b) seek to govern the 'lead firms' in buyer-driven value chains (Gereffi 1994: 96–99). In the clothing industry, the lead firms are the major retailers. Until now, labour law has regulated *national* labour markets, whereas the locus of work and generation of value is increasingly in *global* value chains that most often straddle more than one jurisdiction. The implications of this disconnect are explored in the case studies. Value chains for mass-produced consumer products, such as clothing, are buyer-driven. As buyer, the retailer has enormous power to structure the distribution of the risks and costs of the entire value chain. The case study in South Africa illustrates how retailers exercise this power, and the impact this has on the ability of firms to comply with minimum wages set in a national collective agreement.

Third, the labour law academy needs to contest the development orthodoxy that reifies economic development over distributive outcomes. The case studies illustrate the negative distributive consequences for workers of the orthodox development narrative which typically underpins trade and industrial policy. Labour law scholars should eschew the temptation to argue for labour regulation's contribution to market efficiency, we argue, as the risk is that such a strategy serves to pave the way for labour law's co-option into the neoliberal project.

The chapter is structured as follows. It starts with a discussion of development (section 2). This is important because, unlike labour law where different articulations of its normative goals are broadly in alignment with each other, the normative goals of development are contested. There follows an outline of labour law approaches to development (section 3).

The labour law and development project needs to analyse the redistributive implications of different development paradigms and align itself with a vision of development compatible with its normative goals. In section 4 we discuss our case studies of the clothing sector in South Africa and in Lesotho; and finally present an analysis of our findings in section 5, and our conclusion (section 6).

2. DEVELOPMENT: CONTESTED PARADIGMS

The orthodox development discourse has conceptualised development primarily in economic terms, and has been concerned with two key questions: (a) how to achieve and measure economic development; and (b) whether the principal institutional driver of development should be the state or the market.[7] Dissenting voices[8] have challenged the privileging of economic over social development, and their views have found purchase in instruments such as the UN's Right to Development[9] and the UNDP's Human Development Index. As we explore below, these voices create space for the defence of labour law as developmental. Nonetheless, the orthodox view remains that development essentially refers to economic development, which has often been framed in opposition to legal frameworks, such as labour law, that are perceived to hinder growth.

The prominent role that Keynesian economics gave to the state strongly influenced development thinking in the period after 1945.[10] Demand management had contributed to the rise of the welfare state in advanced industrialised countries and thus resonated with the new post-colonial states in the developing world. However, in that period development was understood as a continuum of stages of industrialisation or modernisation along which countries moved, essentially in isolation from each other.

However, by the 1980s the post-war consensus was shattered, and there

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[7] For example, economic development has been understood as industrialisation, as technological modernisation, as an increase in the gross national product, or as an increase in per capita income.

[8] See Martinussen (2004) for a comprehensive view of the history of development, which includes a discussion of the dissenting sociological and political development theories. See also Kennedy (2006) for a history of development, with a focus on the role of law in different eras.

[9] United Nations General Assembly Resolution 41/128 of December 1986.

[10] For the purposes of this chapter, this is a stylised version. This period was dominated by a number of 'interventionist' economic theories, such as welfare economics, Keynesian economics and early theories within development economics. See Chang and Rowthorne (1995) for a detailed discussion.

was a loss of faith in the state as development protagonist (Kennedy 2006). A new, neoliberal economic development paradigm was in the ascendant, one which combined Austrian libertarianism, for its moral and philosophical rationale, with neoclassical economics, which provided most of the analytical tools (Chang 2002). The market was now promoted as the lead actor in development: 'the economy was now imagined as a "market" in which individual economic actors transact with one another responding to price signals and thereby allocating resources to their most productive use' (Kennedy 2006: 129). Accordingly, the orthodox development approach focused on macroeconomic reform with the objective of creating markets 'free' of state interference, based on the conviction that perfectly competitive markets are the best allocators of scarce resources. This approach was bolstered by the policies of the global financial institutions (GFIs) that made aid to developing countries conditional on the implementation of macroeconomic reforms (notably trade liberalisation, privatisation and the reduction of subsidies and social expenditure).

By the early 1990s, the GFIs' macroeconomic structural adjustment programmes had attracted wide-ranging criticism.[11] Chastened by the failure of their structural adjustment programmes, the GFIs increasingly acknowledged the role of social factors in development. The result was a 'reformed' development approach that incorporated the macroeconomic policies characteristic of the 1980s (trade liberalisation, privatisation and the removal of subsidies), but included governance requirements in the list of conditionalities (such as rule of law[12] and 'good governance'), and recognised the legitimacy of social expenditure that contributes to economic growth (Rittich 2008). But though the neoclassical model has been reformed, its key tenets remain unshaken. The incorporation of social expenditure (ranging from primary healthcare and primary education to gender equality but excluding labour rights) is contingent upon its contribution to economic growth. In other words, as Sen (1999) points out, the social is incorporated into the development agenda on instrumentalist grounds.

Sen is a prominent critic of the 'narrow' view that equates development with economic growth. His argument is not new, but he has been 'heard' by mainstream economic development scholars. So much so that his 'capability approach' has been appropriated by development, labour law and international law scholars across the political spectrum (Du Toit

[11] See, for example, Stiglitz (1999).

[12] See Trubek (2009) and Santos (2009) for a critique of the World Bank's Rule of Law work.

2005; Chimni 2008). For Sen, development means 'expanding' people's 'freedoms' so that they can live lives they value and, in particular, participate in the social, political and economic life of their community. He rejects the reductionist definition of poverty as lack of income, arguing that, even if people have the same income and access to opportunities, differential capabilities determine their ability to convert these opportunities into freedoms and to lead lives they value. Therefore social expenditure (on health and education, say) is 'instrumental' to economic growth but is also 'constitutive' of development, in that capabilities are strengthened. Labour rights, such as the right to freedom of association, to benefits and to protection, contribute to the expansion of workers' freedoms and to their participation in social and economic life and, thus, are constitutive of development irrespective of their contribution to economic growth.

According to Sen, the market is an institution that contributes to (or diminishes) economic freedom. He makes two important points in this respect: first, individual 'freedom of transaction' being the freedom to decide where to work, under what conditions and encompassing the 'freedom to achieve' is constitutive of development (1999: 116–117). Individual freedom to transact freely should therefore be upheld, irrespective of the extent to which the 'market mechanism' contributes to income or to other economic inequality. Second, non-market institutions are as important as the market in promoting freedom.

Sen's approach provides an alternative normative understanding of development, but has nevertheless been co-opted by orthodox theories of development (Du Toit 2005; Chimni 2008). This co-option takes the form of legitimising social goals but subordinating them to macroeconomic reform imperatives.[13] So, implicit in the orthodox view of development is a reliance on the market to realise social outcomes. Nowhere is this more evident than in the context of work: 'work and labour markets have become newly important to the realization of the social dimension of contemporary development and market reform projects' (Rittich 2008: 235). Not only is participation in the economy the primary strategy to alleviate poverty, but it is viewed simultaneously as the primary means of realising

[13] Du Toit argues that in an attempt to operationalise Sen's vision, economists have tried to measure the absence of capabilities by reducing them to 'non-economic' indicators in order to create a more multi-dimensional 'poverty score'. This reduction of the complex interplay of socioeconomic deprivations that result in conceptualising poverty in terms of numerical scores misses Sen's point entirely. Chimni (2008) suggests that this co-option has been helped by the absence in Sen's theory of development of an analysis of political economy, and of the role of collective action in social change.

a range of social and economic objectives, including rural development, social inclusion and gender equality (Rittich 2008; World Bank 2013).[14] In the words of the 2013 *World Development Report*, 'development happens through jobs'. Thus poverty alleviation strategies (encapsulated by terms such as 'pro-poor market development')[15] focus on the inclusion of poor people in the economy, arguing that inclusion will lead to a set of positive social outcomes, but without expressing concern for the terms of their inclusion.

Thus, whether the work is 'decent' or how risks, bargaining power and value are distributed among the newly incorporated workers and the other market actors are questions simply absent from development discourse. Arguably, the weight Sen places on 'freedom of transaction' lends itself to such appropriation. The real contradiction that lies between individual freedom to transact and the role of institutions in the market, especially labour market institutions, seems to be unacknowledged by Sen.[16]

Several labour law scholars (Langille 2006; Kolben 2010; Deakin 2011) embrace Sen's development framework. For example, Kolben argues that:

> [L]abour development should be grounded in a capabilities framework rather than a market-freedom or flexibility-centred framework. . . . [A] development approach to labour regulation recognises work as a central source and locus of unfreedoms. Consequently labour regulation can and should play an important role in achieving development through increasing workers' capabilities. (Kolben 2010: 36)

Kolben enlists Sen's capability approach as an alternative to the orthodox view of development as economic growth. He argues that if labour market institutions contribute to developing workers' capabilities, they are developmental. He therefore ascribes to Sen's position that, irrespective of the instrumental role that labour market institutions may play (in contributing to market efficiency), those institutions are constitutive of development if

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[14] In the words of the *World Development Report*: 'Jobs are the cornerstone of economic and social development. Indeed, development happens through jobs. People work their way out of poverty and hardship through better livelihoods' (2013: 1).

[15] Specific pro-poor frameworks that are used by global aid agencies include: Making Markets Work for the Poor, Sustainable Livelihoods, and Legal Empowerment of the Poor, all of which focus on the economic participation of poor people but show no discernible concern to challenge the terms of their inclusion.

[16] For a discussion of the lacunae in Sen's work regarding labour rights and labour market institutions, see Kolben in this volume, Chapter 3.

they increase workers' capabilities. Langille embraces Sen's capability approach for different reasons. Taking issue with Davidov, he argues that labour law's traditional normative role of redistribution is 'too narrow' in that redistribution should not be a goal in and of itself. Instead, he argues, the normative function of labour law should be redistribution as a means of enabling workers to live lives that they have reason to value. Sen's 'radical ideas' are, Langille argues, an invitation for labour law scholars to 're-eval[uate] our true ends – as opposed to our means for achieving them' (2011: 116).

Adopting a more critical position, Fudge (2011) argues that Sen's appeal for labour lawyers is that labour rights are constitutive of development, and that the capability approach can be married with market-oriented efficiency goals. Herein lies the problem: labour law's normative agenda has to be able to contest market ordering, which the capability approach fails to do.

Chang (2002: 539) adopts a more radical stance that challenges 'marginal tinkering' with the neoliberal framework in order to emphasise the distributive function of institutions.[17] He explicitly incorporates the political into economic theory, arguing that individuals' and firms' decisions are influenced by institutions – both formal (such as laws and treaties) and informal (including norms and values). These laws, norms and values are contestable (and thus political), and therefore in a global context vary and affect economic actors in a different way. Chang argues that institutions shape individuals (or firms) themselves and, conversely, market actors shape institutions. In other words, they are mutually constitutive (Chang 2002). Labour regulations are market-constituting in that they change market actors' behaviour, but market actors also shape these institutions (Estlund 2010). This is illustrated in the case study on Lesotho: transnational retail corporations and brand merchandisers include compliance with national labour legislation as a term in their supply agreements, which shapes the labour market.

Deakin has also discussed the 'market-constituting' role of labour law, but characterises the interaction between institutions and markets as co-evolution, which sees the economic and legal systems as developing in parallel with each other. This gives a functionalist quality to the relationship between the two, whereas Chang emphasises the political, viz. that markets and institutions can clash and in so doing reshape one another (Deakin, 2011: 162–163). The latter approach is arguably much closer to the empirical reality of how workers' rights are fought for in the context of

[17] IPE scholars draw on Marx, Veblen, Schumpeter, Polanyi and Shonfield.

development. The way regulation constitutes the labour market is therefore as much about contestation as it is about serving functional ends.

If we accept such a constitutive view of the market, a number of important implications follow. First, if the market is not natural but is constituted by various actors, and if one actor, namely the state in the form of public law, is 'absent' from the market, it does not follow that the market is unregulated, or 'free' as the orthodox development approach would assert. Instead, the regulatory regimes of other market actors (specifically, corporations) will dominate and the distribution of power and risk between market actors will shift accordingly.

Moreover, the state is never entirely 'absent' since a perfectly competitive market relies on property rights that are clearly defined, protected and can be traded, and on contracts that are enforceable and enforced by the state (Kennedy 2006; Kaufman 2009; Trubek 2009). The state's role in enforcing rights created by private law, notably contractual and property rights, is therefore critical, whether or not public law has much of a role to play (Easterbrook and Fischel 1991; Trubek 2009). Efficient markets therefore rely on states to enforce private law rights, and these rights distribute power, risk and rewards. Moreover, Polanyi (2001) reminds us that the state (particularly in developed nations) plays a critical role in maintaining labour as a fictitious commodity by providing safety nets for the unemployed, educating the future workforce and regulating the migration of workers.[18]

While state action is constitutive of the market, whether or not it is deemed 'an interference' in the market depends on whether there is political consensus on the legitimacy of the structure of rights and obligations underlying a particular market (Chang 2002). So, for example, in developed countries, banning child labour is not considered 'state intervention' in the labour market because the prevailing hegemony is that children's right not to work trumps producers' right to employ whoever is most profitable to employ. Politically, it is '*no longer* even a legitimate subject of policy debate' (Chang 2002: 543, original emphasis). However, in those developing countries where the right of children not to work is contested, it *is* considered a legitimate policy debate (Chang 2002: 543). Likewise, environmental regulations (aimed at curbing factory pollution and automobile emissions) were initially considered an interference with business freedom, whereas now the political consensus in some countries has shifted and citizens' right to a clean environment trumps a firm's

[18] For a related discussion of what Deakin calls 'systemic integration' between institutions and markets see Chapter 2 of this volume.

right to choose the most profitable technologies (Chang 2002: 543). Therefore,

> . . . depending on which rights are regarded as legitimate and what kind of hierarchy between these rights and obligations is (explicitly and implicitly) accepted by members of that society, the same state action could be considered an 'intervention' in one society and not in another. And once a state action stops being considered an 'intervention' in a particular society . . . debating their [*sic*] 'efficiency' becomes politically unacceptable. (Chang 2002: 543)

The problem, of course, is that in a world in which products can move into and out of countries with very few barriers, state 'interventions' in the market are effectively in competition with one another. The pressure thus created influences whether an intervention in a market is politically legitimate or not. For example, as our case study shows, the impact of cheap clothing imports into South Africa has given rise to a heated debate about the legitimacy of the centralised bargaining institution for the sector and the authority of the Minister of Labour to extend its agreements to all clothing employers. These institutions previously enjoyed legitimacy but are now perceived as so illegitimate that a number of court challenges to the extension mechanism have been launched in the country.

Chang's institutionalist political economy perspective provides a useful macro-theoretical framework, but global value chain analysis, with its roots in world systems analysis,[19] has a much stronger empirical and policy orientation. The new international division of labour which began to emerge some 40 years ago saw a dispersal of manufacturing operations from developed to developing countries which had limited regulation and lower labour costs. The global value chain (GVC) concept is primarily intended to help in understanding what this shift means for development. GVC analysis traces the different stages in the production and sale of a good, from raw material to final product and through to the retailer and consumer. A key element in GVC analysis is governance, a concept used to understand the power exerted by the various participants in the value chain (Gereffi et al. 2005). Another element is how value is distributed to the various operations along the value chain. Gereffi, a leading GVC scholar, distinguishes between two types of global value chain according to where the power lies, namely whether the value chains are producer-driven or buyer-driven (1994: 96–99). The production and distribution of most consumer goods takes place in buyer-driven value chains, which are controlled and coordinated by the major retailers and brand

[19] See Hopkins and Wallerstein (1994).

merchandisers. The production and sale of clothing is a classic buyer-driven value chain.

Much of the research conducted using GVC analysis has employed the concept of 'economic upgrading' to determine whether firms in developing countries that participate in GVCs are able to increase the value they accrue in the chain.[20] More recently, however, researchers have added 'social upgrading' to GVC analysis. In practice, social upgrading is generally measured using the four pillars of the ILO's Decent Work concept, i.e. employment creation, fundamental rights at work, social dialogue and social protection (Barrientos et al., 2011). Effectively, this has led to the concept of governance being broadened to include not just the power exercised within value chains, but also the power exerted on firms by the regulatory and institutional frameworks within which they are embedded. Through the addition of the social upgrading element and the concomitant expansion of the concept of governance, GVC analysis has explicitly incorporated a concern with redistribution (through labour regulation) into how it conceptualises development. But the notion of governance also takes account of the effect of trade agreements, industrial policy and the like on economic and social upgrading (or downgrading).

The value chain literature highlights another important dimension of social upgrading, namely, consumer pressure on 'lead' firms (such as retailers) regarding wages and working conditions in their supplier factories. The 'reputational damage' suffered by retailers and brand merchandisers from exposure of poor working conditions in supplier factories has spawned a management sub-discipline – corporate social responsibility (CSR) – that is tasked with driving compliance with labour standards down the value chain. However, studies show that despite considerable energy and expenditure on CSR, the results are unimpressive.[21] The challenge is how to improve and better integrate CSR and local labour enforcement so that social upgrading occurs at the same time as economic upgrading. A more ambitious project would be the development of regulation that would hold 'lead' firms to greater account for conditions in supplier factories.

[20] The process was initially described as 'industrial upgrading' but later changed to to economic upgrading. Four main types of economic upgrading are identified in the literature: process upgrading, functional upgrading, product upgrading and chain upgrading.

[21] See Pike and Godfrey (2012) and the references cited at 3–4.

3. LABOUR LAW APPROACHES TO DEVELOPMENT

Labour law scholars who argue that labour market institutions can embody development goals base their argument on two approaches to development, broadly speaking. Reflecting a largely new institutional economics (NEI) perspective, the first approach argues that labour market institutions can remedy market failures (caused by factors such as asymmetrical access to information or failure to account for transaction costs),[22] and thereby contribute to market efficiency and economic development (Collins 2002; Kaufman 2009; Deakin 2011). For example, Deakin (2011:160) argues that minimum wage regulation can remedy market failure caused by asymmetrical information allowing employers to 'depress wages below the market-clearing rate'. Minimum wage regulation can therefore play 'a market-correcting role'. This resonates with the *World Development Report* (World Bank 2013: 3), which endorses labour regulation that 'address labour market distortions', provided they are not 'a drag on efficiency'. Specifically, the Report states that: 'The centrality of jobs for development should not be interpreted as the centrality of labor policies and institutions' (2013: 3).

Although strategically it may be an important defence of labour market institutions to argue for their market-correcting role, there are risks involved. As Fudge (2011) points out, this developmental argument for labour law fails to acknowledge that there are many instances in which labour regulation favours considerations of equity over efficiency. In such instances, the ideological imperatives of economic development and labour law are incompatible. However, the NEI view leaves little political space to challenge the underlying premise of the neoliberal, orthodox view of development that market ordering is natural, and therefore to challenge the distributional consequences of market allocation.

The second approach (and some authors present a hybrid) relies on Sen's conception of development and argues that labour market institutions are developmental because they increase workers' capabilities. Arthurs reminds us that 'labour law . . . is an experiment in social ordering' (2011: 16).[23] Its very essence, therefore, is to contest market ordering and, as we have argued, Sen's paradigm (which is radical for the way it has re-envisaged development) has nevertheless been co-opted by the

[22] See institutional economist perspectives, for example, in Kaufman (2009). See also this argument in Collins (2002).

[23] See Kolben (2010), Deakin (2011) and Langille (2011).

neoliberal model precisely because it does *not* contest the distributary market outcomes.

Chang's institutional political economy perspective is more useful for the labour law/development project, as it challenges the neoliberal notion of the market as natural, and renders visible the ways in which the political economy affects whether a regulation or labour market institution is regarded as interfering in the market or not. As Hepple reminds us, labour law's future role will be the outcome of struggle (1986: 305). Perhaps the most strategic struggle for labour law scholars is to re-engage with political economy.

We argue that, in this global era, for labour law to be developmental in the sense that it is market-constituting (redistributing and facilitating social outcomes linked to employment), it has to shift, too. First, it has to shift from regulating just the employment relationship to regulating value chains, i.e. from regulating the employment contract to regulating commercial contracts between firms. Second, in each national/regional context, the goals of labour law and of trade and industrial policy have to be aligned.

If either of these two conditions are ignored – a shift to value chains and an alignment between labour, trade and industrial policy goals – then though labour regulation may be market-constituting, the redistribution will occur among the workers themselves, rather than between workers and capital. We offer two reasons. First, labour law regulates *national* labour markets, whereas the locus of work and generation of value is shifting to *global* value chains that mostly straddle more than one jurisdiction. The implications of this disconnect is explored in the case study. Second, value chains for mass-produced consumer products like clothing are buyer-driven chains, as noted above (Gereffi 1994). In a context of low or non-existent trade barriers, the market power of a 'lead' firm can cause the restructuring of entire value chains and undermines the ability of firms in the chain to comply with national labour regulations.

The case study that follows provides an empirical account of the tensions between labour law and economic development in the clothing sectors in neighbouring countries that participate in global and regional value chains. The study highlights the effect that retailers' sourcing decisions can have on labour regulation and development, effectively forcing a difficult trade-off between jobs and social upgrading in countries at different levels of development. This has placed enormous pressure on the perceived legitimacy of labour standards in the clothing sector in South Africa, and this is undermining established institutions and driving informalisation. The plus side is the creation of jobs in Lesotho, albeit at much lower wages and without any social benefits. Although there is

contestation between clothing manufacturers and trade unions in Lesotho regarding wages and working conditions, labour regulation enjoys legitimacy because job creation (participation in the economy on any terms) is a priority in that country.

4. CASE STUDIES OF THE SOUTH AFRICAN AND LESOTHO CLOTHING SECTORS

In Lesotho, which is significantly less developed than South Africa, labour regulation has resulted in permanent, full-time employment, and minimum wages are generally adhered to. The argument could therefore be made that labour regulation has facilitated higher wages than might have been the case if left to market forces. For reasons explored below, minimum wage regulation is not contested as 'government interference', as it is not a significant challenge to capital's 'right' to profit maximisation, and this policy represents a public consensus that the goal is employment on (almost) any terms.

In South Africa, by contrast, minimum wage regulation and the collective bargaining system are a more significant challenge to capital, and the political legitimacy of state intervention is contested. The case study illustrates the adverse implications of labour law's continued focus on the employer/employee relationship rather than on all the actors in the value chain, as well as the limited market-constituting role it plays when there is a disjuncture between the normative goals of labour regulation and of trade and industrial policy. Re-distribution then takes place among workers themselves, rather than among workers and capital. This redistribution is taking place in two ways: first, among the South African workers who are in standard employment relationships and those who are casual, part-time or engaged through other flexible working arrangements (i.e. between insiders and outsiders); and second, among South African workers and Lesotho workers.

South Africa is a particularly interesting country in which to study the interplay between labour regulation and development because it displays characteristics of both developed and undeveloped economies. Further, after the 1994 democratic elections, the Government bucked international trends by introducing major reforms that included more comprehensive labour market regulation. Employers responded to this re-regulation by accelerating processes of casualisation and externalisation (Theron and Godfrey 2000). At the same time, informal employment is increasing 'from the bottom up' because the formal economy is not creating enough jobs to absorb both new entrants to the labour market and the unemployed

(Theron 2010). Informal employment has grown, but unemployment remains high. These trends have focused attention on the role that labour regulation is allegedly playing in stifling employment growth. The spotlight has fallen, *inter alia*, on the clothing industry, a labour-intensive, low-wage sector that has shed thousands of jobs over the past decade or so. A sharply divided debate on this sector has highlighted the role of labour regulation, trade liberalisation and industrial policy as factors behind its restructuring and the decline of formal (regulated) employment.[24] In essence, this debate reflects contesting views of what constitutes development and a clash between workers' rights to decent work and employers' rights to pursue profit maximisation without constraints.

Lesotho is an extremely poor country, with limited labour regulation and a very small manufacturing base. The exception is its clothing industry, which mirrors the types of export-oriented clothing sectors that emerged in many developing countries during the Multi-Fibre Agreement (MFA) regime. Clothing production began only in the 1990s, all firms are foreign-owned, and all production is exported, initially only to the United States (US), but currently to the US and South Africa. The sectors in both countries are linked by the South African Customs Union (SACU), which allows Lesotho's clothing manufacturers to export their products duty-free to South Africa. Because Lesotho has limited and poorly enforced labour regulation, South African manufacturers relocate to Lesotho to lower their labour costs. This relocation points to a stark contradiction: development and employment in Lesotho (albeit at low wages) is paralleled by a crisis in the South African industry, steep formal job losses, and pressure on collective bargaining institutions and on labour standards.

4.1 Decline and Restructuring of the South African Clothing Sector[25]

The South African clothing sector differs from its counterparts in most developing countries. First, it developed early, with clothing firms being established at the start of the 19th century. Second, it has always focused on the domestic market, which is quite large and for years was protected by an Import Substituting Industrialisation (ISI) strategy. The domestic orientation was strengthened by economic sanctions against the country in

[24] An example of one side of the debate is the working paper by Nattrass and Seekings (2013), which elicited sharp responses from the employers' organisation (AMSA), the trade union (SACTWU) and others.

[25] This section and the following section on Lesotho draw extensively on Godfrey (2013).

the 1980s. By the early 1990s, the sector supplied 93 per cent of local clothing demand, exporting only a small proportion of total output (October, 1996: 6). In the light of the sector's domestic orientation, clothing manufacturers have always been dependent on the country's retailers. Initially the retail sector comprised many small, independent firms. But, as in many industrialised countries, the retail sector became increasingly concentrated in the latter half of the 20th century. Currently, five retailers account for over 70 per cent of formal clothing sales in the country (Vlok, 2006: 228; Morris and Reed, 2008: 10). These retailers exercise immense power in the value chain, especially since local manufacturers have enjoyed little success in exporting to external markets.

Third, almost from its inception, workers in the clothing sector were organised by trade unions and the sector was characterised by well-established, centralised collective bargaining structures. Industrial councils were established in Johannesburg, Cape Town, Durban and Port Elizabeth in the late 1920s and 1930s. The industrial councils' agreements were generally extended to all employers and employees within their jurisdictions.[26] From the 1940s, rural areas outside the jurisdiction of the industrial councils fell under an administered minimum wage (i.e. a wage determination) that set wage rates lower than those in the industrial council agreements.[27] The differential in wage levels induced geographical dispersion, as some manufacturers sought to avoid industrial council regulation (Barker, 1962). This dispersion increased from the 1960s owing to government programmes that provided incentives to manufacturers to locate operations in 'decentralised areas.'

From the early 1990s onwards the clothing industry was in a state of ongoing crisis. The reasons relate to trade and industrial policy, and also to changes to the labour environment. First, trade and industrial policy were not synchronised. The country engaged in rapid trade liberalisation from 1994, following the conclusion of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). Thereafter, imports of clothing increased rapidly and the output of South African clothing manufacturers declined. The Government's efforts to assist the industry in restructuring

[26] Agreements could be extended by the Minister of Labour to cover all employers and employees within the jurisdiction of an industrial council if the employers' organisations and trade unions that were parties to the agreements were held to be 'sufficiently representative' and the Minister deemed it expedient to extend the agreement.

[27] A wage determination could be issued in terms of the Wage Act 5 of 1957 for sectors or areas where there was limited trade union organisation or collective bargaining.

and increasing competitiveness lagged well behind the tariff reduction. Initial attempts at industrial policy sought to create a knowledge economy built on innovation and the hi-tech sectors, ignoring labour-intensive sectors such as clothing. It was over a decade before this oversight was addressed.

Second, clothing manufacturers failed to adjust to the new competitive environment. They persisted with outdated technology, low levels of training, poor management systems, and inefficient production processes (Swart Commission 1994).

Third, the large regional unions became bureaucratic and passive. Collective bargaining in the regional industrial councils was perfunctory, leaving clothing wage levels lagging behind the rest of the manufacturing sector (Barker 1962). But worker militancy rose during the 1980s, resulting in a series of mergers in the sector that led to the establishment of the South African Clothing and Textile Workers' Union (SACTWU). The union has raised wages and narrowed wage gaps between regions and rural areas.

4.1.1 Trade and industrial policy

Over the past two decades, trade and industrial policy have moved at very different speeds.[28] In the 1970s and 1980s, the apartheid Government slowly shifted away from the ISI strategy (thereby changing the nature of import protection), and started to promote exports. In the early 1990s, however, the Government undertook a complete overhaul of the tariff system and implemented steep tariff reductions as part of its commitment to the Uruguay Round of GATT. The newly elected ANC Government continued with this commitment after 1994. But a coherent set of supply-side measures that would help clothing firms improve their competitiveness came only much later. In the decade after 1994, the new tariff regime

[28] The lack of synchronicity between trade and industrial policy was presaged by the Government's rejection of the Swart Commission's recommendations. The Commission (also known as the Panel and the Task Group) was a multi-party body set up in 1992 with two objectives for the clothing sector: to make it internationally competitive and export-oriented; and to make it achieve labour-absorbing growth. It produced a range of recommendations regarding technology upgrading, productivity, training, etc. as well as proposing two different schedules of tariff reductions, its point of reference being the apartheid Government's commitments made in the Uruguay Round of GATT. The Government ultimately chose a schedule somewhere between the two recommendations, which introduced a faster phase-down than required by GATT. But it rejected all but one of the Commission's proposals regarding supply-side assistance for the sector (Hirschsohn et al., 2000: 118–120; Gibbon, 2002: 16).

therefore drove restructuring in the clothing sector. Its most visible impact was a rapid increase in clothing imports, especially from China. After increasing steadily through to 2002, clothing imports accelerated sharply from 2003 (Vlok, 2006; Morris and Reed, 2008; Staritz, 2010). Exports by local manufacturers failed to offset the share of the domestic market lost to imports. Local firms downsized or closed, and thousands of formal jobs were lost.

Three measures were available to the Government to assist the ailing clothing sector. The first two could be categorised as trade policy, and the third as industrial policy. First, the country invoked temporary protection from imports through safeguard measures approved by the World Trade Organization (WTO); and second, it sought benefits from favourable terms in trade agreements or unilateral preference arrangements, such as the US's African Growth and Opportunity Act (AGOA). The third measure was to deliver supply-side programmes to help firms become more competitive.

The first two measures have brought little relief to the clothing sector. SACTWU kick-started the process to introduce WTO-approved temporary safeguard measures, which were implemented against 31 lines of Chinese clothing and textiles from 2007 to 2009. This had the perverse consequence of stimulating South African retailers to diversify and source from other East Asian countries. When the quotas ended, Chinese imports rapidly reached previous levels. Furthermore, the temporary relief did not see local output increasing and neither did it stop job-shedding.

Trade agreements have also done little for the industry. The effect of the South African Customs Union (SACU) has been to undermine the industry in South Africa by opening up the domestic market to duty-free imports of clothing from other member countries. The more recent Southern African Development Community (SADC) Free Trade Protocol has had similar negative consequences, with sharp increases in imports from Mauritius and Madagascar. The trade agreements entered into with the European Union, the European Free Trade Association and MERCOSUR have not brought significant benefits to the sector. The African Growth and Opportunity Act (AGOA) has been a boon to clothing manufacture in many African countries but not to South Africa, which is not classified as 'less developed' and therefore excluded from a special rules-of-origin dispensation for the clothing sector.

The third measure has seen the Government in recent years introducing the National Industrial Policy Framework and the Industrial Policy Action Plans 1 and 2 (IPAP 1 and 2), which identify clothing manufacture as a priority sector. A range of supply-side measures were introduced under IPAP 2 and are being administered through the Industrial Development Corporation, but many believe these to be 'too little, too

late'. Furthermore, unless firms are certified by the bargaining council as fully compliant with its agreements, they are unable to gain access to any programmes. The latter condition is understandable – the measures use public funds and only firms that comply with government policy should be able to tap into such funds – but the effect is to deny non-compliant firms any chance of upgrading that would enable them to pay bargaining council wages.

Retailers have been the main beneficiaries of the clothing sector's restructuring. Increased imports have put downward pressure on clothing prices and expanded the clothing market. Additionally, retailers have a wide range of sourcing options: (a) thousands of suppliers in Asia and China, which provide large orders of relatively standard goods at low prices; (b) manufacturing supply chains in neighbouring states such as Lesotho and Swaziland that provide smaller orders of standard goods more quickly and almost as cheaply; (c) manufacturers in the traditional clothing centres that have improved their efficiency and, by working closely with retailers, provide smaller orders on a quick-response basis; (d) design houses, which act as intermediaries between retailers and networks of CMTs,[29] many of which are informal, home-based operations; and (e) manufacturers located in rural towns in South Africa who face lower minimum wage rates than manufacturers in the main centres (despite the lower wages, in recent years many of the latter have openly refused to comply with the prescribed wage rates). These sourcing options mirror the survival strategies of firms, i.e. to upgrade and compete on the basis of efficiency and proximity to their customers; to transform into a design house and outsource the manufacturing operations; to relocate to low-wage rural areas or neighbouring states; or not to comply and/or not to register with the bargaining council. Over the past decade or two, these strategies of downsizing and relocation have had major implications for employment and labour standards.

4.1.2 Labour regulation

Concurrently with tariff reductions, labour regulation in South Africa underwent a major revision, as a key part of the ANC Government's reform agenda. The series of new statutes displayed some continuity with those of the previous system (e.g. the collective bargaining framework), but also introduced significant changes (e.g. employment equity

[29] A cut-make-and-trim (CMT) operation is supplied with the technical specifications, the pattern and the fabric by the retailer or design house and is focused on cutting the fabric and assembling the garment.

legislation and a completely revamped training system). In order to address the inequities of the past, the statutes enhanced and expanded protection for employees. At the same time, they sought to improve the functioning of labour market institutions and to gear the new system to the demands of competition in the global economic environment. It was an ambitious and difficult balancing act, captured by the term 'regulated flexibility'. However, with hindsight, the new statutes were probably out of date with labour market realities at the time of their promulgation, and failed to address adequately the processes of casualisation and externalisation that were rapidly gaining ground.

As noted above, the main strategic thrust of SACTWU was with respect to the existing set of regional centralised bargaining structures (i.e. bargaining councils). It used its organisational muscle to force employers to merge the councils into a national bargaining council, which was achieved in 2002, after a long struggle. At the same time, the union bargained hard to improve the historically low wages in the sector and to narrow differentials between regions, and between urban and rural areas.[30] But this push came at the same time as cheap imported clothing was flooding into the South African market. The downsizing and restructuring that resulted was outlined above. Importantly, the route to flexibility in the clothing sector differs from that in many other sectors. Rather than pursuing a strategy of increasing non-standard employment, manufacturers have elaborated upon earlier models of sub-contracting and geographical dispersal. This has shifted employment to low-wage areas, or from formal to informal operations, many of them home-based. Many are supplying the major retailers through intermediaries such as design houses.

In recent years, a variation on these processes has emerged, particularly in KwaZulu-Natal (KZN) Province. Some firms located in low-wage rural areas and registered with the national bargaining council are openly refusing to comply with the council's agreement, on the grounds that it prescribed unaffordable labour costs. This new category of non-compliant employers is significant: in September 2004, 71 per cent of firms which employed 52 per cent of employees failed to comply, while in August 2009, the figures were respectively 53 and 26 per cent.[31]

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[30] The council has a set of collective agreements that covers the clothing sector nationally: one set of agreements covers specified Metropolitan Areas (these mostly cover the areas that fell within the old regional councils); one agreement covers Non-metropolitan Areas, but with wage differentiation for two sets of non-metropolitan areas (this agreement replaced the sectoral determination for the clothing industry); and one agreement covers certain 'country' areas in the Western Cape.

[31] The data are taken from documentation for the Seventh Annual General

The stand-off between the bargaining council and these firms became highly politicised. Late in 2010, the bargaining council initiated a campaign to clamp down on non-compliant manufacturers, who threatened the future of a reported 385 firms across the country, and meant a potential loss of 20 000–25 000 jobs, mainly held by women. When the campaign moved to the Newcastle area of KwaZulu-Natal, over 100 firms under threat locked out their workers in protest. The protest action was co-ordinated by the Newcastle Chinese Chamber of Commerce (NCCC), and most of the firms that participated in the protest were CMTs owned by Taiwanese and Chinese immigrants. National and provincial governments intervened, lengthy discussions ensued and a number of moratoria were agreed. Ultimately, agreement was reached to phase in compliance, with the firms being expected to pay 70 per cent of the minimum wage rate by 31 March 2011, 90 per cent by 1 January 2012, and 100 per cent from 30 April 2012. However, this agreement seems to have merely delayed the inevitable for many firms, which were unable to keep to the deadlines.[32]

Besides the direct challenge that these firms are making to the legitimacy of the national bargaining council, the growing number of registered but non-compliant firms means that the representativeness of the regional employers' organisations is declining. This jeopardises the council's ability to have its collective agreements extended by the Minister of Labour. If the Minister refuses to extend the council's agreement, it probably means the end of the council.[33] Few employers would have reason to continue complying with the council's agreements if the agreement is not extended to competitors.

A further threat to the council was a court action, launched by a group of the Newcastle CMTs, which challenged the extension of the national

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Meeting of the National Bargaining Council for the Clothing Industry (15 October 2009).

[32] 'A big day for wages in the clothing industry' in *Business Day*, 30 September 2010; 'Minister faces court action over clothing wages' in *Business Report*, 17 June 2011; 'High wages unravel Newcastle's industry' in *Mail & Guardian*, 22–28 July 2011. The decline in proportion of non-compliant firms reflects the fact that many of the firms that closed down in the five-year period were non-compliant firms. So the decline in non-compliance is not because a lot of non-compliant firms became compliant.

[33] In KZN the constitution of the employers' organisation requires member firms to be compliant with the bargaining council agreement. A firm that becomes non-compliant automatically ceases to be a member of the employers' organisation and at the same time becomes a non-party. This is not the case in all the regions but in practice it is unlikely that non-compliant firms will be or remain a member of a party employers' organisation.

bargaining council's agreement to non-parties. The plaintiffs relied on a number of grounds, including a constitutional challenge to the extension mechanism. The court challenge was successful but did not have much effect: it was decided on a technical issue and by the time judgment was handed down a new agreement had replaced the implicated one. However, the court action is only one of a number being pursued vis-à-vis the extension of bargaining council agreements, all of which signal a systematic push-back by employers to labour regulation they perceive to be excessively rigid.

Largely absent from the debate on the Newcastle issue has been the role of the retailers and the intermediaries (i.e. the 'suppliers'), and the margins they are realising. Instead, all the attention has been on the conflict between SACTWU and manufacturers over the distribution of the very thin margins that manufacturers are forced to accept.

4.2 Foreign Direct Investment Creates a Clothing Sector in Lesotho

The role of the clothing sector in Lesotho's development resembles the experience of many other developing countries. Most of Lesotho's citizens are engaged in subsistence agriculture and live in poverty. Historically, the main source of income was from migrant labour to South Africa's mines. However, employment in the mines contracted from the 1990s, reducing this income as a supplement to agriculture. At much the same time Lesotho became a site for Taiwanese clothing manufacturers to locate their factories in order to avoid the limitations of Multi-Fibre Agreement (MFA) quotas. Most engaged in triangular manufacturing, whereby orders placed at head offices in Taiwan or elsewhere were sent out to factories in several countries (including Lesotho) for manufacture and delivery to retailers in the United States. The creation of over 50 000 (albeit low-paying) jobs was a development boon for Lesotho. Clothing was the first significant manufacturing sector to emerge in the country.

Employment in the industry peaked at 53 000 in 2004, but then declined sharply when the Textile and Clothing Agreement (TCA) (successor to the MFA), ended. Fortunately, the African Growth Opportunity Act (AGOA), introduced in 2000, provided sufficient incentive to keep some of the Taiwanese firms in the country. In about 2006, however, there was a new development in the industry: South African clothing manufacturers began to establish factories in Lesotho, with the objective of 'exporting' clothing back to their retail customers in South Africa. This allowed manufacturers to avoid the much higher labour costs and unionised environment in South Africa. The process was enabled by SACU, which permitted goods to move duty-free between member countries. The new

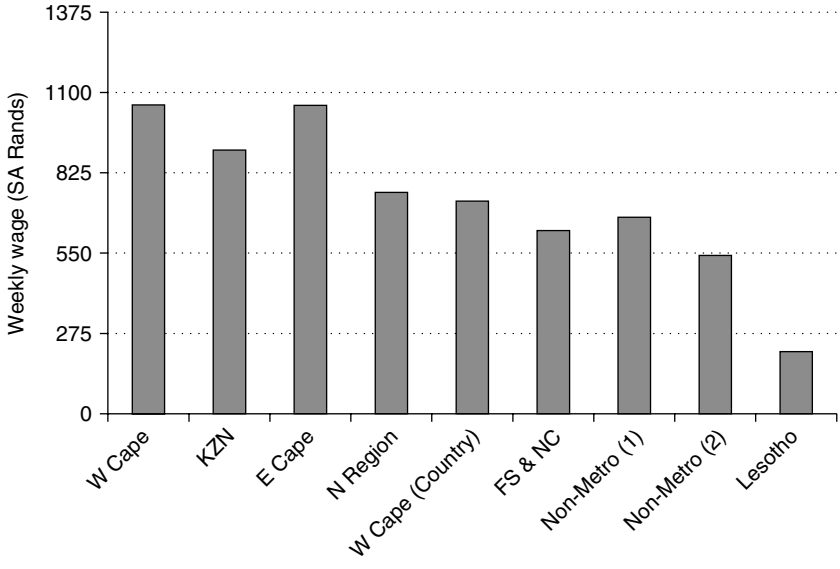
investments offered a life-line to the industry, and employment stabilised, then slowly began to increase. This trend continues: a queue of South African manufacturers is waiting to move into Lesotho, held up only by the inability of the Lesotho National Development Corporation (LNDC) to develop the necessary infrastructure. Furthermore, while efficiencies slowly improve, labour costs are less than half those in much of South Africa.

At present, there are effectively two clothing sectors in Lesotho, of about the same size. One is mainly Taiwanese-owned and is located in Maseru, the capital. It continues to operate in the country only because of duty-free access to the US provided by AGOA. If AGOA ends, most of these manufacturers will leave. Most fabric (except denim) is imported from China and other East Asian countries, and the made-up garments are exported to the US. The other sector is South African-owned and is located in Maputsoe, a small town to the north of Maseru on the border with South Africa. Low labour costs explain the emergence of this sector. The firms in this sector also import most of their fabric from East Asia, but almost all output returns to the South African market (Morris et al. 2011; Pike and Godfrey 2012).

Both sectors are weakly established in Lesotho, with few forward or backward linkages in the country, and limited skills transfer. Twenty years after clothing factories were established, there are no locally owned clothing firms in Lesotho and most managers (except human resource managers) are expatriates. In fact, most managers – including the Taiwanese ones – commute to work each day from South Africa. There are even many expatriate supervisors, although these are now outnumbered by local supervisors (Morris et al. 2011; Pike and Godfrey 2012).

Lesotho's membership of SACU and SADC as well as the existence of AGOA mean that investment policy (not trade policy and industrial policy) is crucial to the growth of the industry. The need to create employment has induced the Lesotho Government to introduce a range of incentives to attract foreign-owned manufacturers. The incentives are administered by the LNDC, which helps new firms set up production facilities in the country, register for tax, and so on. It also guides firms on compliance with labour standards.

Since 1990, labour relations and the labour market have been regulated by the Lesotho Labour Code. The Code provides for freedom of association and collective bargaining and sets minimum standards. Wages are set by the Wages Advisory Board (WAB), established in terms of the Labour Code. Although conceived of as an administrative body, the WAB has evolved into a forum at which government, employers' organisations and trade unions annually 'negotiate' wage increases for the sector. Collective bargaining also

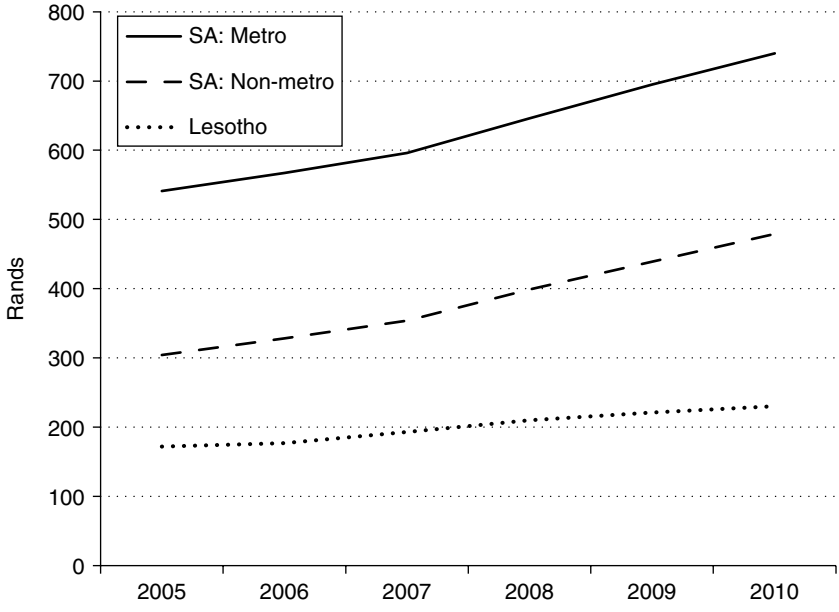


Source: Godfrey (2013: 169).

Figure 5.1 Weekly wage rates: South Africa regions and Lesotho

takes place outside the WAB, at enterprise level, but unions have recognition at only some plants and negotiations are usually limited to non-wage issues. Organisation and the effectiveness of collective bargaining have been undermined by the presence of and rivalry between five unions in the sector.

Only from 1996 onwards did the WAB prescribe minimum wages specifically targeting the clothing sector: minimum rates were set for trainee machinists (0–6 months) and qualified machinists. A wider range of employment categories was covered a few years later, when the WAB issued a dedicated wage schedule for the clothing sector. Wage rates nominally increased each year from 2005 to 2010, but they generally lagged behind inflation. Significantly, wage levels are below half of those in South Africa (Figure 5.1). But wage levels tell only part of the story. Other than a workmen's compensation scheme, Lesotho has no social benefit funds, either at national or at sectoral level. South Africa, on the other hand, has a national workmen's compensation scheme and an unemployment insurance scheme, while the national bargaining council for the clothing industry administers a contributory provident fund for metro and non-metro areas as well as a sickness benefit fund (i.e. medical aid) for metro areas. Employers' contributions to the latter add considerably to labour



Source: Graph compiled using data from bargaining council agreements, the Lesotho Labour Code, and Wages Advisory Board schedules.

Figure 5.2 South Africa and Lesotho weekly minimum wages: 2005–2010

costs. Clothing workers in Lesotho have worse conditions in a number of other respects (see Table 5.1), although provisions in respect of severance pay are better than in South Africa.[34]

Furthermore, as illustrated in Figure 5.2, wage increases prescribed by the WAB have been lower than the bargaining council wage increases in South Africa over the period from 2005 to 2010.

The Labour Inspectorate of the Ministry of Labour and Employment enforces labour standards but is widely seen as ineffective. However, major US retailers have imposed codes of conduct on their Taiwanese suppliers, which generally require compliance with Lesotho's Labour Code. Such compliance is monitored and enforced through CSR audits conducted by the US retailers or third-party auditors. About two years ago, most of these

[34] It should be noted that severance pay in Lesotho is not confined to retrenchments, but applies to all terminations of employment except dismissal for misconduct.

Table 5.1 Lesotho/South Africa comparison of wages and minimum labour standards for apparel sector in 2011

	SA Metro (KZN)	SA Non-Metro	Lesotho
Minimum weekly wage	R739.90	R489.00	M229.00
Ordinary maximum weekly hours	42.5	45	45
Overtime rate	× 1.5	× 1.5	× 1.25
Overtime limit per week	10 hours	10 hours	11 hours
Annual leave days	15 days	15 days	12 days
Annual bonus	3.47% × actual annual wage	1% × standard annual wage	None
Sick leave	40 days p.a. at 50% of wage	30 days paid in full	12 days at full pay & 24 days at 50%
Maternity leave	Max. 6 months/3.25 weeks paid & UIF benefit	Min. 4 months/ UIF benefit	12 weeks/2 weeks paid
Paternity leave	3 days unpaid p.a.	3 days paid p.a.	None
Notice periods	Weekly paid = 1 week	0–6 mths service = 1 wk 7–12 mths service = 2 wks >12 mths service = 1 mth	2 wks after 1 month service
Severance pay	1 week per year service	1 week per year service	2 weeks per year service*

Note: * Severance pay in Lesotho is not restricted to operational requirements terminations.

Source: Summarised from Godfrey (2013: 178–179).

manufacturers signed up with the ILO/International Finance Corporation's Better Work Lesotho programme, which provides an 'umbrella' audit that all retailers accept. South African-owned manufacturers have been slow to sign up, mainly because few face the same CSR requirements from South African retailers, who in turn are not subject to consumer pressure for ethical sourcing. In any event, compliance with wage rates and other conditions of employment appear not to pose a serious challenge to the South-African-owned manufacturers, because labour costs are so much lower than those they face in South Africa (Pike and Godfrey 2012).

5. THE CLOTHING SECTORS IN SOUTH AFRICA AND LESOTHO: HEIGHTENED TENSIONS BETWEEN ECONOMIC DEVELOPMENT AND LABOUR LAW IN A REGIONAL AND A GLOBAL CONTEXT

Trade liberalisation has produced different challenges for South Africa and for Lesotho, given their respective levels of development. Moreover what benefits the clothing sector in one country, disadvantages it in the other. For South Africa's clothing sector, the challenge is to retain jobs while continuing to raise labour standards, in a context where it must compete with cheaper imports in its domestic market. For Lesotho, which does not have a domestic market to speak of, the perverse effect of the MFA was the creation of jobs, partly as a result of its low labour costs. However, many new jobs in Lesotho's clothing factories come at the expense of jobs in South Africa, which adds to the pressure on labour standards and labour market institutions in the South African clothing sector. It is impossible to determine empirically whether the developmental benefit to Lesotho of these low-paid jobs outweighs the growing decent work deficit in the South African clothing sector.

However, this case study does shed light on the theory of the relationship between development and labour law. First, it very clearly illustrates Arthurs' contention (2011: 18) that the choice of labour law to emphasise collective relations 'has impaired the vision of labour law' (Arthurs 2011: 26). This challenge to labour law – to extend its focus to the plethora of national policies and the global background rules that have an impact on labour markets – is especially pertinent in the context of developing countries.

Expanding the scope of labour law scholarship to include this wider set of rules will not be a simple process. The case of South Africa reveals that the impact of these policies varies and can be contradictory. South Africa's Constitution, with its Bill of Rights which includes justiciable socioeconomic and labour rights as well as the horizontal application of rights, suggests a political economy that shares the goals of labour law. But other rules in the form of economic prescripts emanating both from formal sources (such as multilateral agreements to liberalise trade) and from informal sources (such as IMF country reports) affect foreign investment, limit developing nations' policy options and dilute the efficacy of the above-mentioned institutions to shape the political economy.

Second, the case study illustrates the extent to which current 'models' of labour regulation are inadequate to the task of dealing with the regional and global dynamics it uncovers. The focus of labour regulation is the

national labour market, and collective bargaining's ambit is usually the industrial sector. However, sectors are becoming ever less relevant and externalisation means that employees from different sectors work in the same workplace.[35] Firms are increasingly defined by their place in the value chain, rather than by their sector. In the case of buyer-driven value chains, such as that of clothing, the 'lead' firms are retailers. In reality, manufacturers produce for retailers rather than for a notional market; in fact, retailers now constitute *the* market for manufacturers. Retailers' sourcing decisions take account of the domestic, regional and global location of manufacturers and this has the effect of subverting labour regulation's national goals, pitting economic development and labour regulation against each other. Economic development depends increasingly on firms' participation in regional or global value chains, with national labour regulation a key factor in whether they participate or not and in the terms of their participation. At the same time, the core power relation, traditionally the focus of labour regulation and collective bargaining, is subverted: supply agreements between retailers and manufacturers determine the distribution of risk and value within the value chain. Distributive battles between employers and workers are only relevant within the constraints imposed by retailers. Traditional concepts of collective bargaining exclude retailers, who are often in an entirely different sector and/or country.

Piecemeal attempts to address the changing world of work do not begin to challenge this restructuring of the production and distribution of goods. Amendments to the South African Labour Relations Act (LRA) in 2002 sought to remedy the ways in which standard employment was being undermined, by introducing a rebuttable presumption that a worker is an 'employee' if one of seven circumstances is present. The amendment, however, dealt only with the process of casualisation and did not address the distribution of power between commercial and industrial firms and the ability of the latter to restructure, either by focusing on particular functions or by relocating some operations to other regions. Further amendments to the LRA passed into law recently make a more concerted attempt to address the threats to standard employment, but the focus remains casualisation. It deals with externalisation only to the extent that it is achieved through temporary employment services/agencies. Despite these attempts at adapting labour regulation, the model remains rooted in

[35] The sector to which an employee is attributed is usually defined by the nature of the employer's enterprise rather than by what the employee does. A security guard employed by a clothing factory is therefore employed in the clothing sector, whereas if he or she was employed by a security firm they would be classified as employed in the security sector.

a conception of work as being conducted through a standard employment relationship within a national labour market.

As noted briefly earlier, Chang's notion of the political legitimacy of state intervention in the market recognises that such legitimacy can shift adversely. Bargaining councils have been present in the South African clothing industry for many years (as well as in many other sectors of the economy). There were always some complaints by small firms not participating in negotiations via an employers' organisation about the extension of agreements. But it was only once tariff barriers came down and cheap imports began to make inroads into the domestic market and to put pressure on the labour cost structure that the bargaining council itself came to be fundamentally challenged on the grounds that it was to blame for job loss.[36] The debate has highlighted sharply different approaches to development in South Africa that pits labour regulation (with a strong distribution element) against development driven by job creation (that emphasises the primacy of economic growth). In other words, the role of the state in the labour market is a critical and highly contested policy issue.

Our case study of the clothing sector shows that the debate over the role of the state in the labour market arises because (a) the underlying consensus of the rights-obligation structure between labour and capital has been disrupted by the liberalisation of the sector, and (b) because trade, industrial and labour market policies in South Africa are premised on different and competing development narratives.

State intervention takes different forms: macroeconomic, trade and industrial policies are generally regarded as legitimate state intervention in the market, because they tend to be facilitative rather than regulatory, i.e. they aid competitiveness in the market rather than restricting it; they create an enabling framework rather than prescribing constraints. Furthermore, trade policy is perceived as externally imposed on the country, with the rider that trade is good for development, as local firms are forced to become more competitive, and consumers benefit from cheaper products. The distributive implications of these so-called enabling policies in the labour market are viewed as natural outcomes of market competitiveness. By contrast, the legitimacy of state intervention in the form of labour regulation and regulation that facilitates labour market institutions is contested, as these are deemed to undermine 'development'.

When macroeconomic, industrial and trade policies, on the one hand,

[36] See, for example, Nattrass and Seekings (2013).

and labour market policy, on the other, are premised on different articulations of what constitutes development, the contradictions become manifest in the labour market, generally in the form of contestation over its institutions. This is what has happened in South Africa: macroeconomic policy (specifically the Growth, Employment and Redistribution strategy (GEAR)), trade liberalisation, and the various iterations of industrial policy have been at odds with the agenda of redress and redistribution of post-apartheid labour market regulation. Labour-intensive consumer goods sectors have been the hardest hit, with bargaining councils a lightning rod attracting the blame for job loss, while at the same time suffering the impact of firms' non-compliance and the informalisation of work relations.

Retailers have benefitted from trade liberalisation and the resultant restructuring of the clothing industry, while groups of workers have had to trade off social upgrading and downgrading between themselves. Labour law and collective bargaining have become the villains of the piece, allegedly obstructing entrepreneurship and job creation, and labour market institutions are blamed for the failures of economic and industrial policy. This is ironic given the proposition of neoclassical economics that demand in the labour market is derived demand that flows from demand for goods. In other words, if one is examining the question of state intervention, then entrepreneurship and job creation are the responsibility of macroeconomic, industrial and trade policy, not labour market regulation. Nevertheless, labour market institutions suffer the impact of the failures and contradictions of industrial, trade and monetary policy as their legitimacy is challenged, which ultimately has an impact on workers, who rely on regulation and institutions for protection.

6. CONCLUSION: THE LABOUR LAW AND DEVELOPMENT PROJECT

In this chapter, we have voiced an alternative view of development as *economic* development, namely, a combination of Sen's idea of 'development as freedom' (which includes, but is not limited to, economic aspects of well-being) and Chang's institutional political economy approach. Sen has challenged the orthodox definition of development, arguing that social goals, such as socially desirable working conditions (including remuneration) constitute development, irrespective of their contribution to economic development. Chang's focus is on the nature of the market. He challenges the neoliberal development paradigm's assertion that the market is natural. Instead, he argues, it is an institution constituted and continually reconstituted by its actors (including the state), whose

behaviour is influenced by a range of formal and informal institutions.[37] When labour regulation has a redistributive function, it either reallocates resources or power, or it influences the behaviour of market actors to do so, i.e. it has a market-constituting role. Moreover, Chang argues that the same regulation might be regarded as an interference in one country and as a human rights issue in another, depending on the political consensus on the distribution of rights in a country. Our case study illustrates how the broader political economy influences political consensus in a country. In the case of South Africa, the collective bargaining system in the clothing sector historically enjoyed legitimacy, which is now under threat. In the case of Lesotho, the American multinationals' incorporation of minimum wages and working conditions as contractual terms in their supply agreements has lent legitimacy to legislation governing the employment relationship. Sen and Chang's approaches are likely to resonate with labour law scholars who take issue with the orthodox development paradigm's privileging of efficiency over equity. While some scholars have shown that labour regulation can contribute to market efficiency, others, such as Fudge (2011), warn that the normative goals of the orthodox view of development and those of labour law are often incompatible. Labour law's normative agenda has to be able to contest market ordering.

It might be politically expedient to counter the hostility to labour regulation displayed by protagonists of the orthodox view of development (including capital, the global financial institutions and the WTO) by showing that labour regulation *can* contribute to market efficiency.[38] We offer a counter-view, namely that the battle lines should be drawn more sharply. Kennedy argues that development has always been framed by the language of economics, yet relies on law – public law during the heyday of the welfare state and, since the 1980s, the private law of contract and property – to enable either the State or the market to distribute. He argues that law has played an instrumental role to realise a project animated by economics, and has failed to articulate its own vision.

Of course, labour law is an exception. As Arthurs puts it:

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[37] New Institutional Economists (NIE) would argue similarly that institutions affect market actors' behaviour. However, NIE scholars would not contest the legitimacy of market ordering.

[38] Deakin's typology of the functions of labour regulation also include: a constitutive role, facilitating co-ordination, distributing risk, encouraging participatory forms of governance in the workplace and empowering people, by 'promoting economic opportunity and greater social cohesion'.

> Labour law – as it functions in actual workplaces – has often been used by legal scholars not only to challenge the hegemonic claims of state law and legal institutions, but also to initiate alternative approaches to law such as legal pluralism, reflexive law, and critical theory. Seen from this perspective, labour law . . . is law incarnate, an experiment in social ordering that reveals the true nature of the legal system in general. (2011: 16)

Labour law, like all law (including private law), is constitutive. As labour law scholars wrestle with their subject's liminality, we should be conscious that to argue for labour regulation as developmental on the basis of its contribution to market efficiency is to risk the co-option of labour law into the neoliberal market reform project and to deny its commitment to social ordering, based on equity. If, then, our argument is accepted, what might a project of labour law and development look like in developing countries?

We venture the view that the starting-point should be a rigorous analysis of the regulatory models prevalent in developing countries, combined with empirical research to understand the development challenges countries face.

The first challenge is to address the high levels of informality that exist in developing countries.[39] In sub-Saharan Africa, for example, 70 per cent of non-agricultural employment is informal. If one excludes South Africa, informal employment rises to 78 per cent of total employment.[40] The proportion of women in non-agricultural informal employment is even higher, at 84 per cent.[41] In sub-Saharan Africa the principal challenge is therefore to regulate or, more specifically, to extend regulation to a much larger proportion of the employed. The challenge in developing countries is therefore not to resist the rolling back of labour regulation (as is the case in many developed countries), but rather to roll out regulation from narrow enclaves made up of the public sector, extractive industries and commercial agriculture to the wider labour market. The implications for development of such a roll-out of labour regulation are immense.

The question is whether the tension that this creates between the social outcomes pursued by labour law, on the one hand, and by economic development, on the other, can be managed through a concept such as the ILO's Decent Work Agenda. Our concern is that both South Africa

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[39] For a more extensive discussion of the challenge posed to labour regulation by informal employment, see Marshall and Fenwick in this volume, Chapter 1.

[40] If one were to include agricultural employment then the proportion of informal employment would rise, because many sub-Saharan African countries exclude agricultural workers from labour regulation, i.e. they are effectively informal.

[41] ILO (2007) Decent Work Agenda: Africa, 54, 65.

and Lesotho have Decent Work Country Programmes which, like all Country Programmes, have a national focus. The programmes have proved futile in the face of the regional dynamics highlighted by our case study.

Clearly, labour law cannot continue with a national focus in a globalised world. Both its 'constituting narrative' and enforcement mechanisms must have regional and global reach if it is to realise its distributive goals within the context of contemporary forms of work relations.

The second challenge is to re-think the regulatory model, specifically its relationship to trade and industrial policy and its focus on the employment relationship, as opposed to the commercial relationships between different actors in the global value chain. The regulatory 'model' that is generally advocated for developing countries is the one that had its heyday in advancing industrialised countries during the post-war boom: freedom of association, organisation of workers into unions, collective bargaining, minimum standards and social protection legislation. This is the model South Africa has implemented. And as we have shown, the case study shows up the model's limitations, illustrating (a) that labour law has to engage with trade, industrial and investment policy, and (b) that labour law's distributive battles are fought nationally between employees and their employers, whereas the real distributive battles need to be fought within global value chains.

At the same time, the core power relation, traditionally the focus of labour regulation and collective bargaining, is subverted: supply agreements between retailers and manufacturers determine the distribution of risk and value within the value chain. Distributive battles between employers and workers are increasingly irrelevant. The traditional concepts of collective bargaining exclude retailers, who are often in an entirely different sector and/or country.

If labour law is to remain true to its axiomatic normative agenda, which is to act as a countervailing force to the power of capital, then it must find a way of bringing lead firms to the bargaining table, whether they are located in the developed countries of the North or in the emerging powers of the South.

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6. Labour law, inclusive development and equality in Latin America

Graciela Bensusán

1. INTRODUCTION

In global terms, Latin America is still the region that displays the greatest inequalities, despite the political transition to democracy and the efforts made in some countries in the 2000s to bolster state intervention in an attempt to turn back the worst effects of neoliberal policies.[1] Although improvements in the main social and labour indicators have undeniably been observed, coinciding with a period of economic boom, nevertheless we need to take stock within this new context of how appropriate (or inappropriate) labour institutions and policies are[2] for achieving a significant reduction in the inequality that originated in the labour market,

[1] According to the Economic Commission for Latin America and the Caribbean (ECLAC), if we consider the simple average of 18 countries for which data are available, the poorest 40 per cent of the population in Latin America receives 15 per cent of total income while the richest 10 per cent receives 32 per cent of such income. The highest concentrations can be seen in Brazil, Chile, Colombia, Guatemala, Honduras, Paraguay and the Dominican Republic (ECLAC, 2012: 21).

[2] We are using the concept of labour policy in a broad sense, understood as 'a set of policies operating around the employee-employer relationship and which influence the framework and the conditions under which the work is performed' (Perazzo and Rossel, 2009: 11). There are various dimensions of labour policies: political-institutional (such as those concerning relations between trades unions, government and employers, which are the responsibility of labour ministries and influence working conditions); economic (employment policies, which involve various ministries in charge of macroeconomic policy, such as monetary and fiscal policies); and labour market (active and passive policies, which are mostly the remit of the ministries of labour and social development). In this regard, see Samaniego (2002). Similarly, we understand labour institutions as those governing individual and collective rights, enforcement mechanisms and access to and benefits of social security.

bearing in mind that this was one of its original aims.[3] This question is closely linked to the development style followed within the region. Three decades after a growth model associated with neoliberal globalisation was adopted, it can be seen that the marked social and economic inequalities inherent in this style of development not only continue to exist but have increased, and are having consequences for long-term economic growth (Godínez, 2011: 102).[4] However, market forces driven by globalisation are not the only explanation for this phenomenon. The very institutions and policies that should have offset some of the more negative effects on the labour market only exacerbated these by introducing greater flexibility to the employment system and weakening both the trade unions and the mechanisms for their application, as well as social protection systems (Stiglitz, 2012: 106–107).[5]

The social costs of these market-oriented policies are at the root of the institutional transformation and changes to public policies that were made in some countries in the region in the 2000s to restore the original meaning of labour law (in terms of worker protection) and to extend social protection to excluded groups, thus improving the quality of jobs (Cook, 2007; Mesa Lago, 2010: 29–37; Weller and Roethlisberger, 2011).

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[3] In its latest report for Latin America and the Caribbean, the ILO (2012a: 5) shows that, in spite of its considerable heterogeneity and the extremely divergent behaviour of key labour market indicators, the region is nonetheless performing well, despite the global crisis. This has led to a reduction in unemployment (the average is now 6.4 per cent, compared to between 10 and 11 per cent at the start of the decade); an increase in real wages (3 per cent in average wage and 6.9 per cent weighted average in the region for minimum wages); a higher rise in formal employment than that for self-employment in some countries (Brazil, Chile, Colombia, Panama and Venezuela); and an increase in the number of people covered by social security (which now stands at around 60 per cent); and therefore the main outstanding challenge is the fight against inequality. Similarly, ECLAC has recently made efforts to show the importance of correcting the factors from the labour market that impact upon the persistent inequality in the region (2010, 2011, 2012).

[4] In this connection, Latin American empirical evidence shows that unequal distribution of income and wealth and socio-territorial differences in productivity do have consequences on the intensity of economic growth and its make-up, therefore the assumption behind policy recommendations aimed at liberalising markets or producing macroeconomic stability as the main guarantee of output growth and employment were doomed to failure, in the absence of a comprehensive development strategy (Godínez, 2011: 103).

[5] Stiglitz argues in his latest book on inequality, and here we agree with his concept of the relationship between market and inequality, that '. . . market forces are real, but they are shaped by political processes. Markets are shaped by laws, regulations, and institutions. Every law, every regulation, every institutional arrangement has distributive consequences' (2012: 101).

Since the outbreak of the crisis of 2008–2009 there has been growing consensus in the international debate over whether 'jobs are the cornerstone of economic and social development', in the words of the World Bank (WB, 2012: 2, 26). However, there is debate over the role that administrations should play here, beyond fostering the right climate for job creation, and concerns remain about the possible negative effects of employment regulations and policies on economic efficiency (WB, 2012: 26; Marshall, Chapter 9, this volume and Deakin, Chapter 2, this volume). This diversity of positions is illustrated by the fact that many countries (19 of the 27 EU Member States at that time) responded to the crisis with new labour reforms reducing rights and cutting back social safety nets; while others (e.g., some Latin American countries) strengthened and enlarged theirs without jeopardising their economic recovery (ILO, 2012; WB, 2012: 26).

Our contribution to this debate is this chapter, the purpose of which is to analyse the role labour policies and institutions can play in the region in terms of promoting an inclusive form of development that places the creation of formal employment at the centre of macroeconomic and sectoral policies, and reduces the inequalities caused in labour markets, from a long-term perspective.

When we speak of social inequalities here, we are referring both to the 'traditional or structural' inequalities occurring between employers and employees and to the 'dynamic' ones that occur within the same categories and tend to persist. The categories were earlier more homogeneous (e.g., wage earners) or displayed transient differences that it was imagined would tend to disappear (Fitoussi and Rosanvallon, 1997: 73–75).

Although this distinction was originally devised in relation to past situations created by globalisation in a developed country, it can also serve to describe recent events in the region, when inequality between capital and labour tended to worsen, even in times of economic prosperity, and informal employment (without access to social security) was the norm for an average of half the workforce, and growing even faster than formal employment in some countries. Consequently, labour segmentation is structural in nature but now also has a new face: this is a fact that remains and looks unlikely to be corrected in the medium term unless appropriate policies are adopted (ILO, 2012a).

The concept of inclusive and integrated development (ECLAC, 2012a) that is the starting-point for this chapter has three dimensions that must interact and advance simultaneously, something that has occurred only exceptionally in the region. These dimensions are: 'structural change, growth to reduce internal (within the country) and external (with respect to the developed world) income and productivity gaps (convergence), and

the promotion of equality' (ECLAC, 2012a: 21). We are most interested in this last dimension of development for our analysis of institutional deficits, although we will also show how it connects with the other two.

From this perspective, we see labour policies and institutions, together with macroeconomic, trade, industrial and social policies *inter alia* as tools for spreading quality employment with rights, to the extent necessary to improve workers' capabilities, including bargaining power, and to close the inequality gaps in their income and working conditions. This would mean restoring the redistributive character of labour law and policy and giving the State a central role in order to ensure that the institutional approach enhances the distribution of the results of the production process between capital and labour, while the social protection system (on both a contributory and a non-contributory basis) ensures effective protection for all workers and their families from the risks to which structural change exposes them (ECLAC, 2012a: 296).

The Economic Commission for Latin America and the Caribbean (ECLAC)'s concept of inclusive development and the agenda that follows from this concept have come very close to the grounds given by Sen to the ILO's Decent Work Agenda, discussed by Marshall and Fenwick in the introduction to this book (Chapter 1, this volume), while productive convergence is promoted to ensure all workers, regardless of their status and of their employers, have the capabilities, rights and freedoms to address inequalities, including a set of tools and policies that go beyond the legislation and labour policy. As Kolben shows in this volume (Chapter 3), following Stiglitz and Sen *inter alia*, a broad conception of development involves more than economic growth and is a transformative process with social and political dimensions (including the promotion of human rights), which coincide with the perspective we choose to analyse the role that labour law and institutions may play to prevent or, where appropriate, correct the inequalities generated in the labour market.

With these objectives in mind, in this chapter we shall explore the need to foster performance evaluation and, if necessary, to redesign labour institutions (and the public policy ones) to promote inclusive development, taking into account its systemic nature, as Deakin (Chapter 2, this volume) suggests, by focusing on the interaction established between labour law, public policies and the labour market.[6] Our contribution in

[6] The functions to be considered are economic coordination, risk sharing, boosting aggregate demand, democratising the labour world and empowering vulnerable groups according to the proposal of Deakin (Chapter 2, this volume). Marshall (Chapter 9, this volume) adds to Deakin's list of five functions of labour institutions, that of 'redressing the specific vulnerabilities and unfreedoms of

this regard will be to analyse the type of institutional interaction observed in some countries of the region, its impact on inequality, and the changes that might lead to its decline, both in terms of the relationship between capital and labour and between different categories of workers.[7]

This chapter proceeds in three substantive sections. Section 2 outlines the analytical framework on the basis of which we argue that the decline in inequalities flowing from labour markets should be the centrepiece of the reorientation of public policies and labour institutions, in order to promote inclusive development. From this perspective it is assumed that worker protection, equity and economic growth complement each other rather than contradict each other (Godínez, 2011: 101). As a result, labour institutions and policies continue to have a key role to play in achieving these goals, although the latter must be pursued using new instruments and within a regional context very different from the one in which they originated. This new context is characterised by the growing competitive pressures associated with globalisation and society's increasing demands for access to welfare that derive from the political democratisation process.[8] In support of this argument, this section sets out a number of analytical perspectives on the specific challenges facing development in Latin American economies and the complex role of labour market institutions (ECLAC, 2010, 2012a; Huber, 2002; and Marshall, Chapter 9, and Deakin, Chapter 2, this volume).

Section 3 comprises a general discussion of the obstacles that labour institutions and policies face today in their attempts to promote inclusive development in Latin American countries. Taking into account the

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the region or the country', which will be included in our descriptions of each one of Deakin's functions, considering what is happening in some countries of Latin America.

[7] Although we will use evidence from several countries in the region, this chapter will focus more closely on those with protectionist labour regulation models, originally characterised by the broad leeway that was allowed for state intervention in managing labour relations, with legislation and labour policy set up to combat social inequality (as in the case of Argentina, Brazil, Uruguay and Mexico) in order to analyse whether their rules and institutions can help to achieve that goal within the new context of globalisation. These cases are crucial, since it would be hard to imagine that social inequality would be corrected by the operation of institutional frameworks that were designed to leave the market to resolve the problem of distribution. For the characteristics of state-run models of labour regulation and their recent performance, see Bensusán (2000, 2006) and Cardoso and Gindin (2009).

[8] See the timely characterisation of the new context made by Marshall and Fenwick in the introduction to this volume (Chapter 1, this volume), as it fits perfectly into the Latin American situation.

structural nature of the main problems in labour markets in the region and the nature and depth of the changes associated with the emergence of the new economy, along with other problems of a socio-demographic nature,[9] we argue that to close the inequality gaps in the bargaining power of workers and employers and in the quality of jobs in the various strata and sectors, some of the rules and instruments need to be renewed, their original protective intention restored, and the enforcement institutions (weakened by neoliberal reforms) strengthened.

The particularities of this redesign process will depend on the trajectory and specific context of each country (Marshall, Chapter 9, this volume), but the process itself should aim primarily to protect wage earners who are not currently covered and those whose link with the beneficiaries of their work is less clear.[10] Similarly, consolidating democracy in the workplace – as proposed by Kolben (Chapter 3, this volume) – would spell greater efforts towards innovation than hitherto. This is because revitalising collective action would allow the unions – and other organisations which represent workers' interests – to take on a greater political role in favour of redistributive policies, to reduce the asymmetry of power vis-à-vis employers, to take into consideration the diversity of its members' interests and to extend representativeness to the most vulnerable workers, thus reducing the wage gap and improving working conditions.[11]

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[9] For example, the expansion of subcontracting through supply chains or the growing participation of women and the increasingly problematic issue of youth employment. It is worth noting that the change towards female employment occurred faster in the Latin American region. For example, in Colombia, female employment increased almost 20 per cent in just over 20 years: from 47 per cent in 1984 to 65 per cent in 2006 (WB, 2012: 30).

[10] One change observed in labour markets is the increasing level of work previously considered 'atypical', moving away from what was known as 'full employment', characterised as working for others, subordination to a single employer and receiving a salary (Córdova, 1986). Self-employment, brokering, subcontracting, telecommuting or working in a place that is outside the employer's control, fixed-term employment, seasonal work, probation work as part of training or initial skill-building, involving flexible hours or without access to social security, etc., all of which were previously considered 'atypical' (Córdova, 1986), are seen in the current Latin American context as a result of the structural heterogeneity of the labour market in the region (Reygadas, 2011: 21–23; ECLAC, 2012).

[11] Our approach in this chapter is different to that of the World Bank (2012), since here we argue the need to strengthen labour citizenship and institutions of 'voice', not only for the most vulnerable workers (those who are currently excluded from de jure or de facto protection), but for all workers. In most countries of the region, representation is insufficient, caused in Argentina, Mexico and, to

Section 4 sets out some changes in Latin American countries, showing the progress made but also the limits. It considers three issues that are key to reducing inequality: the formalisation of employment and supervision of compliance with rules; the protection of vulnerable groups; and the interaction between subcontracting rules and collective rights. Bearing in mind that institutional challenges vary from one country to another and that we cannot here provide a comprehensive analysis of each one, we shall highlight certain common features and contrasts.[12]

2. DEVELOPMENT AND INTERACTION BETWEEN INSTITUTIONS IN LATIN AMERICAN LABOUR MARKETS

In the light of comparative studies on varieties of capitalism and their institutional arrangements, Huber (2002) and Schneider and Karcher (2010: 624) highlight complementarities or economic and political interactions and the main features of the Latin American markets that prevented better economic and social performance during recent decades of economic reform. From this perspective, labour markets were characterised by low skill levels, high-profile regulations, high labour turnover rates, a widespread informal sector[13] and unions which, though politicised, were barely present in the workplace and enjoyed only limited bargaining power.[14]

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a lesser extent, Brazil, by the legacy of authoritarian and corporatist situations; conversely, in Central American countries, this weakness is due to the extremely fragmented presentation and pluralistic systems. See Bensusán (2006) and Cook (2007) and the third section of this chapter.

[12] For an analysis of labour reforms in the region from the 1980s, see Vega Ruíz (2005), Weller (2009), Cook (2007) and Fraile (2009). For the last labour reform in Mexico (2012) see Bensusán (2013).

[13] Several approaches are used to define both employment and the informal economy (Portes and Haller, 2004). This chapter examines the institutional approach to informal employment, meaning jobs providing no access to social security, which leave workers unprotected against the major risks. Following the same institutional approach, we understand the informal economy to mean 'all income generating activities not regulated by the state in social environments where similar activities are regulated' (Castells and Portes, 1989: 12, quoted in Portes and Haller, 2004: 10). Other definitions of the informal sector or economy take into account various characteristics, such as low productivity and the limited accumulation capacity of production units (Tokman, 1982, quoted in Portes and Haller, 2004: 10). With regard to informal employment, see also note 59 in this chapter.

[14] The higher level of legal protection at work in the Latin American countries

There was often no coordination between stakeholders and government; relations between employers and unions tended to be antagonistic, and governments had paternalistic links and/or control over the unions, limiting their capacity to act as a counterweight (Huber, 2002).

Widespread informal employment held back union growth, and governments allowed employers to default on their obligations towards their employees, in order to keep control over the open unemployment rate;[15] meanwhile, workers turned to welfare-based social policies to make up for the lack of protection associated with formal employment. The reason for the low skills levels was that workers had no incentive to train, since their only future lay in the informal sector or in performing short-term and precarious work[16] in various formal or informal jobs, in view of the high rates of labour turnover (Schneider and Karcher, 2010). As will be seen below, the interaction between these features generates few incentives to break with the status quo and results in a vicious circle of barely effective regulations and a spiral of poverty and inequality, from which it is difficult to escape.[17]

Huber and others argue that economic, employment and social policies affect initial or primary income distribution in such a way that it is very difficult to change subsequently using taxes and transfers (Huber, 2002: 440; ECLAC, 2012; Stiglitz, 2012). The advantage that coordinated capitalism models could offer as a way out of the vicious circle characterising Latin American labour markets is that strong trade unions and high rates of unionisation and collective bargaining coverage translate into a greater ability to avoid inequality at the point where income is generated, i.e., in

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goes hand in hand with lower enforcement and lower spending on social protection, which is the opposite of the situation in most developed countries (Tokman, 2007, 2009).

[15] Open unemployment refers to active jobseekers who had not worked in the week prior to the survey, but it is a poor indicator of the health of the labour market in countries such as those of Latin America, where a high percentage of workers are not wage earners and unemployment insurance is either limited or non-existent, making access to informal employment a survival strategy that conceals the fact that the economy is unable to generate sheltered employment (Samaniego, 2006; WB, 2012: 35). This, along with unemployment trends, is why it is necessary to consider the quality of jobs (Weller and Roethlisberger, 2011).

[16] The concept of precarity has been used to characterise both formal and informal jobs, and covers insecurity, lack of protection in the labour market and low income (Rodgers, 1989; García, 2011: 87).

[17] See the evidence gathered about issues of effectiveness of labour law in the cases of Argentina (Senen and Palomino, 2006), Brazil (Cardoso and Lage, 2006), Chile (Figueroa, 2006) and Mexico (Bensusán, 2006a) and the comparison between these in Bensusán (2006).

labour markets, even at similar levels of wealth (Hayter and Weinberg, 2011: 159).[18]

However, for this type of coordinated capitalism to flourish in Latin America and close inequality gaps, one must take into account – and overcome – the following economic, political and institutional constraints.

2.1 Structural Heterogeneity and Productive Convergence

Under ECLAC's structuralist approach, the persistent segmentation of labour markets in different strata with very diverse working conditions is caused by the structural heterogeneity characterising that region. This means 'a situation in which there are very large differences in labour productivity between groups and firms' (Porcile, 2011: 31).[19] The important point for our argument is that differences in productivity levels between various strata are then transferred on to wages and working conditions, forming a 'determining factor of poor income distribution' and insufficient social inclusion in the region (Porcile, 2011: 70).[20]

The spread of poverty and inequality within income distribution is likely to be positively associated with the degree of structural heterogeneity

[18] Other political and institutional factors on which coordinated models of capitalism were based over a century ago include building centre-left political coalitions, providing support for unions, fostering high unionisation and (predominantly centralised) collective bargaining coverage along with universal and effective welfare schemes, although with extremely varied employment regulations (Schneider and Soskice, 2009: 23).

[19] Unlike the economies of the industrialised countries, where it was transitional in nature, the structural heterogeneity of Latin America has endured over time (under different economic models and in times of strong and weak growth) and has been accompanied by a lesser degree of economic diversification, specialisation in the export sector (natural resources), concentration of technical progress in a small number of large companies and a weak link between the highly profitable sectors and the rest of the economy (Infante, 2011: 66).

[20] Infante (2011) compared regional productivity differentials among the most significant strata between the 1960s and the late 2000s and found that they tended to increase. Three types of changes have occurred in the production structure over the past five decades: production further increased within the more modern stratum, although there continued to be low job-creation capacity and little connection with the rest of the economy; the middle stratum became less important in relation to GDP and employment, concentrated in the low productivity strata, which accounted for 52 per cent of employment in 2007 compared to 47 per cent in the 1960s. Likewise, productivity differentials widened in the period from 1990 to 2008 and changes occurred in the composition of employment as the absorption capacity remained constant in the higher productivity stratum, grew in the middle stratum and fell in the lowest one (Infante, 2011: 71–72 and 75).

owing to the difficulties experienced by workers in low-productivity sectors in achieving better incomes and stable jobs with social protection, caused, *inter alia*, by the incomplete coverage of the main social protection system (Bertranou and Maurizio, 2011). By contrast, countries with greater productive homogeneity have a more complex structure of markets, institutions and policies, coinciding with less volatile growth. This helps reduce the volatility of jobs that leads to high rates of labour turnover, with the negative consequences this entails for workers in countries with incomplete social protection systems, no unemployment insurance or systems with only limited coverage, which is the case in Latin America (Velásquez Pinto, 2010).

The studies coordinated by ECLAC (2012) conclude that productive convergence (also termed productive articulation or productive cohesion by the ILO [2012a]) should be considered essential to a development strategy seeking both high economic growth rates over a long period and less inequality in income distribution (ECLAC, 2010: 165; Infante, 2011: 93; ILO, 2012a). It should be noted that the concept of convergence extends beyond the merely productive and expressly alludes to promoting 'redistribution of income of individuals . . . at the very moment it is produced . . .', and would imply that the poorest would see 'their income grow faster than the rest of the population' (Godínez, 2011: 119).[21]

In sum, productive convergence or articulation as part of a 'long-term view' implies using structural and institutional changes to overcome the biases and problems inherent to the current style of development in Latin America, for example, the specialisation profile (focused on exporting natural resources) and the 'enclave growth' type. In this latter feature, the benefits are concentrated in the formal sector and inhibit endogenous technological innovation capabilities, while increases in productivity are achieved mainly by banishing workers into the informal sector of the economy, which tends to have a greater effect on women, young people and the least-skilled, thereby exacerbating inequalities between the workers.[22]

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[21] The relationship between growth, inequality and poverty is neither linear nor perfect: although there is evidence that a high level of inequality affects economic growth, there is none to indicate that it will automatically lead to correcting inequality, since public policy can affect income distribution right from the outset (Huber, 2002: 440).

[22] Gender income gaps continue to be a factor of inequality. The impact of female employment in increasing productivity and economic activity, mitigating the effect of ageing, and helping to reduce poverty in Latin America has been highlighted by the report entitled 'Global Trends 2030: Alternative Worlds' (NIC,

2.2 Democracy and Collective Rights

A second driver of change seeking to produce truly inclusive development lies in efforts to develop political democracy and extend it into the world of work. The importance of political democracy for development has been a central issue for governments, international organisations and academics (Kolben, Chapter 3, this volume). But political democratisation alone does not guarantee that inequality will be corrected, even in times of economic prosperity, as may be seen in Latin America. To achieve this requires democratising the world of work, which, bar a few exceptions, is an issue still needing to be addressed in the region.[23] However, there are differences in the opportunities created by the democratic transition process and by economic and labour reforms in terms of protecting individual and collective rights, recovering union power or extending collective bargaining, which is one of the pillars of industrial democracy and is essential for reducing income gaps between workers (Traxler and Brandl, 2011).

The sequence of change (democratisation and economic reforms) was also an influential factor.[24] A further differentiating factor was the political alignment of Latin American governments, which followed different

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2012) and the 2012 World Bank Report on Jobs. It is worth noting that Chile has the widest gender wage gap, even with the same educational level, which can be explained partly by low female participation in the labour market (ECLAC, 2012). This wage gap increases with the number of years of education. In Brazil, for example, women with more than 12 years' education earn 62.8 per cent of the income commanded by their male counterparts, while the equivalent gap is 76.6 per cent for women in general (ECLAC, 2011).

[23] There can exist a marked contradiction between democratic political systems and authoritarian forms of labour governance, besides which, unions are not always democratising forces (Kolben, Chapter 3, this volume). A case study analysing these tensions and their implications for workers in Mexico has been produced by Bensusán and Middlebrook (2012, 2013).

[24] In the context of transitions, Chile and Mexico were undergoing their economic reforms under authoritarian regimes and made their transition to democracy in conditions of macroeconomic stability, allowing greater continuity of neoliberal policies and less space for the recovery of the state-run model of labour regulation, union power and inclusive labour and social policies. Argentina initiated pro-market reforms under the dictatorship but deepened them in democratic conditions, allowing unions to exert some counterbalances. Brazil and Uruguay liberalised their economies gradually under democratic governments, facing strong opposition from the left and from unions that had gained strength during the transition. This prevented, or at least slowed, the scope of neoliberal reforms and attempts to dismantle the state's capacity for intervention in key sectors (Cook, 2007).

paths on public policy in the 2000s, thus breaking with the greater homogeneity observed in the previous decade. There is an abundant literature assessing whether differences exist between the social and labour policies of the centre-left governments in the region and analysing their results.[25] In any case, the choice between different models of capitalism, styles of development and systems of labour/social protection is an issue that must be decided and legitimised by society. This means that democratic regimes must be consolidated, as well as the strong organised civil society associated with them.[26]

However, workers in the region still have only limited opportunities and instruments to make their voices heard regarding their choice of the best option for access to welfare – for instance, deciding on the level of legal protection to be offered or on the type of social protection system (targeted or universal, contributory or non-contributory, etc.). Limitations on labour citizenship are to be observed in terms of the exercise of collective rights (obstacles to forming independent and representative trade unions and to extending unionisation caused by restrictions on freedom of association and collective bargaining rights) within trade unions (low or zero levels of internal democracy, accountability and participation) at company level[27] (where there is no room for institutionalised participation in management) and, finally, on the political scene, where a union presence has tended to diminish, all of which leads to a low intensity[28] of labour citizenship. We take Gordon's definition of 'labour citizenship' as 'participation by workers in collective efforts to achieve recognition of and compensation for their economic contributions to society' (2009: 512).

Although there are several instruments that help advance labour citizenship, here we wish to stress the importance of increasing unionisation, strengthening unions and deepening democracy within them as decisive factors for regaining power vis-à-vis employers, and the workers' capacity for social and political representation, as their interests are tending to diversify in the new context.

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[25] See, for example, Madrid et al., 2010; Reygadas and Filgueira, 2010; Moreno Brid and Paunovic, 2010; Huber et al., 2010; and Bensusán and Moreno Brid, 2012.

[26] Kolben emphasises the instrumental value of labour regulations that allow the formation of trade unions and other forms of political organisation that foster political democracy, as well as institutions that enable conflicts to be resolved through institutional channels (Chapter 3, this volume).

[27] For the importance of democracy in the workplace to allow workers to take more control of their lives, see Kolben (Chapter 3, this volume).

[28] Here we are using the concept of low-intensity citizenship coined by O'Donnell (1993: 75) by which he refers to political citizenship.

2.3 The Systemic Nature of Labour Institutions and the Feasibility of Redesign

One of the original purposes of labour legislation was 'structurally empowering the weakest labour market participants', thereby reducing asymmetries (Weller, 1998).[29] However, it is clear that the 'right' or 'appropriate' way of empowering the weakest in the labour market can take different forms (Marshall, Chapter 9, this volume). Therefore it is necessary to experiment with different solutions in different places, while learning lessons from others and assimilating them as appropriate (Pettit, 2003).[30]

Our argument is that the current design (at least of some particular principles or labour institutions and how they work in practice) is not always consistent with the goals of inclusive development; nor is the main system of social protection, which was designed exclusively for workers in formal employment, when a substantial proportion of the workforce today is not in this situation.[31] In some cases, the cause is a faulty initial design, but it can also be due to subsequent changes in the environment, as Marshall argues when she says that the discrepancy between the foundational premises of labour law and the realities in the countries 'has both older, structural features and more recent features due to the impact of the global economic integration and structural adjustment policies aimed at liberalising economies' (Chapter 9, this volume, p. 301). However, it may also be caused by poor implementation strategies, since it relies on procedures inconsistent with the design (e.g. rules that impose high costs and heavy restrictions on employers with no inspection and enforcement mechanisms to actually prevent them from avoiding compliance or

[29] The basic objectives pursued by these institutions, through instruments which may vary depending on the context, would be to ensure the efficiency of the labour market and structurally strengthen the position of the weakest participants, promoting fairness and decent working conditions (Weller, 1998; Weller and Van Gelderen, 2006: 49).

[30] Here, institutional design or redesign is understood to mean 'the creation of an actionable form to promote valued outcomes in a particular context' (Bobrow and Dryzek, 1987, cited by Goodin, 2003: 49). This process is derived from 'the deliberate interventions of purposive, goal-seeking agents', even when they also result from accidental changes, even from errors and evolution, in which some of the tensions and contradictions that can affect institutions are resolved (Bobrow and Dryzek, 1987, cited by Goodin, 2003: 41).

[31] For more on job quality and the way it has changed in the region, see Weller and Roethlisberger (2011). A proposal for reform of the social protection system can be found in Bertranou and Maurizio (2011).

pretending to comply with the rules) (Bensusán, 2006). The next section provides examples of these institutional shortcomings.

By 'appropriate' design, we mean the one which best fits the immediate environment and which helps fulfil the purpose for which the institution was created. When this is not seen to be the case, it may be due less to an error than to the fact that the institution was designed to modify a certain behaviour with a longer-term objective (Pettit, 2003: 53, 57). The problem is that when these intentions are not achieved, even in the long term, the persistent gap between rules and reality erodes the legitimacy and credibility of institutions, which is what happened for a long time and continues to happen in some countries of Latin America, aggravating the segmentation of labour markets and the ineffectiveness of most labour rules.[32]

This distance between the legal design and the actual situations caused by problems of enforcement or by the limited coverage of legislation due to the economy's limited capacity to generate formal employment is not unique to developing countries. The difference with developed countries is essentially one of scale (Deakin, 2010: 60). However, since in most Latin American countries access to formal employment is the main way of gaining access to welfare because universal social policies are either absent or inadequate, the need to develop new designs providing greater protection coverage and to make labour law more effective is central to efforts to combat inequality, along with other instruments.[33]

We argue that institutional redesign is both necessary and possible, because labour market institutions and social protection systems are contingent and result from the calculations, strategies and decisions of the people who were involved in or influenced their design. In other words:

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[32] For a discussion on the problems of ineffectiveness and poor performance of the institutions linked to failures in implementation strategies by enforcement bodies of labour law, see Bensusán (2006: 17–22).

[33] Although most countries experienced significant growth in social-security-registered employment from 2000 onwards (around 63 per cent in Argentina between 2000 and 2011), average non-agricultural informal employment was 47.7 per cent in 2011; 5.2 per cent comes from informal domestic employment, 11.4 per cent from informal employment in the formal sector and 31 per cent of informal employment is in the informal sector (ILO, 2012a: 45). However, these averages mask regional heterogeneity. Mesa Lago ranks countries in the region on the basis of social security coverage, the size of the informal sector of the economy and poverty levels. The first group comprises Chile, Costa Rica, Uruguay, Brazil and Panama, which are among the most developed. The second group includes Mexico, Venezuela and Colombia, and the third, which scores worst for all three indicators, comprises Ecuador, Dominican Republic, El Salvador, Guatemala, Peru, Bolivia, Nicaragua, Paraguay and Honduras (Mesa Lago, 2010: 17).

'they are not the result of uncontrollable forces of nature . . . nor are they the result of immutable cultural propensities' (Adams, 1995: 173). They suppose not only restrictions to freedom, as neoclassical approaches would state, but also opportunities in terms of social inclusion, incentives to innovation and increased aggregate demand, *inter alia*, which should be reassessed in a new context.[34]

Nonetheless, the systemic nature of labour market institutions imposes restrictions on redesign. This implies that it is not only affected by exogenous variables but by the 'governance mechanisms' that emerge in certain economic and political contexts, with a constitutive role and establishing 'systemic interaction' between the two (Deakin, Chapter 2, this volume, p. 38). As we shall outline below, the problem is that the interaction between the various dimensions of labour institutions and the labour market can be virtuous, when it favours the fulfilment of its objectives; or vicious, when it leads to undesired results, as occurs in most countries in the region.[35]

3. THE FUNCTIONS OF LABOUR INSTITUTIONS AND POLICIES ACCORDING TO CONTEXT

While institutions tend to last, labour policies tend to be less stable and to change more easily in response to factors both economic (such as forms of integration into the global economy) and political (changes in the colour of governments or of the political regime). In turn, changes in the orientation of labour policy when the environment changes (e.g. development strategy) exert a strong influence on the way in which institutions operate, even without any changes to their design, as occurred in some countries in the region where labour flexibility was imposed as a *fait accompli* (Bensusán, 2006; Cook, 2007).

Labour institutions and policies are facing enormous challenges as they seek to fulfil their essential functions within the new globalisation context.

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[34] Regarding the generic criteria to be followed in the process of redesigning labour law in developing countries, see those proposed by Deakin, Chapter 2, this volume and Marshall, Chapter 9, this volume.

[35] However, it has been pointed out that the effects of labour institutions cannot be measured in isolation, as most international indices tend to, because the rules are part of a system in which the various parts interact and in which the advantages and disadvantages may offset each other (Weller and Van Gelderen, 2006). On the narrow perspective of these indices, for instance, the *Doing Business* reports of the World Bank, see Deakin, Chapter 2, this volume.

Moreover, the debate remains open concerning the positive or negative effects of labour market institutions on economic performance,[36] and this, together with the effects of the 2008–2009 crisis, may have limited the willingness of Latin American governments to promote more wide-ranging and profound institutional reforms regarding productive articulation and democratisation in the world of work.

While neoclassical approaches assume that institutions are responsible for market distortions, the structuralist approach followed in this chapter suggests that the best institutions are those further encouraging innovation and an equitable distribution of the results (ECLAC, 2010; Porcile 2011: 61). In addition, there are 'institutional equivalences' (Schmid, 1996: 4) or 'functional equivalents' (Marshall, Chapter 9, this volume, p. 300) because the same development goals (growth and equity) can be achieved through different institutional arrangements and public policies according to the specific contexts in which they must operate. What is important is the interaction between actors, institutions and policy to achieve these objectives and ensure that they reinforce each other (Huber, 2002: 440).

Deakin identifies five regulatory functions for labour law (Chapter 2, this volume, pp. 41–4). Marshall adds one more – 'redressing the specific vulnerabilities and unfreedoms of the region or country' (Chapter 9, this volume, p. 293) – which will be included in the analysis of each of the functions Deakin identified. Below we shall examine how they have operated in the changing Latin American context and what keys for transformation might emerge for promoting a virtuous interaction between actors, institutions and policies.

3.1 The Economic Coordination Deficit

The economic coordination role of labour institutions would attempt to reduce transaction costs and problems of collective action arising from

[36] Despite the evidence from recent experiences in some Latin American countries concerning the compatibility of recovering economic growth with restoring labour protection, there are competing and contrasting views on how to restore stability and growth after the 2008–2009 global crisis and its 2011 revival, most of which are neoliberal in type, with the exception of some Southern Cone countries (ILO, 2012a). However, the poor performance of Latin American countries in the 1990s after the neoliberal labour reforms should be taken into account by developed countries that insist on cuts in rights, wages and benefits as a solution to the problems they are currently facing, as if the 2008–2009 global crisis had been caused by excesses in labour markets and not, as has been pointed out, by the low purchasing power of workers and the need to resort to credit as an alternative (Freeman, 2011; Weller, 2012).

asymmetry of information, providing certain guarantees to workers and employers by setting out their rights and obligations. For example, it is stated that regulations on hiring and firing that promote job stability by imposing restrictions on arbitrary dismissal or setting minimum wages and other inalienable working conditions would oblige employers to internalise these costs. One would expect labour institutions to act accordingly and encourage employers to invest in training, technological innovation and work reorganisation as ways of increasing productivity and better supporting increased wage and non-wage costs (Deakin, Chapter 2, this volume).

From the 1940s onwards, institutions, policies and actors interacted in very different ways under the two dominant economic models in the region (the 'state-centred' and the 'market-centred'). In the state-centred model, and mainly in the countries that developed earlier, coherent macroeconomic, labour and industrial policies were adopted with the aim of generating economic growth with social justice through employment protected by state intervention, thus boosting the domestic market and forming unions, which benefited at least the contingent of workers in sectors such as manufacturing or public employment.

By contrast, in the market-centred model, the legitimacy of these rules, of state intervention and of collective action diminished, and opportunities and incentives to circumvent the restrictions were higher in all productive strata (including large companies), which employed more and more people in jobs that were not registered with social security. In the 'market-centred' (or market-oriented) model, workplace flexibility policies were accompanied by increased volatility of employment and high rates of labour turnover,[37] despite supposedly rigid rules on employment,[38] discouraging innovation and productivity as ways of reducing labour costs.

Instead, the possibility of lowering real wages and making profits in spite of lower productivity were factors that led companies to opt for other approaches, even in dynamic manufacturing sectors (Palma, 2011).

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[37] According to Cowan (2007), in the mid-2000s, annual labour turnover rates in countries such as Chile, Mexico and Brazil ranged from 60 to 80 per cent, which is in itself a strong disincentive for investment in training.

[38] For a comparison of the levels of rigidity of employment regimes in the region, see Tokman (2009) and Bensusán (2006). Although protection against individual and collective dismissals tends to be higher in countries where the State-run model of labour regulation predominates than it does in developed countries, the fact is that it is accompanied by lower social spending in the countries of the region, both in active and passive labour market policies. Therefore legislation is the most important (if not the only) mechanism for social cohesion (Tokman, 2007).

For example, outsourcing jobs to smaller, and therefore less visible, companies as a way of cutting costs and avoiding labour obligations (not just as a response to the need to specialise) was a widely used measure in contexts of weak unions and poor or limited freedom of association and collective bargaining coverage (Huber, 2002; Tokman, 2004; ECLAC, 2010).

When state intervention in labour markets was strengthened in the 2000s (particularly after 2002) and minimum wage policy, trade union action and enforcement of law were revitalised in some cases, quality of employment indicators (except for job stability)[39] showed a slight improvement, and progress was even made in correcting income inequality, albeit with significant differences between countries (Weller and Roethlisberger, 2011; ILO, 2012a; Lustig, 2012).[40] However, the asymmetry in the workers' bargaining power compared with employers' persisted or worsened as a result of institutional deficits, a lack of industrial policies driving production chains as part of inclusive development strategies, weak unions and limited resources allocated to active labour market policies.[41] Consequently, technical innovation and efforts to train workers and increase productivity continued to focus mainly on large companies, accentuating the structural heterogeneity characterising the region (ECLAC, 2010). In parallel, other (extra-legal or informal) coordination mechanisms filled this regulatory

[39] The job quality variables studied by Weller and Roethlisberger (2011) include: labour income relative to the poverty line, non-wage benefits, job security, access to social protection, working hours, collective organisation and training. That study indicates the improvement of these variables in various countries of the region between 1996 and 2007.

[40] The evolution of labour indicators under the market-centred model in the 1990s contrasts with its trend to recover in the 2000s, when the protection of labour rights and state intervention in some countries in the region strengthened (ECLAC, 2010: 162). According to this body, although it is difficult to evaluate its determining factors, changes in the labour market do explain much of the reduction in income inequality of households in the region, and were also influenced by greater access to education and non-contributory transfers (ECLAC, 2012: 238, 239).

[41] Improvements were noted in only three of the ten countries for which comparable data are available on wage earners' participation in income between 1990 and 2009: Chile, Paraguay and the Bolivarian Republic of Venezuela. However, Chile started off from its lowest level, at the end of the Pinochet regime, and in 2009 it reached 44.5 per cent, which is 6 per cent more than in 1990. Although in Brazil the figure was lower than that of 1990 (when it was 53.4 per cent), between 2002 and 2009 there was an increase of more than 2 percentage points to 48.3 per cent. However, there was a significant decline in Mexico – from 35.6 in 2002 to 31.4 per cent in 2009. Only Bolivia and Peru had lower wage shares (ECLAC, 2012a, Table V.6: 232).

and public policy vacuum, fostering practices that threaten the quality of jobs, such as not registering workers with social security and excluding them from other legal benefits, such as unionisation, remunerative wages, protection against work-related risks and fringe benefits, such as bonuses or holidays (Tokman, 2004; Weller, 2009).

Against this background, deficits in innovation, training and respect for workers' rights, especially in smaller companies, show the dysfunctional character of at least part of the rules of play, if the objective sought is really virtuous interaction over the objectives of economic efficiency and social justice.[42] The result is low wages, a lack of real job security or any pressure for industrial and social upgrading. As a result, there is no investment in training, no hope of job promotion, and labour productivity gaps remain or even widen (Weller, 2009a; ILO, 2012). Moreover, there are no incentives, forums or appropriate instruments for coordination between actors at the various levels where it is necessary, because of, *inter alia*, the considerable asymmetry of power and distrust, even between the leaders and the people they are supposed to represent, owing to a lack of internal democracy and low levels of participation. All this confirms Huber (2002), who said that there is a vicious institutional interaction that leads to failed competitive strategies. As ECLAC stated in the 1990s, 'Genuine competitiveness' is based on 'increased human capabilities and improved participation in the production process for the whole of society (and not on low wages and over-exploitation of natural resources) . . .' (ECLAC, 2010: 43), which would require changes in the design and operation of labour institutions.

3.2 Risk Sharing

Risk sharing is another feature of labour law in a broad sense (as it includes the rules governing social security systems). It, too, is failing to perform properly in the region and is leading to a lack of protection and the segmentation of labour markets. These systems are essentially based on contributions from employers and workers, and carry less weight than those supported by fiscal resources, thereby leaving many workers

[42] Training schemes in several countries in the region were transformed to include new beneficiaries (the unemployed, vulnerable groups, those employed in low productivity activities), but continue to be concentrated in large companies, which tend to train higher ranking or administrative personnel. Therefore, their effect on equity is very low, apart from the fact that these efforts remain detached from a long-term strategy focused on productive convergence (Weller, 2009a; ECLAC, 2010: 176).

uninsured, which partly explains the inequality characterising this region (Bertranou and Maurizio, 2011: 23).[43]

In terms of its impact on income distribution, one of the greatest risks is the loss of employment – and one which has increased in the context of volatile growth arising from globalisation (Weller, 2012: 46). Because of this, there is debate on whether to continue protecting jobs through compensation for unfair dismissal or whether it would be better to have worker protection mechanisms acting as automatic stabilisers, such as the unemployment insurance schemes that exist in most developed countries. However, in actual fact these mechanisms complement each other in the face of the same risk: while compensation aims to discourage arbitrary dismissals, unemployment insurance seeks to compensate loss of income immediately and to prevent workers from seeking employment in the informal sector as a survival strategy. In any case, except in the case of formal jobs in large and medium-sized enterprises, most workers in the region are vulnerable to this risk and only a small number of the unemployed get to enjoy such benefits (Weller, 2009; Velázquez Pinto, 2010).

In addition to the low coverage in the region (formal workers with a certain seniority in the post), short duration of benefits (although in most cases this is structural unemployment) and a low replacement rate, only six countries in the region actually provide unemployment insurance.[44] Another shortcoming is that, where such schemes do exist, they are not sufficiently well adjusted to active labour market policies to help workers find a new job, for example, through intermediation or training (Weller, 2009).

Reforms adopted to extend the coverage of unemployment insurance cover the inclusion of vulnerable groups such as farmworkers (Argentina and Brazil), domestic workers (Uruguay and Venezuela) and those with fixed-term contracts (Chile) (Beccaria and Maurizio, 2010: 115).

According to estimates by Velázquez Pinto (2010), only 10–20 per cent of unemployed workers have access to unemployment insurance (Chile has the highest percentage), so the only compensation available to most

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[43] In the light of the low tax collection capacity in the region, it has been noted that reducing social inequality requires more progressive tax systems, coupled with increased social spending in order to reduce this inequality (Weller, 2012: 43).

[44] These countries are Argentina, Uruguay, Brazil, Chile, Peru and Ecuador. Mexico began the parliamentary process to approve a presidential initiative on unemployment insurance in September 2013, but the attempt failed (Bensusán, 2014). For the characteristics of unemployment insurance schemes and their reforms in the context of the crisis 2008–2009, see Velázquez Pinto (2010).

formal workers facing unfair redundancy is compensation, and even then it often takes a long and uncertain court case before payment can finally be received. Evidence of the problems faced by workers in these circumstances can be found in various studies concerning the performance of labour courts in Argentina, Mexico, Brazil and Chile, for example (Bensusán, 2006; Cardoso and Lage, 2006; Figueroa, 2006; Senen and Palomino, 2006).

It is worth noting that in places where unemployment insurance is available, the system of compensation for unfair dismissal has not been abandoned, although the amounts paid are reduced (Vega Ruíz, 2005).[45] In the case of informal workers, some countries have recently sought to set up alternative mechanisms of protection against unemployment on a non-contributory basis, such as the Training and Employment Insurance scheme adopted in Argentina.[46]

In short, the problem of frequent loss of revenue as a result of high rates of labour turnover is not resolved in a timely or sufficient way in the region, meaning that the main strategies for survival are working in the informal sector or emigration (Tokman, 2011).[47]

Furthermore, the wide variety of coverage in the social security systems on offer, and consequently in their ability to protect workers against the risks associated with health and old age, results in a sharp segmentation of labour markets. One change under the 'market-centred' model with serious consequences for growing poverty and inequality was the privatisation of pension systems in most Latin American countries, following the example of Chile's private individual capitalisation accounts.[48]

This trend broke the solidarity between the members of the labour force and the people enjoying these benefits. Furthermore, the context of increased job volatility made it harder to meet the conditions governing access to the benefits because of high rates of labour turnover and frequent movement between formal and informal employment.

Some countries have sought to reverse these effects. For example,

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[45] A different form of protection against dismissal is Brazil's job stability protection system, which combines prior and individual capitalisation of a percentage of salary, with another percentage representing a penalty for unjustified dismissal (Cardoso and Lage, 2006).

[46] For the characteristics of this programme, see Ministry of Labour, Employment and Social Security, Training and Employment Insurance at http://www.trabajo.gov.ar/segurocapacitacion/.

[47] Labour turnover rates are around 60 per cent or more a year in Chile, Brazil and Mexico, for example. For the labour turnover rates in these countries and their causes, see Cowan (2007).

[48] For the Chilean pension system based on individual capitalisation and reforms introduced to improve equity, see Mesa Lago (2008).

the arrival of a centre-left government in Chile led to a most significant reform of the pension system in this country (in 2008), extending solidarity between active and non-active workers by providing an additional payment to contributory pensions, regardless of the number of contributions made, thus enhancing other, earlier changes brought to bear under democratic regimes to enhance equity. In Argentina, the pension system was re-nationalised in 2009 (Mesa Lago, 2010).[49]

But despite some improvements to regulations, persistent high rates of informality have left much of the working population unprotected. That is why some people are now advocating the need to move towards adopting universal social protection systems, while strengthening labour market institutions. The challenge would therefore be to achieve sufficient coordination between contributory and non-contributory systems (Beccaria and Maurizio, 2010; Bertranou and Maurizio, 2011: 23–24).

Advances in this direction are very recent and just beginning. In Chile, for example, protection of informal workers will become mandatory in 2016, while in Argentina family allowances previously payable to wage earners have now been extended to informal workers (Mesa Lago, 2008). Although in recent years Argentina and other countries have turned to adopting or strengthening schemes to protect workers (mainly those in the informal sector) against various risks (unemployment, sickness and old age) through non-contributory systems, it remains a controversial choice, since it is deemed to create a disincentive to formalising jobs and to involve monitoring and enforcement problems.[50] The suggested alternative is a general scheme based on fiscal resources, which would remove employers' social security obligations. It is argued that the advantage in this respect would lie in cutting businesses' labour costs, which would supposedly foster job creation and somewhat reduce the segmentation of labour markets (Weller, 2012: 46). However, this assumption involves two problems. First, as Beccaria and Maurizio (2010: 124) warn, evidence from

[49] Social security systems in the region are extremely varied in their coverage and scope, as shown by Mesa Lago (2010). This author analyses the effects of the 2008–2009 global crisis on Latin American social security, based on six indicators of the health and pension system (coverage, adequacy, equity and solidarity, gender equity, administrative efficiency and financial sustainability) and identifies strengths and weaknesses between the best-performing countries, associated with better development conditions, less informality and lower poverty rates (2010: 55–81).

[50] For an analysis of the alleged effects on the level of informality arising from the adoption of the 'Seguro Popular' [people's insurance] designed to extend health coverage for those who have no access to social security in Mexico, see Levy (2008).

the region shows that reducing labour costs does not in any way result in the generation of formal jobs or in formalising existing ones. Second, owing to the low revenue capacity of most countries in the region, benefits would be very basic in the best of cases. A far-reaching tax reform would be required before making this kind of change to extend social protection and reduce inequality gaps for workers in the face of the various risks (Martner and Aldunate, 2006: 20). So far, at least, the relations between the social and political forces in the region have not been conducive to a reform of this magnitude.

3.3 Boosting Aggregate Demand

The third function mentioned by Deakin (Chapter 2, this volume, pp. 42–3) would aim to maintain (or boost) the demand for goods and services, primarily by establishing minimum wages, the effects of which would be felt even in the informal sector and would help reduce social inequality. As for the other functions mentioned above, there were marked differences in the role played by wage policies under the various economic models applied in the region. Boosting aggregate demand was one of the most important functions at the start of labour law in the countries of the region because of interest in developing domestic markets using import substitution in the industrialisation phase. In this context, minimum wage policies fulfilled that role since they also helped combat poverty among salaried workers, while that function was distorted under neoliberal policies favouring inflation control or was used as the main comparative advantage for exports (ILO, 2008).

In the case of countries like Uruguay, the existence of links between the amount of the minimum wage and other benefits, such as pensions, was a factor that limited increases during the 1990s. When this restriction was removed in the mid-2000s, active minimum wage policies were adopted in Uruguay. Other countries that adopted a policy of improving the incomes of workers at the lower end of the wage scale were Argentina, Brazil and Chile (in the latter case, since the beginning of the 1990s) (ILO, 2008, 2010; Saget, 2008).

Uruguay's experience is useful in demonstrating the systemic nature of labour institutions and is an example of wage policy revitalisation through interaction between the wage-setting process and the system of industry-level collective bargaining associated with the arrival of governments allied to unions.[51] This experience even challenged the previously dominant

[51] When the Government in Uruguay stopped convening Minimum Wages Councils in 1992, unions and collective bargaining were gradually and seriously

criterion whereby growth consolidation and a recovery in employment would precede the recovery of minimum wages (ILO, 2010: 67).

The recovery of the original function of minimum wages in most countries in the region helped increase capacity to meet the most vulnerable workers' basic needs; strengthen domestic markets; reduce inequality in income from labour; and limit the effect of the 2008–2009 global crisis on the demand for goods and services, thus enabling the subsequent economic recovery (Saget, 2008; Lustig, 2012; ILO, 2011, 2012a).

However, two types of problem are associated with boosting aggregate demand using the minimum wage. Some countries (e.g. Mexico) continue to neglect the social function of minimum wage policy, emphasising instead their role in inflation control or in maintaining comparative advantage with other countries (ILO, 2012). Moreover, even where this approach is working, support for it may be compromised if wage policy is not part of a long-term development strategy or if it is not possible to rein in inflationary pressures, as in the case of Argentina (ECLAC, 2012).[52]

3.4 Democratising the World of Work

So-called 'institutions of voice' – unionisation, collective bargaining and the right to strike – are essential for promoting social dialogue and

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weakened, while minimum wages lost much of their value, ceasing to be a benchmark (Furtado, in Marinakis and Velasco, 2006: 264). These Councils were reconvened in March 2005, with the arrival of Tabaré Vázquez's union-allied Frente Amplio government, and these negative trends reversed after minimum wages were decoupled from pension benefits. In 2005–2009, even before the economic recovery, the sectoral negotiations supervised and coordinated by the government generated rapid real growth in minimum wages and coverage of collective bargaining (Saget, 2008).

[52] Brazil and Argentina provide two further examples of active policies. While in 2000 minimum wages had lost 35 per cent of their value in Brazil compared to 1980, the arrival in 2004 of a new unionist government led to a rapid recovery in minimum wages, which increased by 72 per cent compared to 2000, and in 2009 were more than 35 per cent higher than those received in 1980. In 2010, they increased by more than double the previous year's rate of inflation (ILO, 2010: 70). The lesser openness to trade in Brazil meant that a greater proportion of minimum wages translated into higher levels of domestic consumption, unlike the situation in most open economies (Bonnet et al., 2012). In Argentina, when the National Employment, Productivity and Minimum, Vital and Mobile Wage Council – inactive since 1993 – was reactivated in 2004, minimum wages increased steadily each year to reach more than double their 1980 levels in 2009. It is impossible to say for sure whether this trend has continued, owing to uncertainty regarding the actual increase in inflation in Argentina caused by the lack of credibility of official statistics (ECLAC, 2009; MTEySS, 2012; ILO, 2012).

enabling workers' interests to be taken into account when deciding on key issues for their living and working conditions at macroeconomic, sector or company level (Durán, 2011). Thus they can become a vital tool to bolster labour citizenship and reduce inequality between workers and employers, and that between different categories of worker (including between formal and informal workers). In addition to the positive feedback we have observed between democratisation in the political sphere and in the world of labour (Kolben, Chapter 3, this volume), the emergence of players with less asymmetric bargaining power is also a condition for effective economic and social coordination. In contrast with that of the United Kingdom, the examples of Sweden, Denmark and Germany illustrate the importance that union centralisation and higher rates of unionisation and collective bargaining coverage can have in fostering growth, productivity and equality (Schneider and Karcher, 2010). Some research into the effect of unions and collective bargaining, and into the pros and cons of sectoral or centralised bargaining corroborates these positive effects, although their impact is lower in developing countries because they are less present (Hayter and Weinberg, 2011).

Again, problems in the legal design and operation of these institutions prevent this democratising function from working properly in the region, not only in the case of informal workers, who are generally excluded from the unions, but of workers in general. However, the area that trails furthest behind the others is resisted most strongly by employers and the possibility of having centralised union and collective bargaining structures (at least at sectoral and production-chain level) is under-served in the region's transformation agenda. This is happening despite the fact that today it is presented as a unique opportunity to expand innovation and reorganise work and training in order to even out the marked differences in productivity levels and working conditions according to company size. Collective bargaining at sectoral level or beyond exists in just a few countries, such as Argentina and Uruguay.[53]

Achieving this across the board would require the removal of the obstacles contained in the region's regulations on collective rights (which prevent the formation or spread of unions) and improving the quality of representation. In some countries, these rules were formulated under authoritarian and corporatist regimes that ensured that the government

[53] While the study by Weller and Roethlisberger (2011: 57–58) found that from 2002 to 2007 five countries (the Plurinational State of Bolivia, Brazil, Costa Rica, Mexico and Peru) saw a slight average increase in unionisation (rising from 13.5 per cent to 15.4 per cent), this is still only a very limited presence, which coincides with the union organisations' weak effect on job quality.

retained control over the processes of organisation and of formulating union demands, but left the players little room for bargaining. This is what occurred in Argentina, Brazil and Mexico (Cardoso and Gindin, 2009).[54] However, differences in the design and the trajectories of political regimes and also in the zones and instruments of state intervention led to varying degrees of autonomy, real representation and internal democracy in the unions with corporatist traditions.[55]

In other cases, as in most Central American countries, the system of collective rights fosters and exacerbates pluralism and a fragmentation that leaves the unions extremely weak and with little presence in society, despite the reforms intended to strengthen them. Moreover, repressive policies of collective action have increased in the context of the 'market-centred' model and of armed conflict (Anner, 2008).[56]

Chile is a paradigmatic case because it reflects employers' intolerance towards collective action, which explains the restrictions placed on the unionisation of workers with fixed-term contracts and on sectoral bargaining (left to the willingness of employers), while imposing severe restrictions on the exercise of the right to strike (e.g. the legality of replacing striking

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[54] Although unionisation rates tend to be lower than in the countries of Northern Europe, in Argentina or Uruguay, where sectoral collective bargaining does exist, coverage tends to be higher, as does the bargaining power of organisations. Unionisation rates among employees vary substantially within the region, with the highest in Argentina (37.6 per cent in 2006) and one of the lowest in Nicaragua (4.1 per cent). Likewise, Argentina has a higher coverage of collective bargaining (60 per cent in 2006) but the highest is in Uruguay (89 per cent), while Nicaragua had one of the lowest in the region (3.9 per cent) (Hayter and Weinberg, 2011).

[55] These differences can be seen in some examples that result in different challenges for achieving union democracy. In the Southern Cone countries, the arrival of centre-left governments in Argentina, Uruguay and Brazil in the 2000s (in this latter case, the president was a former union leader) and the interest in developing domestic markets favoured the recovery or consolidation of union power and the revitalisation of forums for social dialogue. Even much earlier, as a result of the political transition and the constitutional reform of 1988, Brazil's union structure underwent changes towards greater autonomy and pluralism, which also happened in Argentina with the arrival of democracy (Cardoso and Gindin, 2009). By contrast, Mexico has experienced a severe decline in union power over the last thirty years under governments from various political parties, all of which were nonetheless committed to the same export model based on low wages, severely curtailing the possibility to form or sustain independent unions and build genuine forums for social dialogue, even after the latest reform of labour legislation adopted in November 2012 (Bensusán and Middlebrook, 2012, 2013).

[56] Colombia is now the country with the highest number of trade unionists who have been murdered, while Mexico is among those posing the most obstacles to the emergence and consolidation of independent unions (Bensusán, 2010).

workers in certain circumstances). We have already noted that although minimum wage policies have contributed to poverty reduction there (albeit at very basic levels of meeting needs), low union density coupled with decentralisation and low collective bargaining coverage and restrictions on the exercise of the right to strike explain Chile's persistent social inequality, despite the success of its export model and the fact that it calls into question the quality of democracy (Durán, 2011; Reinecke and Valenzuela, 2011).

For all of these reasons, the transformation agenda of the union regime is still valid and should be seen as an unresolved issue of political democratisation in countries with strong authoritarian and corporatist traditions and in others with more liberal and pluralistic traditions. This is also a condition needing to be met by organisations seeking to transcend their members' narrow interests in order to include the unemployed, informal and more vulnerable workers (Huber, 2002; Anner, 2008; Cardoso and Gindin, 2009; Durán, 2011).

3.5 Empowering the Most Vulnerable Groups

The protection that labour law provides to the most vulnerable is one of its essential functions, as is the case with labour and social policy, in terms of reducing inequality between different categories of workers but also as a means of correcting the asymmetry of power vis-à-vis employers. These groups are made up of minimum-wage earners, most of whom are women, domestic workers, farm workers, indigenous peoples, migrants, the young and the less educated, among others (Saget, 2008; ILO, 2010: 41; Fontes et al., 2012).

In Argentina, Brazil and Uruguay there has been progress in formalising domestic or farm workers. Their conditions have been brought further into line with those of the other wage earners, and the legislation has included principles against all forms of discrimination (see the following paragraph). Nevertheless, the absence of a trade union policy to improve the income and working conditions of these groups remains one of the greatest obstacles to achieving full labour citizenship and ensuring the protection of these groups (Huber, 2002).

The absence or the inadequacy of policies to reconcile work and family life (flexible working-time management and support for family care, etc.) is one of the most important factors determining whether women can find employment in quality jobs (Arriagada, 2005). The adoption of rules in the 1990s allowing flexible working time aimed more at preparing companies to adapt to market volatility than at meeting the various needs of workers (for example, by gender or generation) and of families (according to the number of breadwinners and gender equality).

However, regulating this issue has become more important as women have increasingly joined the labour market and with the growing number of part-time workers, since a high proportion of such jobs tends to be precarious[57] and poorly paid – which is not necessarily what the worker would choose.[58]

Although the regulation of part-time work is unlikely to be a solution for the most vulnerable groups (because of the low wages paid), nevertheless if full payment of social security contributions could be guaranteed for these workers, this would be a step forward compared with the lack of protection in the current situation.

In the face of the new risk structure, high and persistent levels of informality and recognition of the need to protect workers not in a dependent relationship with an employer or in a covertly subordinate employment relationship have led to the need to extend certain wage-earners' rights to include non-wage earners, this being usually achieved through conditional social transfer programmes. However, efforts to establish a link between social benefits and labour benefits and to overcome the divisions originating in social protection schemes under neoliberal policies are exceptional. They do exist in Argentina and Uruguay, where child allowances originally granted to wage earners were extended to informal workers (although under different schemes) in order to achieve redistribution. Although these are recent and isolated cases, it is important to note that such an approach could lead the way to greater integration of protection and social security schemes in these countries, as the unions have been calling for in Uruguay (Midaglia, 2012).

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[57] Precarious work is characterised by employment instability, a lack of protection (labour rights and access to social security) and low wages (linked to poverty and insecurity) and exposes the worker to greater potential for abuse (Rodgers, 1989: 3). This author emphasises that atypical or nonstandard work and precarity are not equivalent.

[58] Argentina's reform, adopted in the midst of the crisis (2009) aims to achieve greater protection by setting a maximum part-time working week of 32 hours paid in proportion to a full wage and with full social security contributions. Following the trend towards strengthening union power in Argentina, it is up to collective agreements to set the maximum percentage of part-time contracts per establishment and the preferential rights of such workers to fill vacant full-time posts, thereby reining in the abusive application of this arrangement (Law 26474 of 5 February 2009). Similarly, the 2012 Mexican labour reform regarding hourly work was protective in nature, since it guaranteed payment of wages for a whole day, even if only one hour was worked (which certainly makes it a disadvantageous choice for employers) as well as access to legal and social security benefits (Bensusán and Middlebrook, 2013).

4. UPS AND DOWNS OF INSTITUTIONAL TRANSFORMATION

Major advances and significant results have been observed in the reduction of poverty and, to a lesser extent, of social inequality, with significant differences from one country to another. However, this has happened essentially as the result of a better economic environment caused by external conditions favourable for exports and for restoring the protective role of labour law, rather than by institutional transformation linked to a new strategy of development and structural change. We should therefore use some examples to draw attention to the limitations of these objectives and to the unfinished tasks standing in their way. The following three aspects stand out for their importance in correcting inequalities and because they highlight the need for this redesign to take into account the systemic nature of the institutions, as we illustrated in the second section of this chapter.

4.1 Informality and the Strengthening of State Control

The many different categories within informal employment (inside or outside the formal sector or households) require a set of differentiated policies, either to reduce it or to improve working conditions.[59] One way of limiting informality and reducing inequality between workers, which is suitable for 'disguised wage workers' or those who are not registered with social security, is to improve the state's capacity to enforce labour standards (Betranou and Maurizio, 2011: 23).[60] Similarly, formalisation of employment through contracts is a variable associated with access to other benefits, such as holidays, bonuses, social security coverage and training. However, at the beginning of this decade, four out of ten workers in the

[59] According to the guidelines adopted by the Seventeenth International Conference of Labour Statisticians (November–December 2003), informal employment comprises the following types of workers: own-account workers employed in their own informal sector enterprises; employers employed in their own informal sector enterprises; contributing family workers, irrespective of whether they work in formal or informal sector enterprises; members of informal producers' cooperatives; employees holding informal jobs in formal sector enterprises, informal sector enterprises, or working as paid domestic workers employed by households. See http://www.ilo.org/public/english/bureau/stat/download/guidelines/defempl.pdf.

[60] As Fenwick shows in his chapter, one of the assumptions of many proposals of labour reforms is the state capacity for enforcing the new rules, which is part of the problem to be resolved not only in less developed countries (Chapter 8, this volume).

region were deprived of this possibility (Weller and Roethlisberger, 2011: 50, 60).

The existence of high-profile rules on working conditions, with lesser bargaining powers between the actors (typical of some of the Southern Cone countries and of Mexico), had to be accompanied by an effective system of control (by the labour inspectorate in the region), consistent with the need to enforce them. By contrast, the fragility of that system came to light when the move was made towards the 'market-centred model' when it was decided to apply greater tolerance regarding non-compliance in order to prevent higher unemployment rates (Bensusán, 2008).

After the labour inspectorate (which was responsible for enforcing the rules) was effectively abandoned in Latin America in the 1990s or earlier, most of the countries adopted reforms of varying scope in the following decade (legal, regulatory, policy, plans and programmes) with one essential aim: modernising the inspectorate and (supposedly) making it more efficient. However, we found variations in the strategies pursued that could have been caused either by previous approaches or by the political alignment of governments and their influence on the content of the labour policies under various economic models (Bensusán, 2009). In Argentina, Brazil and Uruguay (all members of MERCOSUR) greater emphasis was placed on establishing a better balance between advice and sanction when left-wing governments came to power; this also happened to some extent in Chile with the arrival of democracy in the late 1980s. All these countries saw very positive changes to the labour inspectorate (although the best achieved and consolidated results were in Brazil), and this convergence can be explained by the political positioning of the respective governments and the presence of strong social actors, as well as by the incipient harmonising effect that regional integration in MERCOSUR is having on labour institutions, leading to higher levels of state responsibility and compliance.[61] Significant reforms also took place in some Central American countries and in the Dominican Republic as part of the requirements for signing the Free Trade Agreement with the United States (Piore and Schrank, 2007). Conversely, advances were less pronounced in Mexico, even after a recent reform of labour legislation severely increased penalties for breaching the rules, the effectiveness of which will depend on whether new control strategies are adopted and whether these are equipped with sufficient human and material resources (Bensusán, 2008; Bensusán and Middlebrook, 2013).

[61] For the results of these strategies in Argentina, see Senen and Palomino (2006); for Brazil (Cardoso and Lage, 2006; Berg, 2011; Rocha Pires, 2011); for Chile (Figueroa, 2006); and for Mexico (Bensusán, 2006, 2009).

In this context, Brazil is a regional example to follow in terms of restructuring the labour inspectorate. It is one of the countries best able to protect formal and informal workers within the formal economy through a combination of educational and punitive intervention strategies, proper work organisation, planning and performance evaluation, increased budgetary resources and conditions conducive to inspectors doing a proper job. Among other attributes, the labour inspectorate enjoys autonomy, job security and attractive performance-related pay, with control mechanisms to prevent corruption and encourage social stakeholders' involvement in the inspection process.

Nevertheless, while the coverage of the inspection system in Brazil is considerable, it is not without problems.[62] Around half of the labour force consists of unregistered workers and very few new workers have registered in the wake of the controls (Berg, 2011: 138). To give an idea of the limitations facing the labour inspectorate in meeting the requirements for protection within labour markets, even where it is strong, in the middle of the last decade it was estimated that it would take 25 years to register all employees at the rate at which controls were being made (Cardoso and Lage, 2006; Rocha Pires, 2008, 2011).[63] All of this further shows the limits of labour law and labour policy, which cannot solve the problem of informality by themselves, even among wage earners, unless they are coordinated with other macroeconomic and sectoral policies that place formal and protected job creation at the heart of the public agenda (French-Davis, 2011).

[62] One of these problems is that, through the incentives offered to inspectors, the institutional design favoured oversight of companies with more than 50 employees, so those with fewer than this were barely checked. Companies covered by unions and by the Ministry of Labour and Employment represent 70 per cent of formally registered enterprises, but comprise less than a third of those that actually exist (formal and informal), which reflects a widespread problem in the region. A detailed analysis of the strategies of the labour inspectorate in Brazil can be seen in Cardoso and Lage (2006) and Rocha Pires (2008, 2011).

[63] It should be noted that the successes of the Brazilian inspectorate were not the result of increasing the number of inspectors but of changing incentives, such as performance-related pay, new methods of inspection, and identifying the formalising of workers as the main objective, a process that began from the mid-1990s onwards. Another innovation involved setting up working groups to address problems in specific sectors (Berg, 2011: 137).

4.2 Protecting Domestic Work

The extent of protection needed by vulnerable groups in the context of inclusive labour policies and the need for such policies to take into account the particular characteristics of the persons needing protection may be illustrated by the case of paid domestic work, the conditions of which continue to show serious shortcomings from the point of view of access to rights and social protection.[64] Precarious conditions and informality affect domestic work more than other types of care work (e.g. health care) and reflect the existence of dual models of labour protection in the region.[65] Moreover, domestic work is characterised by larger numbers of female and indigenous workers, lower educational levels and a higher incidence of poverty than any other care occupation. Changes are taking place in the way this work is carried out, with only a very small percentage of workers now spending the night at the employer's house (traditional model) and an increase in hourly work for various employers, which involves new regulations (ILO, 2009, 2012a: 62–63; ECLAC, 2012: 162).

In the 1990s these workers still faced limitations to their rights, whether they were excluded from the other workers' scheme or had special terms and less favourable working conditions, such as longer working hours or no clear limits to their working time, wages paid partly in kind and restrictions on access to social security.[66] Despite significant reforms in this regard, working conditions vary greatly from one country to another and there is a significant gap in legal terms regarding a levelling of their working conditions with those of other workers, coupled with employers failing to meet their obligations across the board, even in the case of restrictive special schemes (ILO, 2012a).[67] In general, recent reforms have

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[64] In 2012, 6.7 per cent of the employed population in Latin America was engaged in paid care work, 5 per cent of which was devoted to personal care and 1.7 per cent to housework. This percentage was 9.2 per cent and 8.5 per cent of jobs in Chile and Brazil respectively, and 4.5 per cent in the case of Mexico (ECLAC, 2012: 38).

[65] While 63.2 per cent of care workers in the region (half of whom work in the public sector) lack social security, this percentage reaches 76.3 per cent in the case of home workers. Similarly, poverty affects 29.1 per cent of domestic workers, but drops to 9.6 per cent in the case of other employees in the sector (ECLAC, 2012: 37–38).

[66] For example, Argentina, Law 326/56 and Decree 7979/56; Chile, Article 8 of the Labour Code; Uruguay, various regulations. For a comparison, see ILO (2009).

[67] A review of labour legislation in 16 countries in the region reflects the diversity of conditions in domestic work: most state that the national minimum wage

tended to improve the working conditions of employees under the traditional model, meaning they are inappropriate or insufficient to effectively protect people working under the new arrangements.

In the second half of the 2000s, Uruguay, Brazil and Argentina began systematic efforts to expand labour protection to domestic work, either through legal reforms or campaigns in favour of formalising employment, reinstating the protective effect of government intervention that had characterised these countries in the period prior to the adoption of neoliberal principles. Recent reforms in this regard were approved in Argentina (in 2013)[68] and Mexico where new low-profile regulations were enacted in November 2012.[69]

In Brazil, where domestic workers were excluded from the general workers' regulation in 1943 (Consolidation of Labour Laws), the situation had been improving since 1972, when workers and employers were obliged to make mandatory social security contributions and these workers were granted the right to 20 days' annual paid leave.[70] The 1988 Constitution gave them the right to organise and recognised their right to minimum wages, weekly rest, an annual bonus equivalent to one month's salary, 30 days holiday, 16 weeks' maternity leave and access to pensions, while maintaining a system of reduced rights in relation to other workers. In 2001, under union pressure, they were granted right of access to guarantee funds for length of service, but employers were not obliged to contribute

applies to domestic workers, while other rules establish a professional or special salary or simply exclude them from this benefit (Honduras, Peru and Dominican Republic); most allow payment in kind (except Brazil and Bolivia) and place domestic workers under the general system of compensation, while in other cases special rules are established; voluntary affiliation to social security predominates, although it is already mandatory in countries like Brazil, Chile, Peru and Uruguay and only a few countries establish a working day in line with general workers, while most countries continue to apply long or unlimited working days (ILO, 2012a: 65–67). The 2012 Mexico labour reform changed the rules on the working day for domestic workers, but does allow a total duration of up to 12 hours a day (Bensusán, 2013).

[68] In late November 2012, Argentina's Senate passed a new regulation on domestic work, with significant advances in areas such as the length of daily and weekly working hours, overtime pay, social security and maternity rights, and was approved in a second round in the lower house the next year (Law 26844). See http://www.trabajo.gba.gov.ar/informacion/empecemos_por_casa/documentos/Ley_26844.pdf.

[69] For example, while the most protective reforms managed to set a maximum working day of eight hours (Brazil and Uruguay; ILO, 2012), in Mexico the new regulation allows up to 12-hour days (DOF, 2012).

[70] Law 5859, cited by Berg (2011: 140–141).

to these funds. Once again, in 2006, steps were taken to formalise domestic workers through the possibility allowed to employers to deduct the cost of social security contributions from their tax bill, and in 2008 the minimum age for domestic employment rose from 16 to 18 years. As a result of the reforms, formal domestic employment grew annually by 11.7 per cent between 1992 and 1999, while informal domestic employment grew by a mere 3.4 per cent a year. In the next decade, formal domestic employment continued to grow, albeit more slowly, but despite this progress only 27 per cent of domestic employment was formal in 2008, largely caused by people working for the same employer for fewer hours than the minimum established for access to legal protection (Berg, 2011: 127–128 and Figure 5.2).

In 2006 Uruguay reformed its legislation to level domestic workers' rights concerning the working week (44 hours), weekly rest and other items (such as unemployment insurance and health) with those of other workers. In addition, Minimum Wages Councils were set up for domestic workers to encourage unionisation, as they were for farm workers. The number of registered domestic workers rose from 20 000 in 2005 to more than 60 000 in 2012. However, the percentage of unregistered workers remains high, at 50 per cent of the total. This led to an intensification of the campaign to detect and correct evasion and Uruguay became the first country in the world to sign the International Domestic Workers Convention in June 2012.[71]

Argentina made greater efforts to formalise domestic work from 1999 onwards, with the adoption of a special mandatory social security scheme for domestic workers. In 2005, it was made easier to formalise procedures with the pension authorities, allowing electronic access to the system at a low cost, which boosted formalisation rates and protection of workers' working conditions. Nonetheless, five years later a high proportion of domestic workers were still not registered in this scheme. Moreover more than 40 per cent were excluded as they worked fewer hours than the statutory minimum. In 2013 Argentina approved a new law (26844) which replaced the old one (326/56) improving the protection of domestic work, and placed this regulation at the forefront in the region.[72]

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[71] Under Convention 189 ratified by three countries (Bolivia, Paraguay and Nicaragua) up to November 2012, in addition to Uruguay, domestic workers share the characteristic of working for a private home. This is equivalent to 7 per cent of the region's urban employment, although the characteristics of this group would suggest that this is an underestimation in measuring and that there are large differences between countries.

[72] The new special labour contract arrangement for domestic workers in private homes proposed in Argentina applies independently of the working day

4.3 Regulating Subcontracting and Sectoral Collective Bargaining

The need to 'bolster the productive fabric' puts small and medium-sized enterprises at the centre of the development strategy, since they have created a higher percentage of jobs, using various institutional mechanisms and public policies to advance their integration in export supply chains, which in turn generates domestic markets with potential 'multiplier effects on employment and income' (Godínez, 2011: 114).

However, the links that currently exist between large and small companies tend to exploit these as a resource for bringing down labour costs rather than promoting productive convergence and levelling working conditions. Institutional gaps and the poor development of sectoral collective bargaining are also factors that explain the great variety of conditions to be found.

The institutional gap in areas such as the subcontracting of work and triangular relationships has led to other extra-legal or informal mechanisms that encourage the use of these practices as a way of weakening the link between workers and beneficiaries of services and of imposing flexibility on recruitment and the use of the labour force, neglecting innovation and work reorganisation.

On the contrary, fostering subcontracting relationships between small and medium-sized enterprises and large ones, supported by an industrial policy geared to productive convergence, with protection for workers provided through sectoral collective bargaining and effective monitoring of compliance with labour obligations along chains could help to reduce gaps in wages and other working conditions. Here, the issue would be not to reduce the responsibilities of small- and medium-sized enterprises, which would be impractical in the region because of the acute questioning and poor performance of special schemes, but to generate incentives to contribute to raising their productivity, avoiding the degradation of job quality as a competitive strategy.

In this area, there is a clear need to promote appropriate interaction between the new institutional designs and public (labour and industrial) policies, with the participation of stakeholders, which requires governments that favour this type of intervention and actors with less asymmetric powers.

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or week, with no seniority requirement, and provides for an increase in annual leave, maternity leave, sickness and special leave for maternity, marriage, death of a spouse, *inter alia*, and the right to enter into collective bargaining (see http://servicios.infoleg.gob.ar/infolegInternet/anexos/210000-214999/210489/norma.htm).

In view of the consequences of the growth in atypical and triangular relationships, several countries have introduced legal reforms and adopted new legal criteria to increase the effectiveness of worker protection on production chains, their efforts enjoying a powerful boost in recent years as a result of pressure from various union bodies.[73] Here, without actually prohibiting the use of intermediation and subcontracting of work, two types of objectives were pursued. New requirements were imposed on the use of temporary employment agencies to reduce recourse to this kind of hiring and to encourage direct contracts, sanction simulations and clarify who the employer is and who is entitled to give orders to the worker; while also unconditionally extending joint and several liability between user companies (principal, beneficiary or contracting) and contractors. The aim is to improve the protection of workers and to reduce the incentives to use these practices as a strategy to lower labour costs in response to competitive pressures – which does not stop it from functioning as an instrument for specialisation or for cutting other costs. It should be noted that the new requirements indirectly compel the principal companies to monitor contractors much more carefully to ensure they discharge their labour obligations, a task which they will share with the labour authorities, all of which should result in a better level of control of labour standards.

Moreover, the idea would be to improve the opportunities for subcontracted workers to have access to unionisation and collective bargaining, a decisive factor in the effectiveness of other labour rights, which has also been accompanied by changes in trade union strategies.

These goals have not been fully achieved in the new regulations recently adopted in the region, but countries such as Chile and Uruguay do offer relevant examples.[74] Some changes along these lines were adopted in 2007 as part of a new wave of reforms with a strong protective effect on

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[73] The core document of the 16th Congress of the Inter-American Regional Organisation of Workers (ORIT) included the aim of unionising workers who have been 'tertiarised' (meaning there is a beneficiary of the work or service other than the employer) under forms of fraud/concealment of employment, subcontracting with a single beneficiary, cooperatives with fake partners and professionals with a single beneficiary. A key strand of its strategies also included incorporating the criterion of 'union network', to which workers who form the core of the company on which they depend could be connected (CSI-ORIT; http:/www.cioslorit.org).

[74] Among the main criticisms of the business sector regarding the new rules adopted in Uruguay, channelled through the Chambers of Industry, is the argument that they threaten the global trend towards company specialisation and the fact that the obligation to check contractors is transferred to the employer, when it is a responsibility of the State (CSI-ORIT; http:/www.cioslorit.org).

employees, providing solutions to common problems in the countries of the region. The details of these changes could be taken into account in possible future changes in other countries, although, at least in Chile, their application has aroused a great deal of resistance among employers. In Chile, where subcontracting is extremely widespread, Law No 20123 reaffirmed that the beneficiary (or principal) company is jointly liable with the contractor for the labour and social security obligations of subcontracted workers, including compensation, and joint and several liability applies if they fail to exercise these functions of control. The law also recognises the figure of staff supplier, establishing an obligation to register and to set up a wage guarantee as proof of solvency, and this may be allowed only on an exceptional and temporary basis. In addition, the law equates the health and safety conditions of internal and external workers (Martínez, 2008: 18–19).

It should be noted that while Uruguay has a well-developed system of union representation with a high level of dialogue with the government and business organisations, by contrast in Chile there are serious problems in increasing the rate of unionisation and gaining power for the unions, which, together with a more flexible labour model, partly explains the widespread precarity obtaining in the country, due largely to extended labour outsourcing, and the importance of more protective regulations for vulnerable groups (Figueroa, 2006).

Mexico's 2012 reform adopted new subcontracting requirements seeking to discourage the use of the practices of subcontracting, such as stipulating that they can be caused only by the need for specialisation, imposing restrictions on subcontracting all jobs or banning its use for the purpose of lowering working conditions. However, the extremely weak context and the poor quality of union representation coupled with an absence of an effective labour inspectorate will make it difficult to achieve the purpose of these rules (Bensusán and Middlebrook, 2013).

5. CONCLUSIONS

Progress has been made in Latin America in the last decade in terms of job quality and the reduction of inequalities between different categories of workers. However, changes must be made to the way institutions currently interact, in order to escape from the vicious circle in which a significant proportion of workers are trapped in low-productivity jobs, unprotected and excluded from the benefits of development. This means that, along with a strategy of structural change to achieve productive convergence and equality, as proposed by ECLAC, at least some of the labour institutions

must use performance evaluation to upgrade their rules and the structures for their application. To achieve this, account must be taken of their systemic nature and the reasons why they are not suitable in current conditions, as shown in this chapter. Likewise, the social protection system must evolve to provide universal coverage that is independent of employment status.

The changes in institutions and labour policies in the last decade in the Southern Cone countries are insufficient, but do seem to be moving in the right direction. Examples include: policies to formalise employment and protect vulnerable groups that take account of the different categories of informal workers; more effective monitoring strategies achieved by modernising the labour inspectorate; new rules on subcontracting and active minimum wage policies that seek to meet basic needs and to bridge the gap between these workers – particularly the most vulnerable – and workers who belong to unions.

Moreover, in a few exceptional cases, we have seen unions and sectoral collective bargaining and social dialogue becoming stronger (especially where there were none before), and a deepening of union democracy. Equally encouraging are social policies that seek to build a system of universal protection, on a contributory and a non-contributory basis, and the emerging interaction between labour and social policies. However, these changes have not spread and are not generally part of any long-term inclusive development strategies that can make them sustainable and avoid the trend towards the labour market acting as principal generator of poverty and inequality.

Another problem is that, although bolstering the power of the unions and collective bargaining and democratising the world of work are unresolved issues in most countries in the region, they have received less attention on government agendas and continue to generate strong resistance among employers. Nonetheless, this is an essential condition for promoting virtuous institutional interaction, increasing coordination and reducing (structural and dynamic) economic inequality. It implies changes in the relationship between the social partners – unions, employers and governments – to extend autonomy and reduce the asymmetry of power vis-à-vis employers, since inequalities in the functional distribution of income have increased in most countries. It also implies greater internal democracy within the unions so as to renew and legitimise their leaders, broaden grassroots participation and attend to the interests of the most vulnerable groups, thereby correcting inequalities between workers. If this does not happen, greater bargaining power for the unions could even increase levels of inequality between workers, a situation often exploited by advocates of neoliberalism to suggest that employee rights are privileges and to justify cutting them.

From the evidence presented in this chapter we conclude that some improved labour and social indicators are not sufficient for us to assume that problems of inclusion are being overcome or are significantly correcting inequality gaps, in addition to the fact that there are marked differences between countries. Nonetheless, the situation is far from the catastrophic predictions of the 1990s concerning the end of wage labour or the loss of the central interventionist role of the State and labour market institutions, as may be seen mainly in the countries of the Southern Cone. These threats, which derived from certain theoretical approaches but particularly from the region's response to recurrent crises faced from the 1970s onwards, seem to have no basis today. Moreover, there is strong evidence that the effects of the crisis on labour markets cannot be solved by decreasing the protection of formal sector employees or by making hiring more flexible; and that boosting aggregate demand through active wage policies was an important instrument that supported the economic recovery after the crisis of 2000 and later helped workers to cope better with the effects of the 2008–2009 global crisis.

Although European models of coordinated capitalism should remain a source of inspiration for rebuilding Latin American (labour and social) protection systems in order to reduce social inequality (as we have argued here), the liberal capitalist countries in Europe would do well to study the lessons learnt from the region's experience in contexts of crisis, both from their old mistakes when committing to labour flexibility and cutting rights during the 1990s, which failed to provide the expected improvement in the quantity and quality of jobs; and from their most recent, albeit incipient, accomplishments in reversing those policies. Meanwhile, the countries that have experienced some improvement should ensure that it is sustained, since it does not appear to have been accompanied by a change in their production structures to move towards reducing the segmentation continuing to affect their labour markets.

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7. Labour law in South Asia: A right to development perspective

Kamala Sankaran

1. INTRODUCTION

The trajectories of labour law reforms and shifts in the discourse around development have been fairly unrelated until recently. The linking of development and freedom (Sen 1999), the Declaration on the Right to Development, coupled with the widespread incidence of the 'working poor', have helped focus attention on the linkages between development and labour law. This chapter locates and analyses labour law reforms within a framework of a 'right to development' approach. It argues that the right to development approach balances the requirements of equity and social justice with the challenge of achieving higher rates of growth and flexibility, and offers a roadmap for labour law reforms in developing countries such as India. The need to renew labour institutions so as to ensure a more inclusive development for all stakeholders in the labour market and the workplace have been highlighted by Kolben and Bensusán (in Chapters 3 and 6 this volume). Such a perspective for labour law reforms is necessary given the often conflicting reform trajectories in countries undergoing rapid economic changes such as India. This perspective is also in harmony with the two key ILO Declarations of 1998 and 2008, and offers a justification for the direction of reforms suggested elsewhere in this book.

The chapter is arranged as follows: section 2 briefly presents a right to development approach and outlines its implications for labour law. Section 3 traces the debates that have taken place in the current period around labour law reform within India and evaluates these proposals from the perspective of a right to development approach. Section 4 analyses the overlaps between issues of social justice and labour law in order to understand the extent to which the latter could be a vehicle to achieve greater equity in development.

2. 'RIGHT TO DEVELOPMENT' APPROACH

The Declaration on the Right to Development (DRD), adopted by the United Nations in 1986, elaborates the concept of the 'right to development'. Article 1 of the Declaration states:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, and contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

The second paragraph of the Preamble recognises that 'development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom'. This statement of what constitutes development highlights several features: the right of individuals to participate in the process of development which encompasses various processes not merely those economic in nature, the enjoyment of individual freedoms, and the fair distribution of the benefits of such development. Social justice, in the sense of a fair distribution of the benefits of such development is a feature that this chapter focuses upon, together with the idea of equity which underpins this idea of development. But the DRD is more than a set of outcomes which are measurable, it also deals with the processes by which these indicators of development are pursued.

The focus on the *processes* of development as the means to achieve the outcomes and explicit indicators of development finds reflection in the debates that have surrounded labour law in the recent past. The ILO Declaration on Fundamental Principles and Rights at Work has been seen by many as laying down the means through which other labour standards relating to wages, conditions of work and social security could be achieved. These freedoms, perceived as critical to any process of development, have been characterised as 'core' rights and contained in 'core' Conventions of the ILO (Alston 2005; Langille 2005; Sen 2000). The connection between the capabilities framework as developed by Sen and the ILO Declaration and the contested nature of 'development' are considered by Kolben (Chapter 3, this volume) and von Broembsen and Godfrey (Chapter 5, this volume). The specific outcomes of development as identified in the DRD, and the associated concern that there is no 'race to the bottom', has been echoed by the ILO too in its call for a fair globalisation.[1]

[1] See the ILO Declaration on Social Justice for a Fair Globalization (2008).

This approach to the right to development that deals with both 'means' and 'ends' has significance for the debates surrounding labour law which is examined in greater detail in this chapter. The mirroring of concerns about means and ends articulated in the debates around the DRD provides the setting within which to examine the role of labour law in a developing country such as India.

The DRD correlates development with the enjoyment of a broad range of rights, adopting the well-known Cold War division of rights. This approach of the DRD is of course not unique, and to a great extent overlaps and builds upon other human rights. It goes on to identify the human person as the participant and the beneficiary of this right. This latter aspect of the DRD marks a value addition to the earlier Covenants dealing with human rights since it grants a participatory right to the individual in determining the content of these interrelated rights (Sengupta 2001). Salomon notes that:

> The DRD places people and their human rights at the centre of the processes and outcomes of national and international economic and development strategies. The way in which duties are framed in the Declaration is to require, on the one hand, that attention be focused nationally in order to provide a domestic environment in which equitable and sustainable poverty-reduction and development can be realized (participation, persons as beneficiaries of the right, interdependence of rights, equality of opportunity for all with a focus on an active role for women in development processes). (Salomon 2008: 24)

While the creation of an enabling environment (nationally and internationally) has been identified as a core norm for actualising the right to development (Vandenbogaerde 2013), this chapter focuses on the creation of an appropriate enabling national environment. The DRD gives active agency to the individual in the decision-making process in order to ensure the equitable outcomes of development decisions and to guarantee that 'fundamental freedoms' can be realised. The duty falls upon states both domestically and internationally to cooperate so as to ensure these outcomes (Salomon 2008). Such a duty cast upon the State has been long recognised in India. Indian political thought has long recognised the duty of the King to protect subjects and common and private property (Sharma 1982). The presence of the Directive Principles of State Policy (DPSPs) contained in the Indian Constitution echo the broader principles of the equitable goals of development contained in the DRD. The DPSPs mandate the State to observe these principles while making laws.[2] The

[2] The DPSPs were adopted as Part IV of the Constitution of India, 1950 and were made non-justiciable. The initial articles in this Part state:

DPSPs set a limit on the plenary powers of legislation that Parliament and State Legislatures enjoy, and, though not directly enforceable, the judicial review of legislation by the Supreme Court has in the past few decades cited the DPSPs while determining the constitutionality of various legislation, including labour laws.[3]

The implications of such a 'right to development' approach for labour law reforms are significant. It supports the inclusion of a broader social justice and equity agenda, which may allow labour law to address issues and persons falling outside the employment relationship, which has been the traditional scope of labour law. In other words, this approach could facilitate the challenging of social hierarchies and structural inequalities, therefore allowing for the adoption of a more inclusive labour law (see Deakin, Chapter 2, this volume).

The right of participation requires that labour laws be inclusive and cover all segments of the working people, and, further, that workers exercise some agency in the process of the formulation and implementation of such laws, and that they not be reduced to mere beneficiaries of these laws. The value of workplace democracy and its role in development are discussed further by Kolben (Chapter 3, this volume). Labour laws are often seen in instrumental terms as vehicles for ensuring social justice, particularly in developing countries (see Bensusán, Chapter 6, this volume). Social justice is considered as a foundational principle underpinning the Constitution, a part of its so-called 'basic structure' in India, and labour law is seen to 'level the playing field' between employers and workers by providing fairness and voice to workers in determining the employment relationship.[4] Labour policy in India has, for the past several decades,

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37. The provision contained in this Part shall not be enforceable in any Court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be duty of the State to apply these principles in making laws.
38. The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic, and political, shall inform all the institutions of the national life . . .

[3] See, for instance, *Excel Wear v. Union of India* AIR 1979 SC 25, where the Court was dealing with the constitutionality of the provision of the Industrial Disputes Act 1947 dealing with the right of employer to close down a business establishment and the requirement of the State to grant prior approval for such closure.

[4] Thus the early decision of the federal Court in 1949 in *Western India Automobile Association Ltd. v. Industrial Tribunal* (1949) LLJ 245 (FC) held that adjudication by an Industrial Tribunal does not mean adjudication according to the strict law of master and servant and held that an adjudicator's award may

also reflected this approach. Tripartism has been an important plank of labour policy and the emphasis of labour law has been on providing a significant role to the state in employment disputes. The central role of the colonial state was inherited by the newly independent state that proceeded to give itself a primary role in labour relations. At the same time, the ILO policy of tripartism was keenly adopted in all the newly independent South Asian countries in the twentieth century. However, compulsory adjudication of industrial disputes (rather than the institution of collective bargaining) has been viewed as the necessary and countervailing force in otherwise unequal employment relationships in the region. The enactment of a large number of central and state labour laws relating to wages and social security have sought to place a floor and safety net in place to prevent exploitation of workers and advance the cause of social justice.[5] The ability of the state to use labour laws to achieve social justice for all those who work has been limited, given the narrow scope of labour laws in India. These laws, which at present are largely 'employment-centric', do not extend to those workers who are not in employment relationships and who are classified as self-employed/own account workers. An inclusive approach would require the development of a mechanism to include such self-employed/own account persons, if the goals of labour law to achieve social justice and equity are to be realised. It is also necessary to include, within the ambit of labour law, workers in the formal sector who are currently excluded due to limitations in the applicability of the laws to certain sectors, types of workers, size of establishments, etc. The process of informalisation of employment relations in recent years has also led to greater numbers of workers employed via contractors/intermediaries in several establishments/firms in India. An informal *worker* approach, in contrast to an informal *sector* approach, would thus cover a range of work/employment relationships and include those employed/engaged in economic activity.[6]

The great overlap between those in informal employment and those

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contain provisions for settlement of a dispute which no Court could order if it was bound by ordinary law.

[5] Speaking for the Supreme Court in 1978, Justice Krishna Iyer in *Gujarat Steel Tubes Ltd v. Gujarat Steel Tubes Mazdoor Sabha* 1980 AIR 1896, noted: 'The right to unionise, the right to strike as part of collective bargaining and, subject to the legality and humanity of the situation, the right of the weaker group, viz., labour, to pressure the stronger party, viz., capital, to negotiate and render justice, are processes recognised by industrial jurisprudence and supported by Social Justice'.

[6] See, generally, Report of the National Commission on Labour (Government of India 1969, 2002), NCEUS (2009), Chen (2006), Sankaran (2011).

who are poor is demonstrable in the vast numbers in India who constitute the *working* poor. This indicates a significant decent work deficit: nearly 80 per cent of those in the informal sector are classified as poor and vulnerable in India (NCEUS 2007: i). Data reveals that the incidence of poverty in India is greater among the employed than among the unemployed; among those below the poverty line (22 per cent of the population in 2004–2005), 15 per cent were poor because of low income from work, 2.5 per cent due to unemployment, while 4.5 per cent were poor due to underemployment (Papola 2008: 8). Other studies suggest that one quarter of all workers were poor in 2011–2012 (the year for which the latest all-India quinquennial National Sample Surveys on employment are available) on the basis of the official poverty line. Further, if the poverty line were enhanced to US$2.00 per day (PPP) about 58 per cent of all workers would be declared 'poor'.[7] The World Bank raised the global poverty line to $1.90 per day (2011 PPP) in October 2015, based on which the percentage below the poverty line according to 2011 data is 21.25 per cent of the population, down from 31.43 per cent of the population in 2009.[8] India also carried out a massive Socio Economic and Caste Census (SECC) of the population in 2011, the results of which are slowly being made available. The census collected data on seven markers of deprivation which are fairly unique: households living in a *kuccha* or non-permanent dwelling; no adult member between the ages of 18 and 35; female-headed households with no adult male member aged 16–59; households with a differently-abled member with no other adult able-bodied member; all Scheduled Caste/Scheduled Tribe households; households with no literate adult member over the age of 25; and landless households mainly deriving their income from manual labour.[9] These markers of deprivation are not the kinds of deprivation normally discussed in the 'capability' approach literature; instead they pertain to the 'social and economic backwardness' used by policymakers and the courts in India to determine the constitutionality of the claim of deprived groups and quantum of reservations (affirmative action of set asides/quotas) applicable to such groups which is permissible under the Constitution.[10] Notwithstanding this, the SECC noted that landless households mainly deriving their income from manual

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[7] India Labour and Employment Report, 2014 at p. 62.

[8] See http://povertydata.worldbank.org/poverty/country/IND (accessed: 29 Nov. 2015). For data based on the $1.25 global poverty line see World Bank (2015).

[9] See http://secc.gov.in/reportlistContent for further details.

[10] In fact, this SECC was constituted following a Supreme Court direction that continuing reservations for the category constitutionally referred to as the 'social

labour constitute the largest group of deprived households, reinforcing the picture of massive numbers of 'working poor' in India. In 2013–2014 around 50 per cent of India's working population continued to be self-employed, 30 per cent employed as casual labour and around 3 per cent were contract workers, indicating their uncertain and irregular income levels. In fact 78 per cent of households surveyed reported having no wage/salaried persons in their households. A mere 16.5 per cent of those employed were wage and salary earners (Labour Bureau 2014: 19, 30).

Social security measures that specifically address deprivations arising out of the world of work are worker-centric in that they require a minimum period of eligibility as a 'worker' prior to accessing social security benefits. Such social security measures may not cater to those who are vulnerable and poor precisely because they do not have access to work. The high incidence of the working poor indicates that the capacity of labour law (understood as covering the regulation of employment relations, working conditions and social security) should be expanded so as to enhance the employability and livelihood options as well as to benchmark minimum standards of those in informal employment.

Strategies for poverty alleviation or for the legal empowerment of the poor need to be closely linked with a broadened notion of social security that create the means for generating employment/self-employment and economic security. Social security measures thus need to be both protective and promotional, and both employment/livelihood security and income security are important aspects of rights at work that labour law must ensure and protect. Under a right to development approach, economic security and employment and livelihood generation, via the creation of jobs and expanding self-employment potential through access to resources, credit and other targeted policies, would become important aspects of social security. This is in contrast to the traditional approach which provides cover against specified contingencies or social assistance by means of monetary transfers alone. The redesigning of the labour institutions in each country needs to be customised, keeping the specificity of each country in mind (Marshall and Fenwick, Chapter 1, this volume). Promotional aspects of social security play a significant role in reimagining social security structures in India and other South Asian countries where formal employment accounts for a small part of the workforce (Ahn 2008: 1017; Guhan 1993).

The participative role in decision-making assigned to all persons in the

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and educationally backward' must be based on data and be subject to judicial scrutiny.

right to development approach also has implications for labour law, particularly in identifying new avenues for workers' participation in decision-making at the management and shop-floor levels for those in formal employment, and creating a role in urban/rural development planning for those in informal employment and who are dependent upon public spaces and the commons for their livelihood. In short, the scope of labour law and labour policy needs to be vastly expanded to ensure just work and employment outcomes for the workforce.

Finally, the right to development approach has implications for the territorial limits placed upon the domestic labour law of each country. The duty cast upon the states, individually and collectively, to cooperate in order to ensure fair and just development programmes indicates that the claims generated by labour law have extraterritorial implications and also flags the need to have an appropriate international enabling environment. States and international institutions have a duty under the DRD to ensure that international trade and global supply chains produce fair outcomes within the domestic labour market which is impacted (Salomon 2008: 22). Other chapters in this volume suggest directions for changes in the normative framework to better cover the risks and vulnerabilities of those engaged in production that is organised along global value chains (von Broembsen and Godfrey, Chapter 5, this volume). This chapter reviews some of the developments in India to highlight important areas for a labour law reform agenda which could be viewed as forming part of a larger right to development perspective.

3. AGENDA FOR REFORM IN THE LABOUR LAW

This section analyses some of the key debates concerning labour law reforms in India, and some of these themes have been analysed by Marshall and Fenwick (Chapter 1, this volume). This section suggests possible directions for reform as framed within a right to development approach.

3.1 The Formal Sector

Debates in the region have centred on industrial employment in the formal sectors, including in export zones.[11] The need for flexibility in production

[11] The formal sector is referred to as the organised sector in the literature and legislation in India (see, e.g., NCEUS 2007: 3; 2009: 10).

lines to respond to changes in global and domestic demand has been at the centre of many debates. That the debates address formal sector employment comes as no surprise given that Indian labour law mainly deals with the formal sector and also considering the central role certain key industries in the public sector played in the decades following independence (see NCEUS 2009: 168–169).

A social compact between government, industry and national trade unions had underpinned the initial path of development adopted in India over sixty years ago. Massive public sector investment in critical industries was expected to trigger higher growth and generate employment. A legal framework was adopted that gave centrality to the state so as to ensure industrial peace (see NCEUS 2009: 169). This was arranged through several key features: compulsory adjudication of disputes; prior permission from government for retrenchments and closure in larger enterprises; and development of a tripartite structure of labour institutions that determines labour policy (Planning Commission 2007: 6–12).[12] Accommodating trade unions affiliated to major political parties resulted in the absence of a law concerning the recognition of trade unions at the central level; all major national trade unions were represented in voluntary arrangements in the public sector (see Ahn 2008: 1023). Even today, the government continues to have oversight on collective bargaining in the public sector while, in the private sector, adjudication of collective and individual disputes is predominant. The government and public sector comprise the major share of formal sector employment (NCEUS 2009: 11). The government is expected to discharge its role as a model employer in addition to that of an active manager of industrial disputes. Therefore, under the social compact, labour law was largely seen as a vehicle to ensure peaceful industrial growth; its capacity for redistribution was confined to maintaining job security and fair wages for those in formal employment (NCEUS 2009: 169).

The challenge to union power in India is a consequence of both the disinvestment in public sector enterprises (which have been traditional centres of trade union influence), and the increasing use of contractual employment in these enterprises. The result has had adverse effects on the workers' role in decision-making at the workplace (Sharma 2006: 2083). Trade union density as a proportion of total employment has been low in India due to largely non-unionised informal employment and was 2.4 per cent in 2005 (Hayter and Stoevska 2011). The right to development

[12] Significantly, the terms 'industrial law' and 'labour law' were used interchangeably, indicating the limited scope of the labour law.

approach in formal employment relations also requires that a greater 'voice' be given to workers in decisions affecting the workplace; addressing the need to rectify the democracy-deficit in the workplace (see Deakin, Chapter 2 and also Kolben, Chapter 3, this volume). Furthermore, it widens the identification of those who are stakeholders in labour-related matters: the shift from strict tripartism to broader forms of social dialogue processes acknowledges that those who are not directly part of the work relationship could also be stakeholders, and thus have a voice in determining workplace relations. This may be a positive development of the decent work agenda, and may contribute to broad-basing the requirements of voice in workplace decision-making. Strengthening social dialogue institutions would find wide support given the long history of tripartism that countries in this region have experienced.

The disinvestment in the public sector and the opening up of the economy to foreign direct investment – both a cause of and part of dramatic changes within India – have triggered debates around labour law in India. These debates have involved various stakeholders in the employment relationship: the private sector establishments covered by employment protection legislation demand greater flexibility in employment (*review of employment protection legislation*), the right to close down businesses without prior governmental permissions (*an exit policy*) and *simplification* of the laws; the government and employers have highlighted the onerous burden that enforcement places upon employers; central trade union organisations not only oppose such changes, organisations and trade unions among workers in the informal economy demand some degree of social protection and regulation of working conditions; state governments demand that labour matters should no longer be in the concurrent list of the Constitution of India so that they can reform labour law within their jurisdiction (Planning Commission 2007: 23; Shah: 2014). The dominant debate during the last fifteen years has been whether to make labour markets more 'flexible' – that is, to permit employers to freely determine employment decisions and limit job security so as to respond to changes in the economy. The positions of business organisations and trade unions are fairly polarised on labour law reform, and industry wants a reduction in job security (increased flexibility) to be traded off against higher retrenchment payments.

What is interesting about this debate is that calls for labour law reform have continued even in the period of high rates of growth of the economy, on the premise that 'but for' such labour laws, growth would have been higher. Several studies in the past 15 years have focused on employment protection laws (permission for retrenchment/lay-offs/closure and judicial scrutiny of dismissal decisions) as markers of labour inflexibility (Ahsan

and Pagés 2009; Besley and Burgess 2004; Fallon and Lucas 1991). Some studies have argued that decline in employment in certain sectors was due to such rigid laws (see Sharma 2006: 2079), but this has been doubted. These debates have also chosen to ignore the startlingly low proportions of the workforce who are covered under these labour laws. For instance, studies indicate that only 3 per cent and 5.5 per cent of the workforce, respectively, are covered by the Factories Act 1948 and Chapter V-B of the Industrial Disputes Act 1947, both laws which are central to the labour regulation debate in India.[13]

More recent studies point to the increase in employment despite such restrictive laws, or have doubted the link between pro-worker legislation and lack of industrial growth (Deakin and Sarkar 2011; Kannan and Raveendran 2009) and some have doubted the methodology used by earlier studies (Bhattacharjea 2006, 2009). Many have also pointed to the flexibility of employment decisions due to the use of contract labour (engaged through a contractor) and through casualisation (Sharma 2006; Sundar 2005). This has led to a shift in the debate, from the demand for changes in the provisions of the Industrial Disputes Act 1947 (IDA) (exit policy, employment flexibility) to changes in the Contract Labour (Regulation and Abolition) Act 1970 (freedom to engage contract labour in core and perennial lines of work).

The use of contract workers has increased in certain sectors, with the share of contract workers in total organised employment in manufacturing going up from 15.59 per cent in 2000–2001 to 26.57 per cent in 2010–2011 leading to a reduction in directly employed persons (Kapoor 2014: 17). Some state governments such as Andhra Pradesh have already reformed their law to permit contract labour in non-core sectors (NCEUS 2009: 177). Trade unions would not oppose increased flexibility in hiring decisions to the extent that they currently do were equivalent wages and other benefits made available to those who work through contractors and alongside regular employees in the establishment of a principal employer. A clear duality in the labour market emerges as a by-product of informalisation, with permanent workers enjoying benefits while an increasing pool of contract labour employed in the same establishments receive income levels comparable to those in the unorganised sector. Combining flexibility with poorer working conditions for contract labour follows the low road to development. Provisions in the law that ensure equivalent wage payments for similar work done by contract labour and regular employees are rarely enforced. The problem thus becomes one of poor enforcement

[13] India Labour and Employment Report 2014 at p. 118.

(discussed below in the section on 'Access to justice') rather than a 'gap' in the labour law.

The recently elected government has begun the process of amalgamating, simplifying and rationalising India's numerous labour laws into four Codes covering: wages; industrial relations; social security and welfare; and safety and working conditions. In addition, there is also a Small Factories Bill that would regulate manufacturing factories employing fewer than 40 workers; at the time of writing this Bill is under consideration at the tripartite body.[14] At present any establishment that employs 100 workers requires the prior permission of the government for any retrenchment, lay-off or closure. The present government has proposed a Labour Code on Industrial Relations that increases this threshold limit for the requirement of prior permission to 300 workers, and also increases the severance pay in such cases. Stringent penalties have been proposed for participating in illegal strikes. There is strong opposition by trade unions to these proposed reforms. The periodic Indian Labour Conference (tripartite in structure) held in July 2015 recorded that the specific proposal for labour law reform should be considered and discussed in the first instance in the tripartite forum.[15] These proposals continue to face stiff opposition from trade unions. The future of the proposed labour reforms appears uncertain at this stage.

3.2 Informal Employment

What has been characterised as 'typical' employment elsewhere (formal full-time contracts, social protection and regulated conditions of work) has always been 'atypical' in the South Asia region, since those in formal sector employment have always constituted less than 15 per cent of the workforce. Data reveals that a large proportion of the population falls within the informal economy: in India, over 85 per cent; in Pakistan, 70 per cent; in Bangladesh, 79 per cent; in Nepal, 73 per cent; and in Sri Lanka, 66 per cent (Ahn 2008: 1017). The ILO notes that 'non-agricultural employment in the informal economy represents 82 per cent of total employment in South Asia' (ILO 2014: 6). Much of this workforce is

[14] See http://www.prsindia.org/uploads/media/draft/Labour%20Code%20on%20Wages%20Bill,%202015.pdf and http://www.prsindia.org/uploads/media//draft/Labour%20Code%20on%20Industrial%20Relations%20Bill%202015.pdf for the draft Codes available for comment.

[15] Conclusion of the 46th Indian Labour Conference, 20–21 July, 2015 available at http://labour.gov.in/sites/default/files/46-ILC-Record_of_Discussion.pdf.

self-employed,[16] with 73 per cent of all workers engaged in own account enterprises in India; this indicates the sheer scale of the self-employed sector. It also points to overlap in the concepts of 'enterprise' and 'worker'. This duality must be factored into any reimagining of labour law in order to cover own account workers who are simultaneously both employer and worker (Sankaran 2011). The National Commission for Enterprises in the Unorganised Sector (NCEUS) notes that the 'dualism' in counties of South Asia 'significantly has moved away from the textbook division of agriculture and non-agriculture (often referred to as traditional and modern) sectors and has been replaced by the informal and formal dichotomy, cutting across all sectors'.[17]

The Unorganised Workers' Social Security Act 2008 in India provides a broad definition of worker that includes not only those employed but also those 'engaged' in an industry (c I, s 2).[18] (This law is yet to be fully operationalised.) Despite a widespread debate over the need to provide minimum working conditions for those in informal employment, the law concerning unorganised workers as enacted in 2008 only provides for social security.

3.3 Social Security

A right to development approach recognises that all citizens have a right to improve their capabilities and that policies relating to social protection should be both protective and promotional (Drèze and Sen 1991; Jhabvala 1998). A labour law that is consistent with such a developmental approach must be universal and inclusive in the protection it affords, and should cover

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[16] The National Commission for Enterprises in the Unorganised Sector (NCEUS) of the Government of India distinguishes between 'own account' workers – who do not engage any outside workers but may work alongside unpaid family help – and those who engage one or more, but fewer than ten, worker(s) to work alongside them. Own account enterprises constitute the bulk of all enterprises in India: they comprised 87.4 per cent of all enterprises in 1999–2000; establishments employing two to five workers made up 10.9 per cent; and those employing six to nine workers constituted 1.7 per cent (NCEUS 2007: 51).

[17] National Commission for Enterprises in the Unorganised Sector, *The Challenge of Employment in India: An Informal Economy Perspective* (Government of India, 2009) (henceforth, NCEUS) p. 24.

[18] An 'unorganised worker' is defined as 'a home-based worker, self-employed worker or a wage worker in the unorganised sector and includes a worker in the organised sector who is not covered by any of the Acts mentioned in Schedule II of the Act' (c I, s 2(m)). This latter clause covers those in informal employment in the formal sector who for reasons of length of employment, employment via intermediaries, or the nature of their work may not have been covered by laws applicable to the formal sector.

both those who are in employment relationships and the self-employed. Various innovations in social security systems, particularly in Latin America are discussed by Bensusán (Chapter 6, this volume). Social protection measures that cover all working people are, of course, narrower than general citizenship-based entitlements. Despite this, social protection acts as a buffer against poverty and is an important poverty reduction tool. Access to land, market and credit facilities should therefore be seen as necessary components of a proactive labour policy addressing the needs of informal workers. In addition, granting 'recognition', either legally or as stakeholders, in determination of policy would become essential. Social dialogue mechanisms need to expand so as to include unincorporated enterprises and family concerns which constitute the bulk of unorganised sector workers.

The Unorganised Workers' Social Security Act 2008 is a major milestone in the pursuit of creating an entitlement to social security for everyone in India. Currently, the law is restricted to dealing with certain contingencies and is protective rather than promotional in its formulation. It provides for a limited number of money transfers triggered by specific circumstances. Implementation of this law has yet to proceed in any meaningful manner; this is a development that requires close monitoring. Moreover, the latent ability of labour law to work proactively towards creating more employment and livelihoods must be further developed.

An example of a broadened agenda for labour law is the two Draft Bills prepared by the NCEUS that regulate conditions of work in the unorganised/informal sector and also create a 'meta right' for those in this sector to ensure that development of urban and rural spaces took into consideration their livelihood (NCEUS 2007: 202–214). This is achieved through the creation of a tripartite structure of boards at the national and state levels with broad-based membership from trade unions of both wage workers and self-employed workers. These boards would be mandated to develop polices to ensure access to resources, public spaces, town planning bodies and credit facilities in order to promote the livelihoods of those in the unorganised sector. (Examples of institutional innovation based on the context and history of six countries are discussed by Fenwick (Chapter 8, this volume). The ILO has also moved in the direction of recognising the right to social security as a basic human right and its role as a 'pivotal tool' in a globalising world.[19] This exemplifies the development of labour law through a right to development approach.

[19] See, for instance, ILO, *Social Security for Social Justice and a Fair Globalization*, *Report VI*, International Labour Conference, 100th Session, Geneva, 2011; ILO, *Extending Social Security to All: A Guide Through Challenges*

3.4 Women Workers

Labour law's gendered nature links it to the weaker position of women in the labour market. National accounts of labour in India fail to consider women's unpaid work within the household (Ghosh 2009: 9–10; Sankaran 2008a): minimum wage rates do not impute any value to the unpaid domestic and care work that women perform for the household. In the case of home-based workers, labour law in India does not compensate for expenses of housing, lighting and sanitation incurred by the home-based workers and which would otherwise have constituted a cost to the employer/buyer (NCEUS 2007: 90–91). Women's contribution of both labour and input costs is rendered invisible by the gendered nature of labour law. A further aspect that often impacts women workers is the enumeration of dependants, under the social security laws and collective agreements, which grant preference to relations of the male spouse. This reproduces the gender bias of laws dealing with rights within the family.

Women often work in industries and sectors where payment systems are piece-rated (Ghosh 2009: 6). An equivalence to time-rated wages is not established and, as a result, women work longer hours to achieve a minimum wage (NCEUS 2007: 90; Sankaran and Madhav 2011). This is more acute where women are home workers and their children have to work alongside them to obtain a decent wage (NCEUS 2007: 35, 105). Unpaid family workers are invisible in labour law: their contribution is not computed and their relationship to the main worker is often as an employee, with traditional control exercised by patriarchal and parental authority. Labour law needs to make visible this contribution by granting the status of 'worker' to such unpaid family 'helpers'.

The undervaluation of women's work in gender-segregated occupations and the failure of the law to value women's work adequately is a source of discrimination. In India, the Equal Remuneration Act 1976 lays down the principle of equal remuneration for the same work, or work of a similar nature, for men and women within the same establishment. Same or similar work has been found to fall short of the requirement of equal pay for work of equal value to be found in the Equal Remuneration Convention (No. 100) that India has ratified (ILO 1951). Complaints have often been raised by trade unions to the ILO regarding compliance with

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and Options (Geneva, 2010); ILO, 'Conclusions on Promoting Rural Employment for Poverty Reduction', International Labour Conference, 97th Session, Geneva, 2008.

Convention No. 100. An inclusive approach to labour law reform would prioritise the de-gendering of labour law in view of the relevant ILO Conventions.

3.5 Migrant Workers/Bonded Labour

Migrant workers are one of the more vulnerable sections of the workforce in the South Asia region. During the colonial period, migrant workers have been an important source of labour in plantations and mines. Today, they constitute a sizable proportion of agricultural workers. Much of the rural to urban as well as the rural to rural migration is poverty driven; whole families can migrate in search of work, becoming part of the vulnerable urban poor.

Contractors and intermediaries recruit rural men and women on a large scale to work as construction labour in various sites (NCEUS 2007: 38, 41). India has a law in place to deal with inter-state migration (GOI 1979); however, it does not deal with intra-state migration which is also a dominant form of internal migration. There is thus an overlap between migrant workers and contract labour. Where contractors are employed to hire migrant workers, the law should recognise and enforce a joint liability shared between the contractor and the beneficiary (even if the migrant workers cannot be brought into a direct employment relationship with the principal employer/user enterprise) for payment of wages and ensuring working conditions. Presently in India, contract labour law places primary responsibility for payment of wages and provision of amenities upon the contractor and, failing that, upon the principal employer (GOI 1970, c V, s 21(4)). The Contract Labour (Prohibition and Regulation) Act 1970 is poorly enforced, creating an incentive for the informalisation of the existing labour force. A joint liability system at the first instance may prove beneficial to workers who often have no access to the principal employer/user enterprise for whom the work is being performed. Apart from improving enforcement, stronger regulation of contractors and intermediaries is essential in industries such as construction, domestic work, agriculture, brick-kilns work, quarrying and mining, where labour recruitment is conducted through contractors (NCEUS 2007: 38).

Much of the debate within India, Pakistan and Nepal, and in the ILO has centred on the definition and identification of bonded labour and the degree to which it overlaps with forced labour, as understood in the ILO Conventions on the subject. Indian courts have made a critical link between payment of wages below minimum wages and forced labour under the Indian Constitution (NCEUS 2007: 43). They held that labour or service to another may be compelled by: physical force; force exerted

through a legal provision for imprisonment or fine in case the employee fails to provide labour or service; or even hunger and poverty, want and destitution. The interpretation of the Indian Supreme Court has been that forced labour includes working at wages below the statutory minimum as it is a form of 'economic coercion' – on the basis that no person would voluntarily agree to work at less than the minimum wage. Any factor which deprives people of a choice of alternatives and compels them to adopt one particular course of action may properly be regarded as 'force'. If labour or service is compelled as a result of such 'force', it would be considered 'forced labour' (NCEUS 2007: 129).

The ILO has noted that forced labour cannot be merely equated with low wages or poor working conditions (ILO 2009: 5). The Indian position is thus much broader than the international one; the ILO has been wary of using wage levels to determine forced labour. This approach appears to be linked in part to the ILO's reluctance to treat wages as a basic human right relating to labour. The ILO's Forced Labour Convention, 1930 (No. 29) which India has ratified, treats forced labour as comprising situations where work or services are exacted under the menace of a penalty and also where these are undertaken involuntarily. The ILO supervisory bodies have interpreted 'involuntary' in the context of whether the consent was freely given or was coerced. The ILO has adopted a Protocol to Convention No. 29 in 2014 which recognises newer forms of forced or compulsory labour such as sexual trafficking, and addresses gaps in implementation to effectively prevent and eliminate such forms of forced or compulsory labour.

The courts in India can presume the existence of bonded labour where forced labour exists. This presumption may be rebutted by the employer and also by the State Government if it so chooses but unless and until satisfactory material is produced for rebutting this presumption, the Court must proceed on the basis that the labourer is a bonded labourer (Sankaran 2009). Studies indicate that forms of neo-bondage – where, in return for an advance, workers are expected to work for an entire season – are common in India; and these also fall within the scope of the ILO's concept of and standards on forced or compulsory labour. There is debate within India over whether such forms of employment constitute forced labour and whether it is different from bonded labour arising out of customary forms of caste discrimination or bonded debt (Breman et al. 2009). The practice in sectors such as diamond cutting, brick kilns work and agriculture is often based on these kinds of arrangements (NCEUS 2007: 105–107). The challenge for labour law is to recognise such practices within its scope, that is, to classify contracts as employment relationships where an advance replaces periodic wage payments. Labour law should be

capable of regulating such relationships instead of prohibiting them, as is the current position.[20]

3.6 Social Dialogue/Access to Justice

The ability to adapt social dialogue processes for the informal economy constitutes a special challenge. Since a large number of workers within the informal economy are self-employed/own account workers, the dialogue institutions must be developed with consumers, city planners and government departments. Labour law has the capacity to establish institutions such as these which would address livelihood creation and promotion in the informal economy. For instance, the NCEUS Draft Bills set up multi-stakeholder institutions with organisations of unorganised workers, planners and government departments to determine the shape and direction of planning and development (NCEUS 2007: 212). However, the Draft Labour Codes (2015) of the government have not adequately addressed the specific issues concerning informal employment, and in particular own account workers. The city of Pune in India has recently pioneered a memorandum of understanding between the municipality, self-employed waste pickers, their union and residents to arrange for waste collection in certain wards with the municipality ensuring minimum health and safety and social security benefits though contributions from residents who pay for this service (Sankaran and Madhav 2011).[21] These are examples of broad-based social dialogue institutions that can be developed through labour law. Clearly, the tripartite social dialogue structure well-established in India may have to yield to more broad-based structures that accommodate consumers, self-employed persons (often not acknowledged as workers), government departments other than those relating to labour (such as departments concerning industries, town planning, social empowerment and environment) so that the wider impact of work and workplace concerns can be addressed.

The centrality given to the state to determine collective disputes through compulsory adjudication and the resultant juridification of labour disputes is an important feature of labour relations. In many places there is a huge backlog of pending cases before labour courts and labour-related

[20] The ILO Delhi Office together with the Government of India was involved in a project to suggest reforms along these lines (see ILO 2009). The laws in Bangladesh, Pakistan and Nepal dealing with bonded labour are broadly similar to the Indian ones (see ILO 2009).

[21] See agreement between the Pune municipality, Kagad Kach Patra Kashtakari Panchayat and waste collectors.

matters which are pending before the High Courts and Supreme Court. The role played by the courts in shifting the interpretation of the labour law, in keeping with the recent liberalisation of the Indian economy, is noticeable. Yet studies have doubted whether judicial changes in industrial adjudication can lead to changes in hiring decisions (Fagernäs 2010). The considerable backlog of cases is the direct result of the extensive use of courts in labour disputes and the weakness of judicial reforms to address delays in court cases, which can last several years.[22] Rights under labour law are only as good as the remedies it provides: the lack of adequate access to courts leads to increased violence at workplaces; this causes the increased use of the police in industrial disputes, which are treated as 'law and order' problems; this brings about the increased role of political mediation in such disputes; and sometimes private gangs are used to 'settle' issues (see, e.g., CLEP 2008: 78–79).

It is striking that no ILO standard directly addresses labour courts and adjudication. Instead, the ILO adopts collective bargaining and voluntary arrangements as the preferred mode of dealing with employment relationships and disputes (see, e.g., UNGA 2009: 10). The lack of international standard-setting in this area implies low levels of international supervision and the development of norms to evaluate access to justice in labour-rights-related matters.

In many countries in South Asia, labour law is poorly enforced and a sizeable number of violations escape unreported. This is one of the reasons for the widespread scepticism over self-certification programmes in lieu of inspection by the labour administration (see NCEUS 2009: 178). In recent times, however, routine inspections have virtually ground to a halt and prior permission from the government is required for inspection in some states.[23] Such moves are seen as part of the governmental response to employers against harassment by inspectors (Planning Commission 2007). Those industries that are export-oriented such as the garments and textiles industries also undergo regular monitoring under their codes of conduct. There is rarely any contact between this monitoring and that conducted

[22] In India, there are more than 533 000 labour cases pending, of which 28 000 have been pending for more than ten years. The average time of pendency of court cases is around ten years and if appeals are included this rises to 20 years (Ahsan and Pagés 2007: 15–16).

[23] The World Bank's Investment Climate Assessment for India estimated the burden of regulation in terms of senior management's time spent in dealing with Government agencies. It found that, on an average, senior management of small businesses in India spent 11.9 per cent of their time dealing with government regulation (World Bank 2004: 31).

by government inspectors (NCEUS 2007: 171). Reports by monitors such as those appointed under SA 8000 or the Clean Clothes Campaign could be utilised as alternate reporting mechanisms for self-certified companies. Alternate reporting by trade unions or social organisations has rarely been attempted in the field of labour law. Greater harmony between the legal framework for state-centric labour inspection and more broad-based social dialogue mechanisms would require social partnerships and, furthermore, the right of inspection and the submission of compliance reports to the authorities. This is particularly important in the case of the informal workforce in the organised sector where labour law violations are flagrant.

Academic writing on labour law and surveys by supervisory authorities have focused primarily on articulating juridical concepts underlying the law. Empirical studies on enforcement and reports addressing the manner in which labour law has impacted human lives are lacking in India. Court litigation offers a poor substitute for literature, since the complaint-driven court system depends on the initiative of individual employers/workers who have a grievance to access a judicial forum. Experiments such as *Lok Adalats* (less formal settlement of disputes) for speedy case disposal have been promising but have yet to be expanded. The rich literature on regulation and the use of multiple regulatory techniques can be used to effect changes in labour administration systems traditionally based on a command and control model in countries such as India (Deakin, Chapter 2, this volume).[24]

The enforcement and implementation capacity of labour law must be better incorporated within the legal framework in South Asia. The system of state-centred or joint reference of disputes to labour courts should be opened up to access by individual workers and trade unions. Labour laws in this region combine civil with criminal remedies for labour law violations. At present, the government must grant prior permission for criminal prosecution; affected parties lack the power to initiate prosecution by themselves (Sankaran 2010: 240). The past few years have seen a decline in the importance given to inspections and criminal prosecutions of labour law violations (NCEUS 2007: 164). This must be changed if labour law is to be seen as a credible avenue for achieving dignity at work.

[24] Some states such as Punjab in India had experimented with the diversion of pending labour cases to such *Lok Adalats*. The finality of such alternate dispute resolution systems has been strengthened by amendments to the Legal Services Authorities Act1987 in 2002 which grant finality to the decisions of *Lok Adalats*.

4. LABOUR LAW AND SOCIAL JUSTICE

4.1 Ensuring Employment

The Constitution of India identifies social justice as an important concern guiding her policies. Given the large number of people living in poverty, adopting policies to deal with inequality has been an important objective for successive governments since independence. As pointed out above, maintaining public investments and rates of growth, which in turn creates employment, has been viewed as the principal means to development. Yet job creation in the industrial sector has not grown at the required pace and the agricultural workforce continues to hold the largest share of employment.

The emphasis on economic growth as the primary method of development is currently being challenged; the priority of the development agenda has shifted from 'growth first to one of employment first' (NCEUS 2009: 132). This is in line with changes in development discourse over the past two decades. The 'trickle down' theory, which merely addressed some redistribution measures in order to ensure the minimum needs of populations, has been rejected. Instead policy documents now emphasise the generation of employment under decent conditions as a yardstick for assessing development policies (NCEUS 2009: v). An example of such a shift can be found in the adoption of the Mahatma Gandhi National Rural Employment Guarantee Act 2005 in India which guarantees 100 days of work at minimum wage rates for one person in every household in rural areas. The demand for such an employment guarantee law was not initiated by trade unions or labour activists, perhaps because such measures are not perceived as falling within the province of labour law. This chapter argues that a re-imagining of labour law within a right to development framework would require that such proactive employment generation policies/laws be considered as part of labour law to ensure just development outcomes.

4.2 Poverty

The congruence of informality and poverty has been highlighted in recent studies (see, e.g., NCEUS 2009: 17). This is apparent from the significant numbers of working poor and vulnerable workers who earn less than one dollar a day in countries such as India (NCEUS 2007: 6; 2009: 20, 122). One of the factors contributing to the large numbers of working poor has been the ineffectiveness of the minimum wage law in India. Minimum wages laws have often been fixed at levels below the official poverty line

in the South Asia region (see Ahn 2008). India's Minimum Wages Act 1948 is silent on the factors to be considered in calculating minimum wages. Even when such factors have been supplied by boards and court judgments, many components such as the costs of food, housing and clothing have been fixed at unrealistically low levels. The increase in the cost of housing in India's urban centres has been so phenomenal that large numbers of industrial workers who are employed within the formal sector live in urban slums (see, e.g., UN-Habitat 2003: 67). Thus, many workers in the formal sector live a dual life – at the workplace their position is formalised and legal, while at home they are seen as encroachers, subject to the increasingly frequent slum demolition campaigns which are part of the urban renewal mission of a globalising India. The new street vendor law to give some rights of access to street vendors in public spaces marks a departure from the older regime where such vendors were merely seen as encroachers and trespassers on public land. The inability of the minimum wage laws to incorporate elements such as the right to housing and other basic survival needs as a human right, and to quantify wages accordingly is the key reason for the low standards of living of the working poor.

While social security measures manage income and employment security, they benefit a 'worker', howsoever this is defined. Poverty reduction strategies, on the other hand, target the 'poor and vulnerable' (NCEUS 2009: iii). As noted above, there is considerable overlap between the two. Poverty reduction measures have, to a large extent, been restricted to social assistance schemes and targeted programmes (see, e.g., NCEUS 2009: 153, 214). Poverty reduction strategies are primarily positioned as fire-fighting measures to deal with abject poverty. Their inability to deal with 'impoverishment' – the process by which people become poor due to displacement, loss of assets and loss of skills, which is often a by-product of development – is notable. For instance, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 in India is rarely seen as labour legislation, despite the fact that it creates exclusive rights over forest resources for forest dwellers (see Sankaran 2008b: 6.11). Together with the Forest Conservation Act 1980, forest communities can now determine the extent to which natural resources are developed. This is an instance of a promotional social security measure, although it is not seen in the public discourse in such terms.

The relative autonomy of labour law and the manner in which it is constructed to deal primarily with employment/work relations reduces its ability to operate as a vehicle for economic and social change for a considerable part of the workforce. Given the scale of both poverty and the informal economy in South Asian countries, labour law has to contribute towards developing what the Commission on the Legal Empowerment of

the Poor (CLEP) identifies as the rights of identity, property and social protection (CLEP 2008: 27). The notion of social protection includes not only protection from certain specified contingencies (as in the case of traditional social security schemes), but also the promotion of livelihoods and acknowledgment of the right of communities to access resources for this purpose (CLEP 2008: 19). Expansion of the promotional aspects of social security falls squarely into the areas identified by the CLEP for dealing with poverty.

Poverty reduction strategies that include long-term livelihood creation plans coupled with short-term poverty alleviation measures should be linked with social security schemes which are designed as part of labour law policy. However, poverty reduction measures and social security schemes have traditionally developed as parallel policies within governments and lack synergy. Addressing the overlap between informality and poverty requires the creation of a larger amount of promotional social security programmes that overlap with poverty reduction measures, and the fine-tuning of these two largely parallel processes within governments.

4.3 Social Discrimination

Studies are increasingly recognising the presence of large numbers of those subject to social discrimination (*dalits* or scheduled castes), tribals and members of religious minorities such as Muslims in informal employment and their relative absence in formal employment (NCEUS 2007: 8; PMHLC 2006: 96). The inability of labour law to prevent the reproduction of social hierarchies within the working environment is exacerbated by the absence of a general anti-discrimination law in much of South Asia (see, e.g., PMHLC 2006: 39).[25] The lack of such a law has greater impact on the informal economy, where vendors, petty traders/contractors and home-based workers may be unable to obtain work or continue their livelihoods because they are denied access to housing, credit, customers and storage facilities due to their religion, caste or ethnicity (NCEUS 2007: 12).

Thus labour law needs to incorporate the elements of a general anti-discrimination law for ensuring its relevance in producing decent work standards, particularly for the informal economy.[26] Presently, formal employment in the public sector reserves specific jobs for socially

[25] The constitutional prohibition against discrimination is mainly directed against the State, and lacks horizontal effects (PMHLC 2006: 239–240).

[26] The draft legislation proposed by the NCEUS in providing for conditions of work in the unorganised/informal sector contains such anti-discrimination provisions (NCEUS 2007: 305, 326).

discriminated castes/groups in India. There is currently no horizontal extension of such reservations for formal employment in the private sector. The proposed Equal Employment Opportunity Commission in India (PMHLC 2006: 240) seeks to address the need for a general anti-discrimination law in employment but this has yet to obtain the necessary critical support.

5. CONCLUSIONS

Labour law faces tremendous challenges in its ability to ensure social justice and fair outcomes to employers and workers. However, the time is also ripe with possibilities for the law to reinvent itself. A right to development approach coupled with fulfilment of the demands of the ILO Declarations of 1998 and 2008 would reposition labour law not merely as business friendly but as an inclusive instrument that is alive to the needs of working people, including those in the informal economy. This requires labour law to:

- extend its scope to cover all who work;
- develop promotional and protective social security measures to enhance population employability and creation of livelihood;
- be seen as a vehicle for dealing with poverty and inequality, and therefore to decrease the decent work deficit and the numbers of the working poor; and
- widen access to justice to individuals and collectives for claims created/recognised under its ambit.

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8. The ILO and national labour law reform: Six case studies

Colin Fenwick*

1. INTRODUCTION

This chapter is about the experience and practice of labour law reform in six countries in which the International Labour Organization (ILO) was asked to assist: Cambodia, El Salvador, Liberia, Nepal, Romania and South Africa. The primary goal is to consider what theory and practice might learn from each other: to explore how the theoretical arguments made elsewhere in this book could shape the ILO's 'practice' of labour law reform, and, in turn, how experience from that practice might be used to refine theory. The case studies include work done in the early 1990s – El Salvador and South Africa – as well as work that has been done more recently – Liberia, Nepal and Romania – and one case in which the ILO has been engaged deeply for many years – Cambodia. In five cases the ILO became involved soon after the end of major crises, and/or in the context of very recent transitions to multi-party democracy: Cambodia, El Salvador, Liberia, Nepal and South Africa. In Romania, advice was sought 'mid-crisis', that is, during discussion of appropriate policy interventions after the Global Financial Crisis (GFC).

* This chapter builds on C. Fenwick and C. Vargha, *Labour Law as a Tool to Promote Decent Work: A View from the ILO* (Regulating for Decent Work Network Conference paper, 2011; copy on file with author). I thank Corinne Vargha for permission to draw on her work for the case study of Romania, and for her comments on an earlier draft of this chapter. For comments on earlier versions I also thank Mark Anner, Halton Cheadle, Susan Hayter, Shelley Marshall, Amy Luinstra, Jasna Pocek and John Ritchotte, together with participants at the Regulating for Decent Work Network Conference (2011), and at seminars at Monash University (2013), and Melbourne Law School (2014). Darryl Hutcheon and Sara Martinsson I thank for their research assistance. The views expressed are mine alone: they reflect no official policy or view of the International Labour Office of the International Labour Organization. Responsibility for any errors is likewise mine.

The case studies span various other ranges: political systems, levels of economic and human development, and types of work done by the ILO and/or the International Labour Office (Office). They also encompass different effects and outcomes. It is important to note that the case studies have been chosen in order to be illustrative, but without pretence that they are representative in some quantifiable sense: the goal is to use the case studies to explore arguments, and to identify areas for future work, rather than to try to interrogate them in a methodologically rigorous way. Thus, the case studies are not presented according to a single framework or outline. This reflects the range of circumstances and countries chosen, and the consequences this has for the availability of data and secondary literature. It also reflects – but also facilitates – the value in presenting an initial group of case studies so that they are shaped by their own narrative as much as possible. At the same time, however, each case study considers the connections with ideas from other chapters in this book. Each case study – and the overall conclusion – explicitly considers three elements from Deakin and Marshall's checklist:[1] context dependence, systemic fit, and inclusivity and democratisation. These elements receive particular attention both because of their inherent significance, and because they clearly arise from each of the case studies as presented here.

The chapter builds on the (remarkably sparse) literature on the Office's work in supporting member states with labour law reform.[2] The paucity of literature is somewhat surprising – apart from anything else, the Office has *always* worked in this field, discharging a constitutional mandate to do so.[3] It is also perplexing given the intense debate generated in recent years by the World Bank's *Doing Business* reports, and the broader 'legal origins' literature of which they form a part – certainly from a methodological

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[1] Marshall, Chapter 9, this volume.

[2] '[L]ittle scholarly attention has been paid to the technical cooperation role of the ILO's permanent secretariat in law reform in developing countries', A. Blackett, 'Beyond Standard Setting: A Study of ILO Technical Cooperation on Regional Labor Law Reform in West and Central Africa' (2011) 32 *Comparative Labor Law and Policy Journal* 443–492, at 443–444. See also C. Fenwick and E. Kalula, 'Law and Labour Market Regulation in East Asia and Southern Africa: Comparative Perspectives' (2005) 21 *The International Journal of Comparative Labour Law and Industrial Relations* 193–226, at 217.

[3] Article 10(2)(b) of the ILO constitution provides that the Office shall: 'accord to governments at their request all appropriate assistance within its power in connection with the framing of laws and regulations on the basis of the decisions of the Conference and the improvement of administrative practices and systems of inspection'.

perspective.[4] The lack of literature is all the more striking given that this work of the Office represents a very deep form of engagement with those states; indeed: 'it is at the core of the regulatory activity of the State'. Moreover, as Adelle Blackett has suggested, this work is arguably 'the crux of the ILO's law and development work'.[5]

The case studies show that a good number of the ideas advanced elsewhere in this book are already reflected in much of how the Office does its work. The most obvious example is that the Office always endeavours to work in consultation with the tripartite partners, and encourages governments to do the same. In this sense, tripartism is a long-established mechanism that contributes to the design of 'reflexive labour regulation', and which can be seen as a means to promote 'inclusivity and democratisation'. The case studies also show that the Office's work in providing 'technical assistance' to member states is not the only way that the ILO influences national labour law reform. On the contrary, the ILO's machinery for supervision of member states' compliance with international labour standards can play a significant role, and did so in the cases of El Salvador and South Africa.

At the same time, the case studies illustrate some of the important limits to what the ILO can do. Most importantly, they show that the ILO is not in any sense the master of the circumstances in which it is called upon to give advice. On the contrary: in an institutional and in a political sense,

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[4] See, for example, S. Deakin, P. Lele and M. Siems, 'The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes' (2007) 146 *International Labour Review* 133.

[5] Blackett, above n. 2, at 444. Blackett's critical analysis of the ILO's role in the process of law reform in the OHADA countries appears to be the only one of its kind. For other literature that explains or touches on the ILO's work in labour law reform, see in particular the work of Arturo Bronstein: 'The Role of the International Labour Office in the Framing of National Labor Law' (2005) 26 *Comparative Labor Law and Policy Journal* 339–369 (also published as 'En aval des normes internationals du travail: le rôle du BIT dans l'élaboration et la révision de la législation du travail' in J.-C. Javillier and B. Gernigon (eds), *Les normes internationales du travail: un patrimoine pour l'avenir* (ILO, 2004), pp. 219–247); *International and Comparative Labour Law*, (ILO/Palgrave Macmillan, 2009); 'The New Labour Law of the Russian Federation' (2005) 144 *International Labour Review* 291–318; 'The Evolution of Labour Relations in Uruguay: Achievements and Challenges' (1989) 128 *International Labour Review* 195–212; 'Protection against Unjustified Dismissal in Latin America', (1990) 129 *International Labour Review* 593–610; 'Societal Change and Industrial Relations in Latin America: Trends and Prospects' (1995) 134 *International Labour Review* 163–186; and 'Labour Law Reform in Latin America: Between State Protection and Flexibility' (1997) 136 *International Labour Review* 5–26.

the ILO is constrained by the national context. In some of the case studies, the institutional context included deep crises in governance and respect for the rule of law.[6] In all cases, the political context – capacity, will, and the interplay between them – has shaped the role that the ILO played, and had a major impact on the process, and the progress, of labour law reform. More broadly, the case studies show the ILO at work on terrain that is shaped by continuous and intense debate over labour market regulation and its effects,[7] together with shifts in the composition of labour markets that pose major challenges to 'the traditional socio-economic and political "pillars" on which labour law rested',[8] and so raise questions about the goals and purposes of labour law itself.[9]

Some – indeed perhaps all – of the case studies raise important questions about the arguments made elsewhere in this book; or rather, about certain assumptions that appear to be implicit in some of those arguments. (In fact the point applies equally to the assumptions underpinning almost *any* arguments about the impact and role of labour law.) Experience in the practice of labour law reform suggests that many arguments in the field implicitly assume a level of state capacity – both to adopt and to implement policy – that may very well not be present in practice. Similarly, arguments about the desirability and the importance of consultation in the process of policy development may assume a level of capacity in non-state actors that is not present in practice. It is also clear that important questions arise about the effectiveness and the significance of labour law reform, given the notorious fact that in many developing economies a significant proportion of work happens beyond the scope of formal labour

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[6] The complexity of the concepts of 'governance' and 'rule of law', and their uses, are not taken up in this exercise, although they are addressed a little below, nn. 224 to 229 and accompanying text.

[7] It was the World Bank itself which remarked that current data and research methods suggest that the effects of labour market regulation are 'relatively modest in most cases – certainly more modest than the intensity of the debate would suggest', World Bank Group, *World Development Report 2013: Jobs* (World Bank Group, Washington, DC, 2012), p. 258.

[8] T. Teklè, 'Labour Law and Worker Protection in the South – An Evolving Tension between Models and Reality' in T. Teklè (ed.), *Labour Law and Worker Protection in Developing Countries* (ILO/Hart, 2010) pp. 3–47, at 3. And see, more generally, A. Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (OUP, 2001).

[9] In academic circles, particularly in the English language literature, the debate has continued for some twenty years. For a synthesis of debates and themes in that literature, see R. Mitchell, 'Where Are We Going in Labour Law? Some Thoughts on a Field of Scholarship and Policy in Process of Change' (2011) 24 *Australian Journal of Labour Law* 45–59.

law. These issues are identified in the six case studies that follow, and further explored in the discursive conclusion. Thus, there is much scope for the ILO – and for others in the field of labour law and development – to draw on the ideas presented in this book. At the same time, there is space for further refinement and reflection in the arguments made in this field, and the case studies in this chapter are presented in the hope of contributing to that project.

2. CAMBODIA: POST-CRISIS REFORMS AND INSTITUTIONAL INNOVATION

The ILO has supported reform of labour market regulation in Cambodia in several ways over some twenty or more years. Initially the Office provided support for reform of the Labour Code, after the advent of democracy in 1993. Subsequently the ILO established a programme that became Better Factories Cambodia (BFC), which works directly with garment factories to promote improved compliance with labour law, and also improved productivity, through a mix of public and private regulation.[10] As a separate initiative, the ILO has also provided extensive support for the establishment and operation of the Cambodian Arbitration Council (the Council).[11] The origins of both BFC and the Council lie in large part in the national and international response to the attention that was being paid to the poor working conditions in the Cambodian garment sector in the mid-1990s. The early results of institutional innovation in Cambodia are positive, but it seems are not yet capable of being sustained without external budget and implementation support.

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[10] http://betterfactories.org/. See, for example: J. Hall, 'Human Rights and the Garment Industry in Contemporary Cambodia' (2000) 36 *Stanford Journal of International Law* 119; K. Kolben, 'Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia's Garment Factories' (2004) 7 *Yale Journal of Human Rights and Development* 79; S. Polaski, *Cambodia Blazes a New Path to Economic Growth and Job Creation*, Carnegie Endowment for International Peace, October 2004; L. Sibbel and P. Borrmann, 'Linking Trade with Labor Rights: The ILO Better Factories Cambodia Project' (2007) 24 *Arizona Journal of International and Comparative Law* 235.

[11] http://arbitrationcouncil.org/. See H. van Noord, S. Hwang and K. Bugeja, *Cambodia's Arbitration Council: Institution-building in a Developing Country*, ILO, Dialogue Working Paper No. 24, August 2011.

2.1 Country Context: the 1997 Labour Code and the Emergence of the Garment Industry

The government that assumed office in Cambodia in 1993 was the first elected after more than twenty years of civil war and instability.[12] There was little or no employment available, and labour market institutions – indeed all institutions – were at best severely limited. There were few if any representatives of either employers or workers. Although the UN Transitional Authority introduced a new labour law in 1992 – replacing the (disused) law of 1972 – the new government soon sought ILO assistance for labour law reform. A new law was promulgated in 1997 that was 'essentially the ILO draft', and which drew on both the 1972 and 1992 texts, as '[t]hey were embedded in the country's legal culture, essentially made up of French tradition'.[13] The government did consult with sources other than the ILO, but in the absence of employer and worker organisations, and despite ILO advice that they would be desirable, there were no tripartite discussions.[14]

In practice, the 1997 Code had very little effect. First, many of its provisions are of a 'framework' nature, requiring secondary measures to give them more substance. Yet many of these measures were not implemented for some time.[15] More generally, endemic corruption was a key reason for the law's ineffectiveness:[16] underpaid and inexperienced labour inspectors were vulnerable to corruption.[17] Close links between business and the state also raised questions about improper influence, and the lack of a strong independent trade union movement limited workers' capacity to hold the government to account.[18] Overall, lack of enforcement of the 1997 Code was among the factors that led to the establishment of what is now BFC, and of the Council.

The early to mid-1990s saw the rapid establishment of a garment manufacturing industry in Cambodia, and the sector soon came to dominate formal employment.[19] International attention to poor labour standards in

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[12] Moreover, that period of instability followed only 17 years of independence after French colonial rule.

[13] Bronstein, 'Framing of National Labor Law', above n. 5, at 363.

[14] Ibid., at 365.

[15] S. Polaski, 'Combining Global and Local Forces: The Case of Labor Rights in Cambodia' (2006) 34 *World Development* 919.

[16] G. Berik and Y. Van der Meulen Rodgers, 'Options for Enforcing Labor Standards: Lessons from Bangladesh and Cambodia' (2010) 22 *Journal of International Development* 56–85.

[17] Polaski, above n. 15, at 922.

[18] Kolben, above n. 10.

[19] In 2005, for example, the Cambodian workforce was approximately 6.2 million

the industry soon put pressure on the US government, leading in turn to the inclusion of a labour standards provision in the 1999 US–Cambodia Trade Agreement on Textiles and Apparel.[20] The agreement set a quota for Cambodian garment exports to the US, but provided that the US would periodically increase the quota if it determined that working conditions in garment sector factories substantially complied with fundamental labour standards. The agreement did not determine how this clause should be implemented, even though there were no 'credible [Cambodian] . . . systems for monitoring and enforcing the law'.[21] This led to the establishment of an ILO 'Garment Sector Project', which subsequently became BFC.[22] The evolution of the garment industry also led to a focus in Cambodia on enterprise-based industrial relations, which in turn necessitated amendments to the law. The ILO submitted draft proposals in 2001, which included the legal basis for the establishment of the Cambodian Arbitration Council.[23]

2.2 Institutional Innovation and the Role of the ILO

The Garment Sector Project did seek to address the challenge of making the 1997 law effective by supporting the work of labour inspectors.[24] The innovation in the project however was the establishment of an independent, external factory monitoring programme to be conducted by the ILO itself – despite the ILO having no experience in inspecting private firms to enforce national labour laws.[25] Factory monitoring in the BFC approach

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people, of whom a little over 10 per cent – 650 000 – were in formal employment. The largest share of formal employment was the public sector – 350 000 – followed by the garment sector – 230 000 – and tourism – 70 000. D. Sieng and M. Nuth, 'Extending Labour Protection to the Informal Economy in Cambodia' in D. Tajgman (ed.), *Extending Labour Law to All Workers: Promoting Decent Work in the Informal Economy in Cambodia, Thailand and Mongolia* (ILO, 2006), pp. 36–67, at p. 38.

[20] Noord et al., above n. 11.

[21] D. Adler and M. Woolcock, 'Justice without the Rule of Law? The Challenge of Rights Based Industrial Relations in Contemporary Cambodia', in C. Fenwick and T. Novitz (eds), *Human Rights at Work – Perspectives on Law and Regulation* (Hart Publishing, 2010), pp. 529–554, at p. 539.

[22] The initial project was largely funded by the US government with further contributions from the Royal Government of Cambodia and the Garment Manufacturers' Association. Better Factories Cambodia in turn served as the inspiration for the global Better Work programme: www.betterwork.org.

[23] The legal steps to give effect to these ILO proposals were taken in November 2001: Bronstein, 'Framing of National Labor Law', above n. 5, at 365.

[24] ILO Garment Sector Project Proposal, 2000.

[25] Polaski, above n. 15.

involves scrutiny for compliance with both international labour standards, and also a wide range of other rights and conditions in Cambodian labour law.[26] Confidential reports are prepared on each factory, and public Synthesis Reports show outcomes across all participating factories over each six-month period. In addition to monitoring, BFC trains management and workers on their respective rights and responsibilities. BFC also engages with employers and workers through its tripartite Project Advisory Committee, and for some time has offered fee-for-service training at the factory level.

Like BFC, the Council has its roots in the context of Cambodia's expanding textile manufacturing industry, the Cambodia-US textiles agreement, and the imperative to improve the application of labour law. An ILO project was initiated to support the creation of a national dispute prevention and resolution strategy, with a view to a new arbitration and labour adjudication system. However, the corruption, partiality and lack of transparency in the Cambodian judicial system quickly led to the project being reformulated to focus on the establishment of an entirely independent arbitration mechanism. Moreover, US representatives indicated that quotas may not be increased under the textiles agreement if an independent Arbitration Council was not established.[27]

The legal basis for the establishment of the Council came from the amendments to the 1997 Labour Code that the ILO had suggested in 2001: these required the government to issue a proclamation (in Khmer – a *Prakas*) to give further effect to the Code's limited provisions on collective labour dispute resolution. The ILO project soon turned to preparing a draft Prakas for tripartite discussion. The Prakas that establishes the Council is based on tripartism, giving employers, unions and the Ministry of Labour each the power to list and nominate one-third of the arbitrators to be appointed to the Council.[28] The Council itself is independent of the Labour Ministry. It has mandatory jurisdiction over collective labour disputes, whether of interests or rights, but only if compulsory conciliation at the Ministry of Labour is unsuccessful. The Council publishes its awards, but each party has eight days from publication to stipulate that the award should *not* be binding and enforceable. Awards are however enforceable if the parties have so agreed in writing, or if so provided in a collective

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[26] Kolben, above n. 10.

[27] Noord et al., above n. 11.

[28] In practice, however, the ILO conducted initial recruitment of arbitrators, who were unanimously endorsed by the tripartite partners: ibid.

agreement. Arbitrators also have power to provide civil remedies, and to order parties to stop strikes and return to work.

2.3 The Impact of Innovative Institutions

BFC has undoubtedly contributed to improved conditions in some factories: the overarching picture is of 'significant though uneven improvement in compliance with the labour law and international labour rights standards'.[29] A World Bank survey early in BFC's life found that Cambodia's labour standards compliance ranked ahead of all its regional competitors.[30] A 2010 Synthesis Report found almost universal compliance with national minimum wage laws, payment of overtime rates, and minimum annual leave requirements.[31] Adler and Woolcock noted big improvements in the protection of freedom of association, which had given rise to increased union membership and increased registration of new unions, albeit largely occurring in the formal economy.[32] The programme has also been very cost-effective.[33] Econometric analysis suggests that on average, compliance with rules on working conditions improved across visits, while, at the same time, average wages in the garment sector increased much more than wages in other sectors of the Cambodian economy.[34] A particularly clear sign of support is the fact that many international buyers now routinely require their suppliers to share BFC monitoring reports as a pre-condition to establishing or renewing contracts.[35] Moreover, participating factories producing for at least one reputation-conscious buyer have better compliance records than other factories.[36]

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[29] Adler and Woolcock, above n. 21. For a review of the evidence of the impact of BFC, see D. Brown, R. Dehejia and R. Robertson, 'Regulations, Monitoring and Working Conditions: Evidence from Better Factories Cambodia and Better Work Vietnam' in D. McCann et al. (eds), *Creative Labour Regulation – Indeterminacy and Protection in an Uncertain World* (ILO/Palgrave, 2014), pp. 185–203, at 188–192. On Better Factories Cambodia see also, in the same volume, C. Oka, 'Evaluating a Promising Model of Non-State Labour Regulation: The Case of Cambodia's Apparel Sector' at pp. 259–279.

[30] Foreign Investment Advisory Service, *Cambodia, Corporate Social Responsibility & the Apparel Sector Buyer Survey Results*, December 2004.

[31] ILO, 24th Synthesis Report, 2010.

[32] Noord et al., above n. 11.

[33] Polaski, above n. 15.

[34] Brown et al., above n. 29.

[35] Polaski, above n. 15. Kolben gives the example of Nike, which left Cambodia due to publicity of child labour in its factories, and agreed to return provided the factories in question showed Nike their ILO monitoring report: Kolben, above n. 10.

[36] C. Oka, 'Accounting for the Gaps in Labour Standard Compliance: The

Naturally, BFC's success is not unlimited. The Synthesis Reports show that trends are very different for different labour standards, and that progress is not uniform.[37] Thus discrimination was at an 'all-time high' in the 28th Synthesis Report (2012), which also recorded the greatest number of underage workers in six years. Moreover, some reports have emphasised repeated violations of freedoms of expression and association, and deterrent activity ranging from the murder of trade unionists, to measures taken by local authorities to discourage trade union membership.[38] Some standards continue to be largely ignored, such as overtime rules, where relatively few inspected factories comply.[39]

The Council also appears to have been a successful innovation. Since its establishment, the Council's workload has continued to grow, from 31 cases in 2003 to 191 in 2011,[40] and again to 361 by the end of 2014.[41] Since 2003 some 73 per cent of disputes referred to the Council have been resolved.[42] According to one analysis, labour disputes, strikes and walk outs have reduced 'dramatically',[43] but the industrial relations situation remains volatile, and it is never guaranteed that parties will rely on the Council for dispute resolution. At the same time, the attraction of the Council's services can be inferred from the 2010 Memorandum of Understanding between the Garment Manufacturers' Association and six of the largest union confederations and federations, which provides for binding arbitration of collective disputes.[44]

The Council is active beyond the settlement of particular disputes, promoting and providing training on social dialogue, improved industrial relations, peaceful dispute settlement, good governance and the rule of law. Thus the Council has contributed to a broader movement of positive legal, judicial and developmental reforms.[45] Indeed the Council has been praised as 'perhaps the most successful commercial dispute resolu-

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Role of Reputation-Conscious Buyers in the Cambodian Garment Industry' (2010) 22 *European Journal of Development Report* 59–78.

37 ILO, 28th Synthesis Report, 2012.

38 Cambodian Centre for Human Rights, *Business and Human Rights in Cambodia: Constructing the Three Pillars*, November 2010.

39 It has been as low as 14 per cent: ILO 28th Synthesis Report, 2012, p. 2.

40 Cambodian Arbitration Council, 2011 Annual Report.

41 Cambodian Arbitration Council, 2014 Annual Report.

42 Ibid.

43 Cambodian Centre for Human Rights, above n. 38.

44 Cambodian Arbitration Council, 2011 Annual Report.

45 Noord et al., above n. 11.

tion body in Cambodia'.[46] On the other hand, for the foreseeable future the Council will face great difficulty in securing its operational funding, which the government cannot provide, and which, perhaps ironically, might threaten the Council's independence were it to do so.[47] Given this problem and the difficulties of securing international donor funding, the Council is supported by the Arbitration Council Foundation, a permanent institution responsible for seeking funding for the Council's continuing operations.

2.4 Assessment: Innovation without Sustainability?

This case study shows the ILO working in different ways in labour law reform. The initial process appears to have focused largely on the formal legal framework. Its emphasis on maintaining links to the 1972 and 1992 laws could be considered an example of promoting *systemic fit*. On the other hand, the relevant tradition was from the French colonial period, and it is not clear that much attention was paid to bridging the gap between the approach of that formal law, and the reality of the national labour market.[48] This would have been highly relevant from the perspective of *context dependence*. Similarly, the subsequent concern about the application of the law in practice raises the question whether and how that issue was addressed in the law reform process. The process of developing the 1997 law appears not to have been particularly inclusive. While the absence of representative organisations of employers and workers *could* explain the lack of tripartite consultation, the question arises what, if anything, was or could have been done to support their establishment, and their ability to engage in such consultation.[49] At the same time, and as we will see with the case of El Salvador, it seems clear that the government was determined to move ahead, not least to respond to economic and trade pressure.

From that pressure were also born both BFC and the Council, innovative institutions specifically designed to address 'orthodox' or 'traditional' issues: the weakness of state labour inspection and the absence of effective dispute resolution. Each promotes *inclusivity and democratisation* through

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[46] Booz Allen Hamilton, *Southeast Asia Commercial Law and Trade Diagnostics – Cambodia* (USAID, 2007), p. 51.

[47] Noord et al., above n. 11.

[48] Compare Blackett, above n. 2.

[49] By contrast, in its more recent work to support labour law reform in Haiti, Liberia and Zambia, the Office has incorporated support for employer and worker organisations, precisely so that they may be able to play a more effective and informed role.

emphasis on tripartite participation, and, as country-specific innovations, they are arguably *context dependent*.[50] In each case there are elements of other recommendations made elsewhere in this book. The direct connection between labour standards compliance and improved trade opportunities seems to reflect an attempt to move beyond the 'relative autonomy' of labour law:[51] BFC makes labour law relevant by tethering economic opportunities to labour law compliance. The evolution of BFC also shows attention to incentive compatibility, designing institutions 'in a way that does not invite their destabilisation through, for example, free-riding or destructive competition'.[52] Furthermore, BFC has a mix of public and private regulation at its very core.[53] (A further issue is how BFC interacts with the existing public labour inspectorate, and what impact it has in this respect.)[54]

Questions do however arise about the long-term effects of BFC and the Council. One limit to BFC's developmental impact is the high proportion of factory owners and managers who are not Cambodian.[55] On the other hand, wages in the garment sector have been nearly 35 per cent higher than the average wage,[56] and (anecdotally, at least) it appears that the benefits of wage employment in the sector spread well beyond the factories, especially throughout remittances.[57] And of course BFC is only operating in one sector, raising the question whether it has any spill-over effect into the rest of the Cambodian economy.[58] For its part, the Council's very

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[50] While the BFC model has since been expanded into Better Work, which operates now in seven different countries, the Better Work model retains significant flexibility at the country level, in order to be responsive to context.

[51] Sankaran, Chapter 7, this volume.

[52] Deakin, Chapter 2, this volume.

[53] Kolben, Chapter 3, this volume.

[54] As Amengual has noted, there are as yet relatively few empirical studies that explore this issue: M. Amengual, 'Complementary Labor Regulation: The Uncoordinated Combination of State and Private Regulators in the Dominican Republic' (2010) 38 *World Development* 405–414.

[55] D. Wells, '"Best Practice" in the Regulation of International Labor Standards: Lessons of the US–Cambodia Textile Agreement' (2006) 27 *Comparative Labor Law and Policy Journal* 357–376.

[56] Brown et al., above n. 29, at p. 192.

[57] Better Work data suggest that a very high proportion of workers in garment factories in Vietnam remit part of their wages, with important and measurable economic effects: Better Work, *Impact Brief – Better Work in Vietnam*, November 2013 (available at: http://betterwork.org/global/wp-content/uploads/Vietnam-Impact-Brief-Rnd5_LR.pdf [last accessed 13 March 2014]).

[58] Although as noted, the garment sector is by far the largest source of low-skilled, formal employment.

existence is an investment in a new institution, quite apart from a change to the substantive content of regulatory norms.[59] Furthermore, the Council's tripartite structure and its role in promoting social dialogue are clear indications of 'inclusive governance'.[60] At the same time, questions arise about the Council's sustainability given its significant and ongoing challenges in securing funding. In that sense, questions arise about the potential limits to institutional innovation.

3. EL SALVADOR: POST-CRISIS REFORM AND THE INFLUENCE OF INTERNATIONAL TRADE PREFERENCES

The ILO assisted with labour law reform in El Salvador after the civil war of 1980 to 1992, providing support to the Forum for Economic and Social Consultation (the Forum) that was created by the Chapultepec Peace Accords.[61] The Forum's operation and the ILO's role were significantly shaped by a pending review by the United States Trade Representative (USTR) of El Salvador's privileged access to US markets under the US Generalized System of Preferences (GSP) trade regime.[62] The reforms therefore focused on redrafting national labour law to promote greater conformity with ILO standards on freedom of association. As a result, the effects of labour law reform on the economy and labour market, and the impact of trade pressure on El Salvador's commitment to freedom of association, are in some ways ambiguous.

3.1 Country Context: Civil War, Weak Institutions and Trade Pressure

Labour law reform in El Salvador in the early 1990s took place in a national context of democratic deficit and labour law that limited collective action. The Peace Accords and the changes they introduced were 'just

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[59] Marshall, Chapter 9, this volume.

[60] Deakin, Chapter 2, this volume.

[61] Bronstein, 'Framing of National Labor Law', above n. 5, at 361.

[62] On the origins and operation of the US GSP and its provisions linking trade preferences to compliance with 'internationally recognised worker rights', see, for example, T.A. Amato, 'Labor Rights Conditionality: United States Trade Legislation and the International Trade Order' (1990) 65 *New York University Law Review* 79–125 and J. Pérez-Lopez, 'Worker Rights in the US Omnibus Trade and Competitiveness Act' (1990) 41 *Labor Law Journal* 222–234. For critical analysis, see P. Alston, 'Labor Rights Provisions in US Trade Law: "Aggressive Unilateralism?"' (1993) 15 *Human Rights Quarterly* 1–35.

the beginning of a process to build democratic institutions'.[63] The civil war aside, El Salvador had 'an extremely circumscribed democratic tradition', in which there had been at best limited scope for opposition political parties until 1994.[64] El Salvador's labour laws, before the reforms of the 1990s, privileged individual rights for workers while limiting the scope for free collective action,[65] and at the same time were mainly relevant to urban workers, even though most workers were in agriculture.[66]

Legal limits on collective action and the broader political context significantly influenced the capacity and orientation of the labour movement in El Salvador. Until the 1960s, union activity was largely confined to agriculture, although the Labour Code of 1972 limited the scope to form trade unions in the sector.[67] At the same time, an urban labour movement only emerged with the beginnings of industrial manufacturing.[68] Union density as a proportion of the economically active population was always low: government data from 1975 to 1994 show that union density was as low as 2.46 per cent (in 1992 – at the end of the war), and never higher than 5.62 per cent (in 1977 – just before the coup that ignited the war).[69]

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[63] R. Robertson and A.Trigueros-Argüello, 'The Effects of Globalization on Working Conditions: El Salvador, 1995–2005', in R. Robertson, D. Brown, G. Pierre and M.L. Sanchez-Peurta (eds), *Globalization, Wages, and the Quality of Jobs – Five Country Studies* (World Bank, 2009), pp. 131–173, at 132.

[64] T. Fitzsimmons and M. Anner, 'Civil Society in a Postwar Period: Labor in the Salvadoran Democratic Transition' (1999) 34 *Latin American Research Review* 103–128, at 108. Bronstein also acknowledges that the elections of 1994 were the first free elections in El Salvador: Bronstein, 'Societal Change', above n. 5, at 166, fn. 9.

[65] The El Salvador Code of 1972: Bronstein, 'Societal Change', above n. 5, at 17, fn. 18. Constitution of 1983: Bronstein, 'Labour Law Reform in Latin America', above n. 5 at 11–12; Bronstein, 'Societal Change', above n. 5, at 170.

[66] Bronstein, 'Labour Law Reform in Latin America', above n. 5, at 8. This was consistent with the regional approach, which was shaped by an inheritance of bureaucracy and intervention from colonial powers, and also by the pursuit of economic policies that kept markets closed: workers were protected by individual labour law, and business by limitations on collective organisation. A. Bronstein, 'Labour Law in Latin America: Some Recent (And Not So Recent) Trends' (2010) 26 *The International Journal of Comparative Labour Law and Industrial Relations*, 17–41, at 18–22.

[67] Bronstein, 'Framing of National Labor Law', above n. 5, at 361.

[68] Teachers also began to organise: B. Davis, 'The Effects of Worker Rights Protections in United States Trade Laws: A Case Study of El Salvador' (1994–1995) 10 *American University Journal of International Law and Policy* 1167–1214, at 1184.

[69] Fitzsimmons and Anner, above n. 64, at 112. Based on their data, during that period union density averaged 4.179 per cent, with a median rate of 4.405.

During the civil war the union movement was 'severely repressed' by the government: over 5000 unionists were killed, and thousands more were detained, tortured or forced into hiding.[70] Unsurprisingly, trade unions were highly politicised during the war.[71] Nevertheless, the labour movement was a dominant element of civil society during the war, and the subsequent breakdown of the regime. Indeed, labour's role in the Forum was the only mention of civil society organisations in the Chapultepec Peace Accords.[72]

3.2 Law Reform under Trade Pressure, and the Role of the ILO

Quite apart from its history of circumscribed democracy, and the effects of the civil war, El Salvador was also at risk of being removed from the list of countries eligible for preferential access to the United States market under the GSP. The key issues in this context were the legal obstacles to forming unions, and the lack of protection against acts of anti-union discrimination.[73] The major focus of the labour law reform was thus whether El Salvador was 'taking steps' to comply with 'internationally recognized worker rights'.[74] The threat of losing trade preferences was the dominant influence on the labour law reform process. Discussions in the Forum initially focused on union proposals to improve government policy to alleviate the effects of market-oriented reforms, and it was only on the eve of a USTR decision on GSP that the parties agreed to start discussing ratification of ILO standards, *provided* that unions withdrew their demands for immediate economic measures.[75]

It was then that the unions proposed that ILO technical experts work with the Forum's drafting group, the Labour Code Commission.[76] An

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[70] Ibid., at 106. See also for some detail Davis, above n. 68, at 1184–1187.

[71] Fitzsimmons and Anner, above n. 64, at 117–118.

[72] Ibid., at 107.

[73] Bronstein, 'Labour Law in Latin America', above n. 66, at 37.

[74] 19 United States Code §§ 2461–2466. The rights are defined as: '(A) the right of association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children, and a prohibition on the worst forms of child labor . . .; and (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health'. 19 United States Code §§ 2467(4). The term 'worst forms of child labor' is further defined in 19 United States Code §§ 2467(6).

[75] Davis, above n. 68, at 1203.

[76] Ibid., at 1206. For its part, the government refused to allow the ILO to determine the question of constitutionality: ibid.

ILO expert subsequently visited, and drafted a 49-point programme for the Commission to consider.[77] The ILO's proposed amendments focused on freedom of association issues: lifting restrictions on rural workers' rights, making it easier to form a union, ensuring unions could operate autonomously of government, allowing union federations and confederations to bargain collectively, and facilitating strike action (by reducing the majority of workers required for approval, and by introducing a presumption of legality).[78] Given the context of the USTR review, the ILO's proposals were developed in large measure by reference to whether Salvadoran law and practice were consistent with the observations of the ILO's supervisory bodies in these areas, and by the country's record of ratifying ILO Conventions: '[m]ost . . . reforms were aimed at solving problems relating to the compatibility of national law with ILO Conventions'.[79]

The Forum immediately agreed to repeal the limitation on rural workers' rights, but it could not agree on certain issues relating to trade union structures and the exercise of the right to strike.[80] Thus, in the end, the government moved ahead with its own text. While substantially based on the ILO proposals,[81] this also included matters not agreed in the

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[77] Ibid., at 1207. The expert also subsequently gave evidence on the proposal at a USTR hearing on GSP: ibid., at 1207–1208.

[78] Bronstein, 'Labour Law in Latin America', above n. 66, at 38.

[79] Ibid., 25 and 38. For detailed analysis of the weaknesses in the Code at this time, see Davis, above n. 68, at 1188–1197. 'Closely modelled on the doctrine of the ILO's Committee of Experts on the Application of Conventions and Recommendations and the Freedom of Association Committee, this reform enabled El Salvador to ratify no fewer than 14 ILO Conventions.' Bronstein, 'Labour Law Reform in Latin America' above n. 5, at 24.

[80] Bronstein, 'Framing of National Labor Law,' above n. 5, at 362.

[81] These were: protection of trade union founders against retaliation or dismissal during the early stages of forming a union; a presumption that a union is formed legally unless the Registrar acts to the contrary within 30 days of the application; the reduction of the majority required to declare a strike from a qualified majority to a simple majority, and the retention of the presumption of legality of a strike, which was quite unusual in Latin America: ibid., at 363. In addition to its emphasis on collective labour law, the ILO proposals introduced individual protections, such as 'maternity protection, the elimination of outdated restrictions on women's work, an increase in the rate of compensation for dismissal without cause, and the extension of the Code to apprentices'. Bronstein, 'Labour Law Reform in Latin America', above n. 5, at 24. For an analysis of the law subsequent to the amendments and before the 2006 ratifications see ILO, *Fundamental Principles and Rights at Work – A Labour Law Study: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua* (ILO, 2003), at pp. 13–17.

Forum. Nevertheless, the USTR subsequently terminated its review, so maintaining El Salvador's GSP entitlement.[82]

3.3 Assessment: The Effects of Labour Law Reform under Trade Pressure

The economy and the labour market in El Salvador have not significantly improved in the years since the labour law reform.[83] Moreover, the trade union movement has faced major challenges. In the first ten years of peace the number of unionists in manufacturing fell, while the number of trade unions rose,[84] suggesting a splintered and ineffective union movement, at least in that sector. In the same period, structural adjustment policies also had significant effects. Reduced public employment weakened public sector unions,[85] while economic liberalisation brought the challenge of organising in Export Processing Zones,[86] as well as in the continually expanding informal economy, all the while within a legal system that continued to privilege plant-level bargaining.[87]

At the international level, El Salvador took many years to follow through on its freedom of association commitments. Even though the reforms of the mid-1990s came under trade pressure, and with a focus on compliance with ILO standards, El Salvador did not ratify ILO Conventions No. 87

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[82] Davis, above n. 68, at 1208. (The Forum, having had 'a few stormy sessions', then 'went into an indefinite decline': Bronstein, 'Societal Change', above n. 5, at 183.)

[83] See, for example, Robertson and Trigueros-Argüello, above n. 63. El Salvador was also hit hard by the GFC, with severe drops in tax revenues, remittances, exports, FDI, employment and GDP; ILO, *Global Jobs Pact Country Scan – El Salvador* (ILO, 2012), pp. 3–7.

[84] The proportion of workers in manufacturing who belonged to trade unions fell from 28.95 per cent in 1992 to 7.92 per cent in 2003: M. Anner, 'Meeting the Challenges of Industrial Restructuring: Labor Reform and Enforcement in Latin America' (2008) 50 *Latin American Politics and Society* 33–65, at 53.

[85] Fitzsimmons and Anner, above n. 64, at 119–120.

[86] Leaving aside the question of union formation, there is evidence that working conditions are better for those in the FDI-exposed sector: Robertson and Trigueros-Argüello, above n. 63, at 170.

[87] Bronstein, 'Societal Change', above n. 5, at 168; M. Anner, 'Labor Law Reform and Union Decline in Latin America', Labor and Employment Relations Association, Proceedings of the 60th Annual Meeting 2008 (see http://50.87.169.168/OJS/ojs-2.4.4-1/index.php/LERAMR/index); Fitzsimmons and Anner, above n. 64, at 120. Those authors also argue that Salvadoran unions had been too reliant on international funding: ibid., at 118.

and No. 98 until 2006.[88] Furthermore, ratification only came within weeks of a deadline beyond which El Salvador would have lost GSP+ trade preferences with the European Union (EU), and despite the fact that the preferences had been granted on a temporary basis in October 2005, on the understanding that the ratifications would follow.[89]

This brief case study raises interesting questions about labour law reform, and about how the ILO supports reform processes. The fact that the ILO was involved through the Forum arguably shows the ILO promoting law reform that would foster *inclusivity and democratisation*. At the same time, however, the effectiveness of this approach must be considered in light of the fact that trade unions appear to have been confronted with significant challenges from well before the reforms began. Moreover, questions arise about both *systemic fit* and also *context dependency* when the focus of law reform is narrowly technical, and perhaps has insufficient connection to the collective bargaining and industrial relations contexts.

The case study also points to the inherent limitations where governance is weak. In a country with virtually no history as a functioning democracy, the reform process happened under the auspices of the Peace Accords, rather than as part of the programme of a democratically elected government. Moreover, the reforms were prompted by, and focused largely on, access to international trade preferences, leading to a primary goal of progress

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[88] Robertson and Trigueros-Argüello, above n. 63, at 147.

[89] J. Orbie and L. Tortell, 'The New GSP+ Beneficiaries: Ticking the Box or Truly Consistent with ILO Findings?' (2009) 14 *European Foreign Affairs Review* 663–681, at 673. According to Robertson and Trigueros-Argüellor, a major consideration was the investment of a Spanish company in the Tuna fishing industry: Robertson and Trigueros-Argüello, above n. 63, at 146–147. El Salvador's constitutional court subsequently ruled that it was unconstitutional for the unions to be established in the public sector: ibid., at 147. This in turn prompted an investigation by the European Commission into the impact of the decision: Orbie and Tortell, ibid., at fn. 48. The issue of ratification of ILO Conventions also featured in the negotiations for the Central America Free Trade Agreement (CAFTA): Robertson and Trigueros-Argüello, above n. 63, at 146–147. El Salvador's application of Convention No. 87 continues to be considered by the ILO's supervisory bodies. In recent years the Committee on Freedom of Association has received complaints about the murder of a trade unionist, and about government interference in the selection of employer representatives in tripartite bodies. Moreover, the Committee of Experts on the Application of Conventions and Recommendations published an individual Observation in 2015 touching on a number of issues, including civil servants being excluded by the constitution from exercising their freedom of association: ILO, Committee of Experts on the Application of Conventions and Recommendations, *Individual Observation – El Salvador* (adopted 2014, published 2015).

towards legal conformity between the text of national law and ILO standards. This is noticeably different from the kind of approaches suggested elsewhere in this book which, broadly speaking, emphasise responsive regulatory design.[90] That necessarily entails a wider range of considerations, including, in particular, the potential of the proposed reforms to contribute to improved labour market and socio-economic outcomes.

4. LIBERIA: SOMETHING OLD, SOMETHING NEW – SOMETHING THAT WAITED TO BE ENACTED

4.1 Country Context: A Legacy of Conflict, Discrimination and Weak Institutions

Liberia sought ILO assistance for labour law reform soon after President Ellen Johnson-Sirleaf began her first term in office in 2006.[91] The 2005 election marked Liberia's return to democracy after a period of non-democratic rule and/or civil war that endured for most of the time between 1980 and 2003.[92] This severe failure of governance and respect for the rule of law was preceded – indeed precipitated – by longstanding chronic weaknesses in these areas. From its founding, Liberia's economy and politics were dominated by the 'Americo-Liberian' elite,[93] and the legal system

[90] For a similar emphasis on regulatory design in the case of El Salvador in particular, and Latin America more generally, see Anner, 'Meeting the Challenges', above n. 84. In considering why 'pro-union' labour law reforms have not led to greater union influence, Anner points to, among other things, the need to design labour law in keeping with the prevailing economic trends and structures. Thus, countries that were moving away from import substitution policies and opening up to the global economy, notably through the establishment of export processing zones, were not designing labour laws suited to the new paradigm.

[91] The process of labour law reform was also supported by an international human rights NGO, Realising Rights, and the American Bar Association office in Monrovia.

[92] Charles Taylor was democratically elected in 1997, but war resumed in 2000: Stephen Lubkemann, Deborah Isser and Peter Chapman, 'Neither State nor Custom – Just Naked Power: The Consequences of Ideals-oriented Rule of Law Policy-making in Liberia' (2011) 63 *Journal of Legal Pluralism* 73 to 109, at 78.

[93] See http://trcofliberia.org/ (accessed 24 January 2014). The term 'Americo-Liberian' elite refers to Liberians descended from the settlers who first established the country, and distinguishes them from the many ethnic and tribal groups that were living on the territory when the settlers arrived in 1822. See, for example, the TRC report. See also Jeremy Levitt, *The Evolution of Deadly Conflict in*

effectively discriminated against the majority indigenous population, by excluding those who did not own property from many rights.[94] Not surprisingly, the majority perceived the formal legal system to be controlled by the elite and used for their own benefit.[95]

Governance and respect for the rule of law have remained extremely challenged since the return to peace.[96] Reinforcement of the rule of law is of paramount importance, and public confidence needs to be improved, but the responsible bodies are weak.[97] Unsurprisingly, Liberia is extremely poor and under-developed, ranking 175th out of 187 countries in the 2013 Human Development Index.[98] It has low labour market participation, little formal employment, and low levels of educational attainment.[99]

Liberia: From 'Paternalism' to State Collapse (Carolina Academic Press, 2005). The economy depended largely on revenues derived from concessions granted to foreign enterprises operating in agriculture and extractive industries, and these revenues went disproportionately to the elite. On one view, Liberia's dependence on this economic model has changed little since the restoration of democracy: Andreu Solà-Martín, 'Liberia: Security Challenges, Development Fundamentals' (2011) 32 *Third World Quarterly* 1217–1232.

[94] Many indigenous groups had no legal concept of individual property ownership: Jim Dube, 'Resurrecting the Rule of Law in Liberia' (2008) 60 *Maine Law Review* 575–586, at 577, citing Levitt at 38. The legal system created a separate sphere of operation for customary law, codified in the so-called Hinterland Regulations: Lubkemann et al., above n. 92, at 77.

[95] Despite significant efforts since the restoration of democracy to promote adherence to the rule of law, it has been reported that many people *still* consider the formal legal system to be corrupt and inaccessible, and still an instrument of exclusion and oppression (Lubkemann et al., above n. 92, at 101). The operation of the rule of law in practice was also adversely affected by the fact that very few of Liberia's judicial officers held the legal qualifications that were required of them: L. Gberie, 'Truth and Justice on Trial in Liberia' (2008) 107 *African Affairs* 455–465.

[96] The situation is complicated in particular by the fact that many key participants in the civil war hold or have held elected office, and have not been held to account for their actions during the conflict. The fact that many key participants have been and/or are legislators and/or members of the executive is one of the reasons that many of the TRC recommendations concerning prosecution, and/or prohibition from further participation in politics, were not initially put into effect: A. Weah, 'Hopes and Uncertainties: Liberia's Journey to End Impunity' (2012) 6 *The International Journal of Transnational Justice* 331–343. At the same time, some steps have been taken more recently to incorporate some of the TRC recommendations into a National Reconciliation Road Map: United Nations, *Twenty-sixth Progress Report of the Secretary-General on the United Nations Mission in Liberia (UNMIL)*, 12 August 2013, UN Doc. S/2013/479, at [6].

[97] United Nations, *Twenty-sixth Progress Report*, above n. 96, at [89]. Indeed, the UN considers its on-going presence 'essential' as a 'stabilizing factor': ibid., at [99].

[98] Data available at www.hdr.undp.org (accessed 19 August, 2015).

[99] Labour force participation in 2010 was 62.8 per cent, with 68 per cent

Liberia's policy direction since the return to democracy has emphasised reinvigoration of a functioning free market economy, promotion of good governance, and strengthening the rule of law – all key elements of Liberia's initial Poverty Reduction Strategy (PRS). The PRS included specific commitments to develop a National Employment Policy, to strengthen the labour administration machinery, and to revise labour law 'to make it more responsive to the needs of employees, employers and investors, while promoting fundamental human rights and other workplace standards appropriate for Liberia'.[100] Most of the labour legislation dated from the 1950s.

4.2 The ILO and Labour Law Reform with Weak National Institutions

The ILO first commissioned a detailed analysis of the existing Liberian Labor Code.[101] It also worked to build the capacity of the tripartite partners, especially to engage in a process of social dialogue about labour law reform. The ILO helped reinvigorate the Liberia Chamber of Commerce, and advised on the formation of the Liberia Labour Congress (from two previous national trade union centres). The ILO worked with the parties to identify their goals for new labour legislation; the Ministry of Labour produced its own strategy paper. The ILO also facilitated the signing of a Memorandum of Understanding to create a National Tripartite Committee.

By mid-2009 the ILO had agreed to support legal drafting. Although a consultant was sought, ultimately an ILO official based in Geneva did the drafting, while making multiple trips to Liberia. Several drafts were prepared during the first half of 2009, and discussed in tripartite workshops; the Office also prepared comments on the draft texts.[102] It

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informal employment, and fewer than 200 000 in regular paid employment, out of some 1.8 million eligible to work. Over 39 per cent of the Liberian population (among women, over 50 per cent) either have never attended school, or have not completed a single grade. Almost 23 per cent have completed no more than 6th grade. Thus, just over 60 per cent of Liberians either have never attended school, or have at most a 6th-grade education. ILO, *Report on the Liberia Labour Force Survey 2010*, February 2011.

[100] Republic of Liberia, *Poverty Reduction Strategy*, 2008, at 74.

[101] The expert was a former Minister of Labour, Counsellor Supuwood. The two Acts that are most relevant are the Labor Law, and the Labor Practices Law, which are Titles 18 and 18-A of the Liberian Code of Law (respectively).

[102] While it may seem unusual for the Office to prepare comments on a draft text prepared within the Office itself, it reflects several practical realities: no one person is likely to have the necessary depth of knowledge in each sub-topic within

did not appear that any of the constituents had independent legal advice during the process.[103] In May 2009 the Ministry of Labour ran a process of consultation in several of Liberia's counties; the draft texts were debated at a three-day National Labour Conference in October 2009. In early 2010 the Ministry of Justice and the Law Reform Commission provided feedback, while the ILO engaged a consultant to examine the draft texts from the point of view of Liberian law. The final draft texts were prepared in Geneva, and delivered to the then Minister of Labour during the 2010 International Labour Conference. The Bill was first introduced into the legislature in 2010. Passage was delayed in large part because of differences between the House of Representatives and the Senate over whether the legislature should also adopt a new minimum wage, and if so, at what level.[104] The Bill finally became law in mid-2015: it was adopted by the legislature in May, and signed into law by the president in late June.[105]

The Law contains new, modified and old provisions. New elements include explicit protection of fundamental rights at work;[106] a National Tripartite Council (NTC); and occupational safety and health law on the Robens model.[107] Modified provisions include those relating to the operation of the Minimum Wage Board and the labour inspectorate; those regulating contracts of employment and termination of employment;[108] and those relating to collective bargaining.[109] Old provisions include those on

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the field of labour law; responsibility for technical expertise on the various subtopics within the field of labour law, and for international labour standards, is divided among different units within the Office; and it is always useful to have a different view on a draft text than that of the drafter or, perhaps, that of the government and social partners concerned.

[103] The Office has addressed this specifically in other countries where it has been working, including Haiti and Zambia.

[104] The legislative programme was also shaped by the 2011 national elections. In fact, the Bill passed each chamber separately, and without amendment to the ILO text, but in each case without resolution of the question of a minimum wage. As to that: the Bill provided for the operation of a Minimum Wages Board, in a modified form from that which previously existed. Neither the previous law nor the Bill envisaged a role for the Legislature in minimum wage setting.

[105] http://www.emansion.gov.lr/2press.php?news_id=3327&related=7&pg=sp (last accessed 19 August 2015).

[106] The rights are those covered by the ILO's Declaration on Fundamental Principles and Rights at Work, 1998. A similar approach is taken in, for example, Namibia's Labour Act 2007.

[107] For a brief overview see, for example, R. Johnstone, *Occupational Health and Safety Law and Policy*, 2nd edn (Thompson/Lawbook, 2004), pp. 63–73.

[108] Here, ILO Convention No. 158 has been influential.

[109] The collective bargaining provisions are taken more or less word for word from the Labour Act 2007 of Namibia, which was suggested as a model because

workers' compensation which, in the absence of new government policy, simply reproduce the existing law.

4.3 Assessment: The Limits of Law Reform in a Weak Institutional Environment

Overall, the Law follows a rather 'orthodox' approach to legal regulation of a formal labour market. In that sense it falls short of some of the ideas proposed elsewhere in this book.[110] Most conspicuously, the provisions related to social protection are at best poorly linked to wider policy in this area. Also, civil servants are completely excluded, although they are perhaps the largest single group of workers with formal employment in Liberia.[111] The Law does little to enhance the organisational arrangements within the Ministry of Labour, and nothing to simplify the complex procedures needed to enforce the Law.[112] Neither does the Law limit legal dispute resolution procedures, which can continue for long periods of time given that there is an absolute right of appeal from the National Labour Court to the Supreme Court.[113]

The picture is not however all negative. The Law does attempt to extend labour law beyond common law employees, adopting the (rebuttable) presumptive definition of an 'employee' used in the South African Labour Relations Act 1995.[114] Unlike the old law, the Law would not explicitly exclude certain categories of workers, such as domestic servants.[115] In

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it was developed through lengthy consultation, and with ILO assistance. On the development of post-independence labour law in Namibia, see C. Fenwick, 'Labour Law Reform in Namibia: Transplant or Implant?' in T. Lindsey (ed.), *Law Reform in Developing and Transitional Economies* (Routledge, London, 2007), 317–343 and C. Fenwick 'Labour Law in Namibia: Towards an "Indigenous Solution"?' (2006) 123 *South African Law Journal*, 665–699.

[110] Compare Blackett, above n. 2.

[111] There is a separate regulatory scheme for the employment conditions of civil servants.

[112] The Ministry would therefore still have power to fine, but remain constrained from directly enforcing any decision that is not complied with: rather it would still have to initiate legal proceedings before the National Labour Court.

[113] The legislature is constrained by Art 69 of the Constitution from limiting the authority of the Supreme Court as the final appeal jurisdiction in all matters, both as to law and as to fact.

[114] See below nn. 201–202 and accompanying text, on the effects of this approach in South Africa.

[115] The previous Labor Law used a concept of 'workman' which included 'every employed person whose earnings do not exceed one hundred dollars per month, *except* persons employed in the following occupations: agriculture; forestry;

this sense, the Law goes some way towards a form of appropriate *context dependency*, although as a largely 'orthodox' law, and one that would operate in a very weak institutional environment. The Law therefore falls a long way short of radical regulatory re-design – or even the kind of institutional innovation that has been evident in Cambodia.

Nevertheless, the NTC would be a flexible mechanism for ongoing social dialogue, empowered to engage with groups in society not represented by trade union or employer organisations.[116] The Law would facilitate voluntary collective bargaining, and directly address certain important 'unfreedoms',[117] by explicitly protecting certain fundamental rights. In that respect the Law's specific provisions on sexual harassment are important in the broader context of the high level of sexual violence in Liberia.[118] Overall, then, the Law does contain provisions, and was developed through processes, promoting *inclusivity and democratisation*.

The retention of significant parts of the legal architecture is not necessarily negative, and, indeed, there are many good reasons why it would be better for reform to be incremental rather than dramatic: institutions and their users can both have difficulty with change. Indeed, this might be thought of as an attempt to ensure a satisfactory degree of *institutional fit*. A further consideration is the argument that effective and lasting change to a legal framework is more a political than a technical process.[119] Another is the need for sound policy development; as noted,

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processing the products of agriculture and forestry; domestic service; and administration of aid, comfort; or care to the sick' (emphasis added), Labor Law, §21(a).

[116] 'In carrying out its tasks . . . the National Tripartite Council may consult with interest groups representing participants or potential participants in the labour market on matters of economic and social importance': Decent Work Act, §4.2b).

[117] Kolben, Chapter 3, this volume.

[118] A World Health Organization study found that 90.8 per cent of respondents had been subjected to one or more acts of abuse and/or sexual violence; 75 per cent were raped – most of them gang raped: United Nations, *Report of the Independent Expert on Technical Cooperation and Advisory Services in Liberia*, 14 February 2008, UN Doc. A/HRC/7/67, at [33]. The UN has reported in the past that rape and sexual violence were the most frequently reported serious crimes: United Nations, *Report of the Independent Expert on Technical Cooperation and Advisory Services in Liberia*, 15 August 2008, UN Doc. A/HRC/9/15, at [25]. More recently, the UN reported that only a very low number of the reported cases of rape, and sexual and gender-based violence (especially involving children) go to full trial, and that this is symptomatic of the shortcomings in the criminal justice system: United Nations, *Twenty-sixth Progress Report of the Secretary-General*, above n. 96, at [51].

[119] Lubkemann et al., above n. 92 at 85.

its absence explains the decision to retain the previous provisions on workers' compensation. Similarly, while more efficient dispute resolution and enforcement procedures could be imagined, it would be better that any proposed changes be based on a detailed analysis of the current system.

5. NEPAL: LABOUR LAW REFORM AMIDST CONSTITUTIONAL CRISIS

5.1 Country Context: A Legacy of Conflict, Inequality and Weak Governance

Like Liberia, Nepal experienced significant social turmoil for a period of over twenty years, including periods of non-democratic rule and a civil war led by a Maoist insurgency. The underlying causes of the turmoil were also similar to those in Liberia: longstanding weaknesses in governance and the rule of law, together with deep-seated economic and social discrimination, leading in turn to '[s]tructural inequality'.[120] Unsurprisingly, Nepal is a very poor country, ranking 145th out of 187 countries in the 2013 UN Human Development Index.[121] The population on the whole is not well educated; the majority of its workers are engaged in subsistence agriculture, and very few have formal employment.[122]

The Comprehensive Peace Agreement that brought the war to an end included an Interim Constitution, under which a Constituent Assembly (CA) was elected. The CA took office for two years in May 2008, with responsibility for developing a final constitution, and authority to exercise legislative powers.[123] Maoists were the single largest group of

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[120] M. Langford and A.M. Bhattarai, 'Constitutional Rights and Social Exclusion in Nepal' (2011) 18 *International Journal on Minority and Group Rights* 387–411, at 387. For further detail see also, for example, E. Wickeri, 'No Justice, No Peace: Conflict, Socio-economic Rights, and the New Constitution in Nepal' (2010) 2 *Drexel Law Review*, 427–490, esp. at pp. 432–475.

[121] See www.hdr.undp.org (last accessed 19 August, 2015).

[122] According to the 2008 Labour Force Survey: 11.7 of 23.9 million people were employed (approximately 81 per cent participation rate). Only 6 per cent of the more than 8 million workers engaged in agriculture had waged employment. Of those in non-agricultural jobs, 70 per cent worked informally. In terms of education, 46 per cent of the total population had never attended school, and 70.9 per cent did not go beyond primary education. Among women, the respective figures were 58 per cent and almost 78 per cent.

[123] The Interim Constitution of Nepal, 2063 (2007) (UNDP Nepal, January

representatives elected to the CA. The CA extended its own term a total of four times (that is, without seeking a further electoral mandate) before it was finally dissolved in May 2012, following a Supreme Court ruling that further prolongation would be unlawful.[124] Despite the extensions, the CA did not agree on a new Constitution. The range and complexity of the issues to be resolved no doubt played a significant role in this. Among them were (and are) the type of federal state that Nepal might be, protection of economic and social rights and, more broadly, constitutional design to promote equality for the many marginalised groups.[125] The matter was further complicated by the composition and functioning of the CA which, it has been suggested, largely privileged those groups that had been powerful before the outbreak of turmoil.[126] Elections were ultimately held on 19 November 2013, leading to a much reduced Maoist presence in the CA.[127]

2008). The legislative powers are in Art 83 for power and Arts 84–88 for legislative procedure.

[124] K. Chapagain and J. Yardley, 'Legislature in Nepal Disbands in Failure', *New York Times*, 28 May 2012, A4.

[125] See, for example, B.R. Upreti, 'Nepal From War to Peace' (2012) 24 *Peace Review: A Journal of Social Science* 102–107. For the view that land reform is a pressing issue, see, for example, Wickeri, above n. 120.

[126] S. Tamang, 'Exclusionary Processes and Constitution Building in Nepal' (2011) 18 *International Journal on Minority and Group Rights* 293–208, and K. Vollan, 'Group Representation and the System of Representation in the Constituent Assembly and Future Parliaments of Nepal' (2011) 18 *International Journal on Minority and Group Rights* 343–368. In the view of Y. Gai, '[t]he lack of progress in concluding the Constitution is due almost entirely . . . to conflicts between leaders of political parties': 'Ethnic Identity, Participation and Social Justice: A Constitution for New Nepal?' (2011) 18 *International Journal on Minority and Group Rights* 309–334, at 334. It has also been argued that the very concept of a constitution in Nepal is difficult, in view of the various attempts to establish constitutional democracy in Nepal over time, and their interrelationship with broader, ideological projects to establish a coherent state around the many minority groups that compose the population: M. Malagodi, 'The End of a National Monarchy: Nepal's Recent Constitutional Transition from Hindu Kingdom to Secular Federal Republic' (2011) 2 *Studies in Ethnicity and Nationalism* 234–251.

[127] G. Harris, 'Election Results in Nepal Signal a Political Right Turn', *New York Times*, 26 November 2013, A6. The CA convened – for a largely ceremonial sitting – on 22 January 2014, to begin work on the new Constitution. The leader of the Nepali Congress Party is reported to have expressed confidence that the task could be completed within a year: 'New Nepal Assembly Convenes to Write Constitution', *The New Zealand Herald*, 23 January 2014.

5.2 The ILO: Proposals for Integrated Labour Market Reform

The ILO has been providing support to Nepal on industrial relations and labour market regulation for many years. In 2001 the ILO contributed to the development of Nepal's Poverty Reduction Strategy.[128] Between 2002 and 2006 the ILO helped to facilitate national processes in which the key parties worked towards agreement on key principles for labour market regulation, and in February 2006 Nepal formally requested ILO assistance for law reform. The ILO carried out a major study of the labour market in Nepal, which has shaped much of the subsequent policy advice, particularly on the need to promote orderly industrial relations.[129]

The ILO has consistently advocated a broad range of policy interventions to improve both labour market regulation, *and also* economic and social outcomes.[130] One key feature has been advice on changing employment termination laws – drawing on ILO Convention No. 158 – while also introducing an unemployment insurance scheme and making other changes to social protection measures. The objective was to promote improved labour market flexibility, but without causing undue harm to workers who may lose their employment.[131] A second key element was advice on creating institutions and processes to promote a culture of peaceful industrial relations.[132] The ILO later submitted a detailed report on specific proposals for labour law reform, authored by an external consultant.[133] Among other things it recommended the introduction of a scheme of good faith collective bargaining

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[128] R. Kyloh, *Social Dialogue in Nepal – Promoting Economic Efficiency and Equity*, unpublished background paper for the ILO input to the PRSP of Nepal (ILO, Geneva, 2001).

[129] R. Kyloh, *From Conflict to Cooperation – Labour Market Reforms that can Work in Nepal* (ILO/Academic Foundation, 2008).

[130] The ILO has been advocating an approach in Nepal that is much broader than mere labour law reform for some time: ibid., at 97. The World Bank, by contrast, repeatedly recommended labour market liberalisation in keeping with orthodox neo-liberal policy prescriptions, especially during the period 2003 to 2007 when the conflict was unresolved: the Bank more than once indicated its willingness to make this a condition of its lending to Nepal: ibid., at 85–95.

[131] The study also recommended improvements in tax-financed benefits for the elderly, and the introduction of tax-financed benefits for the young: ibid., at 162–168.

[132] On the nature of industrial relations conflict in Nepal and the need to improve the industrial relations climate, see generally Kyloh, above n. 129. On the specific legal means that might be used to achieve this goal, see generally M. Bromberg SC, *The Labour Law of Nepal – Proposals for Reform* (October, 2007) (copy on file with author).

[133] Bromberg, above n. 132.

superintended by an independent institution,[134] and a new role for authorised worker representatives in helping to enforce the law, to supplement labour inspectors.[135] The report also recommended amending the legal definition of an 'employee', to guard against disguised employment relationships – in line with the ILO's Employment Relationship Recommendation, 2006 (No. 198).[136]

The ILO subsequently supported Nepal in developing new legislative texts based on these recommendations in a process formally carried out under the auspices of the tripartite Central Labour Advisory Council,[137] via a sub-committee known as the Tripartite Taskforce.[138] From mid-2007 to mid-2011 the ILO convened numerous tripartite workshops that focused, among other things, on policy regarding collective bargaining, on principles for codes of practice on discrimination and on termination of employment, and on draft legislative texts. At different times the ILO engaged both international and national legal consultants to advise and/or to draft; from July 2010 an ILO official took responsibility for legislative drafting.[139] Final draft texts were delivered to the Government in October 2011.[140] From early 2012 the ILO engaged two national consultants to work intensively with the Government, and later submitted technical advice both on the comments of employer and worker organisations on the ILO texts, and, in July 2013, on a draft Bill prepared by the Government of Nepal.

To a large degree, the draft legislation submitted in October 2011 sought to give effect to the ILO's policy recommendations over time.

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[134] The report makes extensive reference to the model of the Cambodia Arbitration Council as an example that may be appropriate for Nepal to follow: ibid., at 12–16.

[135] There has been a similar system in Australia for a long time, see e.g. C. Fenwick and J. Howe, 'Union Security After Work Choices' in A. Forsyth and A. Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009), pp. 164–185.

[136] In a related way the report recommended regulation of private employment agencies, whose operations were felt to be threatening the legal scope and practical operation of the definition of an 'employee'. Bromberg, above n. 132.

[137] The Committee is established under the Labour Act 1992.

[138] In practice, when the Taskforce met it generally included representatives of *all* trade union and employer groups in Nepal. On the structures and political affiliations of the trade union movement in Nepal, see Kyloh, above n. 129.

[139] This included spending an extended period in Kathmandu in March 2011 to work with the national consultant and with ILO officials based in the region.

[140] ILO, *Technical Memorandum to the Government of Nepal*, Geneva, October 2011 (copy on file with author).

The drafts proposed a clear legal framework for the taking of lawful industrial action, shaped by an obligation to bargain in good faith, which would be superintended by an independent body called the Nepal Labour Commission (NLC). The draft Labour Act included termination of employment laws drawing on Convention No. 158; draft provisions to introduce an unemployment insurance scheme were submitted in parallel. The proposed Labour Act included a chapter on fundamental rights at work, and a definition of a 'worker' (rather than an 'employee') designed to broaden the scope of the law's application, by establishing a rebuttable presumption as to the existence of an employment relationship. Neither would the law be limited in its application to enterprises with ten or more workers, as is the current law. The draft also provided for a registration scheme for private employment agencies (called 'labour providers' in the draft text), and a mechanism for persons other than labour inspectors to seek a permit from the NLC to support the labour inspection process. The most recent Government draft on which the ILO commented differed in significant ways from the ILO draft texts, and from the ILO's policy recommendations. At the time of this writing, however, no Bill had been made public, or presented to the CA.

5.3 Assessment: The Long Road to Law Reform

The process and policy in this case show the ILO making 'holistic' proposals that resonate with some of the recommendations elsewhere in this book. The proposal for a scheme to allow authorised persons to supplement labour inspection has a direct connection with Kolben's call for mixed state and non-state regulation.[141] Given that the proposal responded to an assessment of the weaknesses in the existing labour inspection system, this can be considered an example of institutional innovation, and, in a sense, an effort to balance the different demands of *context dependence* and *systemic fit*. Perhaps most striking is the explicit link, indeed policy package, suggesting modified employment protection law, but *together with* law to ameliorate the social effects of employment termination (and which again seeks to balance *context dependence* and *systemic fit*). At the same time, this falls short of, for example, linking with wider poverty reduction schemes.[142] The ILO draft law would not be limited to enterprises with fewer than ten workers, and it would attempt to broaden its scope of application by extending the concept of an 'employee'. On the other hand, the

[141] Kolben, Chapter 3, this volume.
[142] Marshall, Chapter 9, this volume.

proposed changes to termination of employment and the introduction of unemployment insurance – as well as those relating to collective bargaining and industrial action – would still mean a major focus on workers in formal employment.

Two questions arise, the answers to which may be interrelated. One is what explains the differences between the Bill the Government has prepared, and the key elements of the policy reform package that the ILO has been recommending for many years. A second is why no Bill has yet been presented to the CA, much less adopted. The second is easier to answer than the first: it must be assumed that labour law reform was a less compelling priority than others during the CA's first term.[143] This assumption suggests a possible answer to the first question: the institutions of the state responsible for developing and prosecuting a policy and legislative agenda may have lacked the political authority, and the institutional capacity and experience, to do so. This might explain, among other things, why the draft Government Bill of mid-2013 omitted some key elements of the ILO's proposal for a new institutional framework: it may be precisely because in the Nepalese perspective they were, and were seen to be, so new as to be incompatible with the existing framework. If so, then the balance of *context dependence* and *systemic fit* may not have been appropriate, notwithstanding the efforts to involve all the tripartite partners in the development of the policy proposals. This analysis suggests questions in turn about how the recommendations were arrived at and promoted, and the respective roles of the ILO and the Government in the process; but these cannot be answered here.

6. ROMANIA: LABOUR LAW REFORM UNDER EXTRA-NATIONAL INFLUENCE

Romania, and the ILO's involvement in labour law reform in the country, are in many respects very different from the other case studies in this chapter. Among other things, the ILO did not become involved following a period of internal conflict. And while Romania has faced significant economic challenges, especially in recent years, its economy and workforce are still far ahead of those in a number of the countries considered here.[144]

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[143] The CA passed relatively little legislation at all during its first term. See: http://www.lawcommission.gov.np/.

[144] Romania ranked 54th out of 187 countries in the UNDP Human Development Index for 2013: http://www.hdr.undp.org/en (last accessed 19 August, 2015).

On the other hand, there are some important similarities. Like the other countries considered here, Romania has been going through several transitions in its governance: first, the transition to a democratic country, and then subsequently, the transition to membership of the EU. Both transitions led to legal change. It is also true that Romania, like El Salvador, has been responding to global and regional economic and political pressures. Thus, Romania has amended its law from time to time in response to the views of the International Monetary Fund (IMF), including most recently following the GFC, when the EU and the IMF offered similar advice.[145]

6.1 Country Context: A Series of Transitions

As in Cambodia and Nepal, the ILO has advised on labour law reform in Romania on a number of occasions over a period of time. The ILO provided technical assistance during the process that led to the adoption of the Labour Code of 2003, by which Romania sought to harmonise its law with EU labour standards, in advance of its accession to the EU in 2007.[146] The new Code was developed through a process of social dialogue, and gave effect to the outcomes of the parties' discussions.[147] Indeed the process was described in 2007 as 'an important example of democratic maturity, which demonstrates the capacity of social actors to participate responsibly in governmental processes'.[148]

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[145] For a summary of the economic events and policy changes, see ILO, *Social Dialogue and Adjustment in Romania: Progress Report on ILO Cooperation with Constituents and the International Monetary Fund*, ILO doc. GB.310/WP/SDG/2/2, March 2011 (available at: http://ilo.org/gb/GBSessions/GB310/wp-sdg/WCMS_152302/lang--en/index.htm [last accessed 3 February 2014]).

[146] C. Ghinararu, F. Pavelescu, R. Dimitru and G. Modiga, *Flexicurity and Social Dialogue in Romania – Perspectives on the Implementation of Flexicurity Principles in Romanian Undertakings*, European Institute of Romania, Strategy and Policy Studies (SPOS), No. 2009, 3, at p. 125 (available at: http://www.econstor.eu/bitstream/10419/74686/1/623006278.pdf [accessed 3 February 2014]). On the EU requirements for Romania (and Bulgaria), see, for example, T. Felcman, 'Crafting Employment Policy During EU Accession: Strategies for Romania and Bulgaria' (2006) 15 *Minnesota Journal of International Law* 189–218, esp. at pp. 191–195.

[147] G. Ghebrea, 'Social Dialogue in Romania: From a Forgotten Tradition to a Renewed Practice' (2005) *South East Europe Review for Labour and Social Affairs* 41–61, at 55 (the Bills were discussed in the Economic and Social Council).

[148] UNDP, *Fostering Human Development by Strengthening the Inclusiveness of the Labor Market in Romania*, National Human Development Report, 2007, at 76 (available at: http://www.undp.ro/download/files/publications/NHDR%202007%20EN.pdf [last accessed 3 February 2014]).

Assessing the 2003 Labour Code from a different perspective, the IMF concluded in its statement after the 2004 Article IV consultations with Romania that the new labour code was not conducive to private sector development – a view shared by foreign investors – and that reforms were further needed with respect to regulation of hiring and firing, collective bargaining and a new wage-guarantee fund for bankrupt companies.[149] As a result, the government further amended the Labour Code in 2005 and 2006, managing to devise a compromise solution with the social partners as it did so. The ILO was asked to advise on these subsequent reforms, and it challenged their merit, arguing that the macroeconomic indicators for 2004 did not suggest that the Labour Code was generating immediate negative effects.[150] Furthermore, reviewing its potential longer-term impact, the ILO also found it 'difficult to detect any clear negative link between the introduction of the revised labour legislation and the macro economy as the country experienced an economic boom between 2003 and 2008'.[151]

6.2 The ILO and Labour Law Reform as Response to the Global Financial Crisis

The government initiated further labour law reform as part of a broader package of austerity measures implemented to respond to the deep recession experienced following the GFC.[152] Romania's 7.1 per cent drop in GDP in 2009 was one of the largest in Europe, and it was one of only five European countries not to return to growth in 2010.[153] The package of reforms was supported by the EU, and also by the IMF. On very short notice, the Presidents of five trade unions requested technical comments

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[149] IMF, *Romania: Staff Report for the 2004 Article IV Consultation*, IMF Country Report No. 04/221, Washington, DC, 2004, at paragraph 28.

[150] R. Kyloh, 'Labour Reforms in Romania', in *The Global Crisis: Causes, Responses and Challenges* (ILO, Geneva, 2011), 93–123, at 110.

[151] Ibid., at 101.

[152] For analysis of such policies across a variety of countries, see the *World of Work Report 2012: Better Jobs for a Better Economy* (ILO/International Institute for Labour Studies, 2012). Compare O. Blanchard, F. Jaumotte and P. Loungani, *Labor Market Policies and IMF Advice in Advanced Economies During the Great Recession*, IMF Staff Discussion Note (IMF, March 2013). (Available at: https://www.imf.org/external/pubs/ft/sdn/2013/sdn1302.pdf [last accessed 13 March 2014]).

[153] C. Domnisoru, *Decent Work Policy Options for the Romanian Economy*, Working Paper No. 105, Policy Integration Department, ILO, Geneva, July 2012, p. 1.

from the ILO in January 2011.[154] There was an exceptionally short deadline for the ILO's response – a direct result of the very short period of time that the Government had given the Romanian social partners to agree on the suggested reforms. The urgency was generated in large part by the Government's decision to pursue the legislative reforms through a special procedure in Article 114 of the Romanian Constitution, under which the Parliament may only approve or reject a draft law in its entirety, without detailed Parliamentary debate.

The 2011 labour law reforms amended the labour code, and included the adoption of a Social Dialogue Act, which amalgamated several other laws.[155] The amendments to the labour code were mainly geared towards increasing labour market flexibility and attracting foreign investors in order to boost employment, and also towards implementing certain EU directives. Changes were also made to the collective bargaining system. Given that one of the greatest causes of high unemployment in Romania is the level of informal (in this context, undeclared) work, it might be wondered whether the policy focus on labour market flexibility was well suited to address the problem.[156]

The key features of the 2011 changes to the regulation of hiring and firing included: the extension of the probationary period for employment contracts of indefinite duration; the regulation of works-sharing schemes; the extension of the maximum duration of fixed term contracts; the elimination of restrictions on temporary agency work; and the introduction of workers' performance as a criterion for determining the order of redundancy.[157] For its part, the Law on Social Dialogue changed key aspects of the prevailing industrial relations architecture, notably by extending the role of elected workers' representatives; modifying the representativeness criteria of trade unions for collective bargaining purposes at

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[154] The National Trade Union Confederation – Cartel ALFA (NTUC); The National Confederation of Free Trade Unions of Romania – Brotherhood (CNSLR); the National Trade Union Bloc (*BNS*); The Democratic Trade Union Confederation of Romania (CSDR); and CS Meridian.

[155] Law 54/2003 on unions, Law 356/2001 on employers, Law 109/1997 on the organization and functioning of the Economic and Social Council, Law 130/1996 regarding collective labour contracts, and Law 168/1999 regarding the settlement of labour conflicts. For some detail on the reform process, both the changes to introduce labour market flexibility and the changes to collective bargaining and the role of trade unions, see Domnisoru, above n. 153, pp. 38–42.

[156] Ibid., at 12.

[157] For a brief outline of the provisions as they existed before the amendments, together with observations on how they might be changed in the interest of promoting flexisecurity, see Ghinararu et al., above n. 146, pp. 45–71.

enterprise level; and suppressing the *erga omnes* effect of branch-level collective agreements.[158] The Government of Romania described the changes as having the effect of 'reinforcing bargaining at the enterprise level' and as being 'the vector of wage and employment policy.'[159]

6.3 Evaluating Employment Protection Laws through a Different Lens

The Romanian reforms of 2003 and 2011 illustrate well the type of decisions policymakers and social partners have to agree on – at times under severe pressure – with a view to adjusting labour market regulation to optimise its impact – or at least some of it – on the economic and social development of a country. In such a context, Deakin and Marshall's distinctions between the three functions of labour law – correcting, constituting and limiting market outcomes – serves as a good basis for developing a useful analytical framework to guide the assessment of how to improve labour market regulation, and how to optimise its effects.[160] What follows now is a brief attempt to use this approach to review the changes to employment protection laws (EPL) in Romania, and to identify the alternative policy recommendations that might have been suggested.[161]

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[158] The *erga omnes* operation of collective agreements obviated the need in Romanian law for a mechanism by which a discretion could be exercised to extend the operation of a collective agreement – extension was, in effect, automatic: ibid., at 56. For an overview of the evolution of Romanian regulation of trade unions from the socialist period in the early years after transition to democracy, see L.S. Bush, 'Romanian Regulation of Trade Unions' (1999) 32 *Cornell Journal of International Law* 320. For a brief description of the establishment of social dialogue institutions in the early years after the return to democracy, see R. Radu, *Social Dialogue Perspectives in Romanian Road Transport*, Working Paper No. 258, Sectoral Activities Department, ILO, Geneva, April 2008, pp. 13–16. For a detailed account of the legal evolution from socialist to market-economy labour relations, with attention to the political economy of the process, see T.J. Keil and J.M. Keil, 'Reconstructing a Legal Basis for Capitalist Labor Relations in Post-Revolutionary Romania' (2007) 41 *East European Quarterly* 239.

[159] Remarks of the representative of the Government of Romania to the International Labour Conference Committee on the Application of Standards, concerning Romania's implementation of the Right to Organize and Collective Bargaining Convention (No 98): ILO, *International Labour Conference Provisional Record 18* (2011), Part Two, at 73.

[160] Deakin, Chapter 2 this volume; Marshall, Chapter 9, this volume. See also S. Deakin, 'The Contribution of Labour Law to Economic and Human Development' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP, 2011), pp. 156–175.

[161] The exercise is hypothetical: the ILO's comments did not take this approach. Rather, they highlighted those provisions for which the ILO recommended:

Most reforms seeking to promote labour market flexibility concentrate on the corrective functions of labour legislation, and use indicators to measure EPL as a negative externality. For Romania, the OECD EPL indicator rated the legislation as being too rigid with respect to fixed term contracts and in the procedure for collective dismissals.[162] Thus the European Commission advised that Romanian legislation was too rigid – by comparison to other EU countries. For its part, the IMF drew on Romania's ranking on the 'employing workers index' of the World Bank's *Doing Business* reports, and referred to the country's relatively low employment and participation rates.[163] The policy recommendation derived from these approaches was, in essence, to facilitate recourse to fixed term contracts and to simplify the procedures for collective dismissals; as noted, this was the orientation of the 2011 labour code reforms to EPL in Romania.

Assessing EPL in Romania from the perspective that labour law can facilitate *economic coordination* leads, however, to consideration of the benefits of maintaining the internalisation of EPL costs, as part of a broader strategy to tackle the widely acknowledged problem of low productivity and low skills. More secure employment can encourage employers to invest in human resources, and to improve their organisations.[164] And where the hiring dimension of EPL is concerned, it has been shown that fixed term workers benefit far less from employers' investments in training.[165] For these reasons, an alternative policy recommendation with respect to EPL would rather be to *maintain* the level of protection, secure compliance with the law, and design schemes that would support employers' initiatives to invest in workers' training.

(i) further assessment of the changes proposed in light of the objective to be pursued; or (ii) modification of the change contemplated, to ensure better compliance with ratified ILO Conventions. ILO, *Memorandum of Technical Comments on the Draft Labour Code and the Draft Law on Social Dialogue of Romania*, ILO, January 2011 (copy on file with author).

[162] The OECD EPL indicators can be found at: http://www.oecd.org/employment/emp/oecdindicatorsofemploymentprotection.htm.

[163] Kyloh, above n. 150, at p. 95.

[164] See for example, R. Batt, 'Managing Customer Services: Human Resource Practices, Quit Rates, and Sales Growth' (2002) 45 *Academy of Management Journal* 587–597.

[165] See, for example, S. Carpio, D. Giuliodori, G. Rucci and R. Stucchi, 'The Effects of Temporary Contracts on Capital Accumulation in Chile', IDB Working Paper Series No. IDB-WP-253, IADB, 2011; and E. Wasmer, 'General Versus Specific Skills in Labor Markets with Search Frictions and Firing Costs' (2006) 96 *American Economic Review* 811–831.

Thinking about the *risk distribution* role of labour law brings into focus the balance between EPL and the unemployment insurance scheme in Romania. Effectively balanced risk distribution promotes social cohesion, *provided* it covers most workers. As noted: this is challenged in Romania by the high prevalence of undeclared work, which has continued to grow in recent years.[166] From this point of view, preserving social cohesion (by effective risk distribution) would thus call for reforms aimed at ensuring the laws can be effectively enforced by the labour inspectorate, including by use of dissuasive sanctions where necessary. Lastly, considering the potential role of labour law in *managing economic demand*, it can be argued that there is a need to consider how to ensure that incomes are maintained in a country where domestic demand shrank as a result of the GFC and the following recession. Typically, this objective would call for a *mix of policies* taking into account EPL, but also social security schemes, wage policies, and perhaps other elements.

6.4 Assessment: Labour Law Reform in a Constricted Policy Space

This case study illustrates again the ILO's emphasis on action through social dialogue, which is of course in keeping with recommendations made elsewhere in this book. In that sense, it is further evidence of how the ILO seeks to promote *inclusivity and democratisation*. It also shows the ILO offering advice that seeks as far as possible to accommodate the needs of both *context dependence* and also *systemic fit*. On the other hand, the case study shows how national political circumstances can alter the scope for effective social dialogue – even where it has been important in previous reforms – and how parliamentary and political processes can limit not only the role of the social partners, but also the scope for the ILO to offer detailed and targeted advice. At the same time, the summary attempt at using elements of the checklist proposed by Deakin and Marshall appears to demonstrate its potential usefulness in framing the questions to be considered in national policy discussion over labour law reforms.

[166] Domnisoru, above n. 153.

7. SOUTH AFRICA: BUILDING DEMOCRACY THROUGH LABOUR LAW REFORM

7.1 Country Context: Apartheid and the Role of the ILO Standards System

In South Africa, the Office's role was limited and strategic, rather than 'operational': it engaged experts to advise a national Task Team, and it supported the team's visit to Geneva.[167] The national process however owed much to the ILO's promotion of freedom of association: the International Labour Conference considered South Africa annually from 1964, and a 1992 report of the Fact-Finding and Conciliation Commission on Freedom of Association (FFCC) looking into a complaint by the Congress of South African Trade Unions (COSATU)[168] identified key areas for reform from the point of view of ILO standards.[169] South Africa's first post-apartheid government committed itself to adherence to ILO standards, and to implementation of the FFCC findings; at the same time, freedom of association was protected by the Interim Constitution of 1993 (s 17).[170] The focus on freedom of association reflected the fact that labour law had been a key tool of discrimination under apartheid: for

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[167] The Explanatory Memorandum was published in (1995) 16 *Industrial Law Journal (South Africa)* 278–336; on the role of the ILO see p. 280. The international expert advisers were Professor Sir Bob Hepple, Professor Manfred Weiss and (the late) Professor Anthony Adeogun: see R. Hepple, 'Can Collective Labour Law Transplants Work? The South African Example' (1999) 20 *Industrial Law Journal (South Africa)* 1–12, at 1.

[168] The FFCC was jointly established by the ILO Governing Body and the United Nations Economic and Social Council (ECOSOC) in 1950 to deal with complaints of violations of trade union rights. See *Special Procedures for the Examination in the International Labour Organization of Complaints Alleging Violations of Freedom of Association – Annex 1*, available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:62:3533126116767322::NO:62:P62_LIST_ENTRIE_ID:2565060:NO (accessed 12 November 2013).

[169] The International Labour Conference adopted a Declaration concerning Action Against Apartheid in 1964, 'unanimously by acclamation': ILO, *Official Bulletin*, Vol. XLVII, No. 3, July 1964, Supplement 1, p. 1, n. 1. The adoption of the Declaration (which was updated in 1981, 1988 and 1991) prompted South Africa, a founding member of the ILO, to leave the organisation. Following the Declaration, a Conference Committee on Action against Apartheid considered annual reports from the ILO Director General, until the Declaration was rescinded in 1994: Héctor Bartolomei de la Cruz, Geraldo von Potobsky and Lee Swepston, *The International Labor Organization – The International Standards System and Basic Human Rights* (Westview, 1996), p. 112.

[170] The final constitution – adopted after the passage of the Labour Relations

decades, African workers were excluded from the industrial conciliation and wage regulation systems,[171] and from certain jobs, while the 'pass' system restricted where they could live and work. Major legal change had only begun after the Wiehahn Commission report of 1979.[172]

The government consented in February 1991 to the FFCC examining COSATU's complaint, having previously refused several times.[173] The FFCC called for an end to race-based discrimination, and for changes to the law on registration of trade unions, their constitutions, collective agreements, and the right to strike. The FFCC did not make specific suggestions for law reform, although it did make recommendations about

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Act 1995 – protects the rights to freedom of association, to bargain collectively, and to strike: Articles 18 and 23.

[171] Collective bargaining did not function effectively because the industrial councils were patchy and inconsistent, while African workers were mostly organising and bargaining at the workplace level, which was generally regulated through an incomplete body of decisions by the Industrial Court: Explanatory Memorandum, above n. 167 at 291.

[172] Before the Commission (so-called after its chairman) was established, the system was under stress from the increasing numbers of unregistered unions: D. Du Toit et al., *Labour Relations Law – A Comprehensive Guide* (6th edn, Lexis Nexis Butterworths, 2016), pp. 6–16. Thus, an initial goal of the changes was to diffuse political tension by inducing the independent unions to register in the system: P. Benjamin, 'Ideas of Labour Law – A View from the South', in Davidov and Langille, *The Idea of Labour Law*, above n. 160, 209–222, at 210. By the mid-1980s, however, many unions had joined bargaining councils, and shifted their strategy towards organising and bargaining at the industrial level.

[173] Government consent is required for the FFCC to consider a complaint: *Special Procedures for the Examination in the International Labour Organization of Complaints Alleging Violations of Freedom of Association – Annex 1*, above, n. 168. The ILO Governing Body appointed the three FFCC members at its session in May/June 1991: Sir William Douglas (Barbados), Justice Michael Kirby (Australia) and Justice Rajsoomer Lallah (Mauritius). The FFCC report was submitted to the ILO Governing Body at its session in May–June 1992, under the title *Prelude to Change: Industrial Relations Reform in South Africa*, and was originally published in ILO Doc. GB.253/15/7, which can be found at: http://www.ilo.org/public/libdoc/ilo/GB/253/GB.253_15_7_engl.pdf (accessed 12 November 2013). The FFCC report was subsequently published in the ILO *Official Bulletin*, Volume LXXV, Series B, Special Supplement. The conclusions were also republished in (1992) 13 *Industrial Law Journal (South Africa)* 739–791. In this case, government consent followed successful negotiations with the unions on certain issues, which also had the effect that it 'significantly reduced the scope of the investigations called for': *Prelude to Change*, at [567]. For comment on the FFCC procedure, see S. Saley and P. Benjamin, 'The Context of the ILO Fact-Finding and Conciliation Commission Report on South Africa' (1992) 13 *Industrial Law Journal (South Africa)* 731–738.

the national process for negotiating law reform.[174] Thus, in keeping with its responsibilities, the FFCC findings focused on labour law in its role as protector of fundamental human rights, but not on its contribution to economic and human development.

7.2 Protecting Fundamental Labour Rights – as a Means to Development

The Task Team began its work in August 1994,[175] and released a draft Bill, together with an Explanatory Memorandum, in February 1995.[176] The Memorandum includes an outline of the Task Team's 'brief'. The Team was to address 'technical' legal and institutional concerns,[177] and was required to give effect to the government's public commitments to implement the FFCC findings, and to promote and facilitate collective bargaining at different levels. The Team was also to give effect to government policy as set out in its Reconstruction and Development Programme (RDP).[178]

The RDP set out a range of economic and labour market objectives,[179] and saw labour relations as a key area of both economic *and* social policy, noting that segregation in employment had contributed to inequality and economic inefficiency.[180] The RDP's proposed changes to labour relations

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[174] *Prelude to Change*, above n. 173, at [748]. The FFCC also commented on certain legal design issues, including the complexity of the Labour Relations Act as it then stood (a result of multiple amendments over the years), and also the multiplicity of laws (11 in all) across the various territories into which South Africa was then divided.

[175] Its members were lawyers familiar with both employer and union perspectives.

[176] Titled 'Draft Negotiating Document in the Form of a Labour Relations Bill', it was accompanied by its own Explanatory Memorandum (Pretoria, Government Printer, 1995).

[177] This included use of simple legal language, compliance with constitutional rights and establishment of effective dispute resolution procedures.

[178] *The Reconstruction and Development Programme – A Policy Framework* (Umanyano Publications, Johannesburg, 1994).

[179] These included: elimination of poverty, inequality and insufficiency of wages: ibid., at [4.2.2.1]; creation of productive employment opportunities 'at a living wage': ibid., at [4.2.2.7] and promotion of manufacturing, so that export-oriented manufacturing might play a role in South Africa's integration into world markets: ibid., at [4.2.2.9]. The Programme was particularly concerned with the place of small and micro enterprises in the economy, especially those operated by black entrepreneurs and women: ibid., at [4.4.7.1].

[180] Ibid., at [1.2.3]. Particular problems included low skill levels, and the consequent constraint on developing a modern economy capable of creating jobs and ensuring a living wage: ibid., at [4.1.7].

law and policy were seen as part of the plans for building the economy.[181] Redressing power imbalances and protecting the basic rights to organise and to strike were presented as critical to the economic restructuring necessary to overcome the legacy of inequality and segregation: only then could labour play an effective role in national reconstruction and development.[182] The key principles included protection of basic organising rights, a living wage, workplace empowerment, and a system of collective bargaining at the 'national, industrial and workplace level',[183] including the capacity to extend the effect of industrial agreements to all workplaces.[184]

In turn, the primary objects of the Bill were 'to promote economic development, social justice and labour peace'.[185] At the same time the Bill was drafted with an eye to the challenges of small businesses,[186] and sought 'to avoid the imposition of rigidities in the labour market'[187] (especially given the goal of South African integration into the world economy). The Bill also sought to address 'the various forms of atypical employment' by including them in its definition of an 'employee', while still excluding independent contractors.[188] Thus it responded to the concern expressed in the

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[181] See in particular Section 4.8. The need for labour relations reform is also mentioned in relation to developing human resources. The RDP had five programme areas: meeting basic needs, developing our human resources, building the economy, democratising the state and society, and implementing the RDP: ibid., at [1.4.1].

[182] Ibid., at [1.4.14].

[183] Ibid., at [4.8.7].

[184] Ibid., at [4.8.8].

[185] Explanatory Memorandum, above n. 167, at 289.

[186] It did so by (among other things) simplifying unfair dismissal procedures, providing simple and non-legalistic dispute resolution procedures, and requiring that bargaining councils make adequate provision for the representation of small business: Explanatory Memorandum, above n. 167, at 286. The Labour Relations Act was not expected to do all of the work necessary to meet these goals: it was the first of a quartet of laws that included the Basic Conditions of Employment Act 1997, the Employment Equity Act 1998 and the Skill Development Act 1999. P. Benjamin, 'Beyond the Boundaries: Prospects for Expanding Labour Market Regulation in South Africa' in B. Langille and G. Davidov (eds), *The Boundaries and Frontiers of Labour Law* (Hart, 2006), 181–204 at 182.

[187] Explanatory Memorandum, above n. 167, at 286.

[188] Ibid., at 287. It is of some note that the Memorandum says little about the forms of atypical employment in question, and that it does not include an explanation of its proposed scheme to regulate labour broking. This omission is also of some interest in light of the relatively innovative provisions in the draft Bill: workers engaged through labour brokers were to be deemed employees of the labour broker; the labour broker and the 'end-user' would be jointly and severally

RDP about the challenges posed by casualisation and informalisation.[189] The proposals to promote freedom of association and collective bargaining were also explained in terms of their likely contribution to economic growth.[190] The decision not to introduce a duty to bargain backed by judicial enforcement, for example, was driven in part by the need for flexibility 'to respond to a changing economic environment'.[191] It is noteworthy that the RDP, and hence the draft Bill, were committed to industry-level bargaining,[192] given the widely held (and also widely contested) view that workplace-level bargaining offers the most flexibility to respond to economic change.[193] For the same reason it is noteworthy that the proposal for Workplace Forums was explained in terms of the importance of joint negotiation for successful economic transformation.[194]

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liable to the worker; and bargaining councils might have a role in regulating the operation of labour brokers: ibid., at 332.

[189] Benjamin, 'Beyond the Boundaries', above n. 186, at 182.

[190] Naturally much of the Memorandum explains its proposals on freedom of association and collective bargaining in terms of the Government's commitment to implement the FFCC findings, and its intention to domesticate relevant ILO standards, and with regard to its commitment to the constitution, including its protection (among other things) of the right to strike.

[191] Explanatory Memorandum, above n. 167, at 293. Instead, the Task Team proposed a system of collective bargaining giving the parties the greatest flexibility to determine the level and content of their bargaining: ibid., at 292. The chosen method was to establish organisational rights for unions, combined with extensive protection of the right to strike; the Bill was drawn up to promote bargaining at a central/industry level, 'but without prescription to this effect': ibid., at 293. The Memorandum also noted that the Bill left to the National Economic Development and Labour Council (NEDLAC) the determination of the particular thresholds that should be required for a registered union to be able to exercise the various organisational rights: ibid., at 295. On the proposed regulation of strikes, to bring the law into line with international standards and the constitution, see ibid., at 209–309.

[192] Bargaining councils under the Labour Relations Act would: be able to cover both public and private sectors; need to ensure small business representation; be subject to an annual review of representativeness; and be empowered to request that the Minister extend the operation of an agreement concluded in the bargaining council to non-parties: ibid., at 296.

[193] In the few years prior to the development of the draft Bill, both Australia and New Zealand, for example, de-centralised their industrial relations systems, as had the United Kingdom during the 1980s.

[194] The Memorandum refers to the success of such systems in Japan, Germany and Sweden, and notes that the shift from industrial to flexible production in Europe in the 1970s was achieved through the 'consensus, involvement and commitment of its workforce', which in turn gave rise to 'a new system of workplace participation'. Explanatory Memorandum, above n. 167, at 311. At the same time, Workplace Forums were to be voluntary, and, so as not to be in conflict with trade

The Labour Relations Act 1995 was certainly not identical with the draft Bill,[195] although it was very much in keeping with the Task Team's proposals to promote collective bargaining. The Act provides for a 'sufficiently representative' union to exercise certain organisational rights,[196] and that where neither bargaining nor (compulsory) conciliation is successful, the parties may engage in strikes and lockouts.[197] The Act also provides for bargaining councils, to be formed voluntarily by employers and unions at sectoral level, with power to determine conditions, enforce compliance with them, and extend their operation within the sector.

7.3 Assessment: The Challenge of Change and the Limits of Legal Innovation

The literature on South African labour relations raises questions – which cannot be resolved here – about the country's progress towards the goals established in the post-apartheid legal framework. Centralised bargaining is far from the norm: while increasingly common in some sectors (e.g. chemicals and mining), there has also been growing fragmentation of bargaining units.[198] Indeed, enterprise-level labour relations are arguably becoming more conflictual, perhaps reflecting in part the historical orientation of South African unions towards conflict, in the context of

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unions, could only be initiated by trade unions. In order to take account of small business needs, it was proposed that a forum could only be formed in enterprises of 100 or more: ibid., at 312.

[195] For an overview of the issues that were contentious in the NEDLAC discussions, and the evolution of the Bill, see Du Toit et al., above n. 172, at 23–28.

[196] Either a union or an employer may refer a dispute over representativeness to the Commission for Conciliation, Mediation and Arbitration (CCMA): Labour Relations Act 1995, s. 21.

[197] Workers on strike or locked out may not be permanently replaced with newly hired workers. Moreover, workers may take protected secondary or sympathy strike action, subject to certain conditions: Du Toit et al., above n. 172, at 6–16.

[198] M. Leibbrandt, I. Woolard, H. McEwen and C. Koep, *Employment and Inequality Outcomes in South Africa*, mimeo, undated, p. 25 (available at: http://www.oecd.org/employment/emp/45282868.pdf [last accessed 14 March 2014]). Collective bargaining may therefore be having a limited distributional effect across the workforce, while relations at the workplace have become less effective, even though it was hoped that at this level the parties could deal with issues like skills and productivity: D. Budlender, *Industrial Relations and Collective Bargaining: Trends and Developments in South Africa*, ILO Dialogue Working Paper No. 2, May, 2009, at p. 10.

the liberation struggle.[199] At the same time, a high proportion of workers still fall outside the legal framework, given continuing growth in sub-contracting, casualisation and externalisation, and the prevalence of labour broking.[200] Legal innovations to address the diminishing scope of legal regulation of the employment relationship have arguably been of little effect,[201] and may even have helped to contribute to the rise of externalisation through labour broking.[202]

Of all the case studies in this chapter, this one is most out of proportion to the available literature, of which only a very small amount has been considered. Thus, no firm conclusion is suggested, but rather some general themes. One is that the law reform process in South Africa appears quite clearly to have proceeded in keeping with many of the ideas elsewhere in this book. True, the labour law reform process took place in isolation from the development of other elements of social protection policy,[203] but the process did involve extensive interaction among the tripartite partners. Thus it was pursued through, and was moreover explicitly intended to promote, *inclusivity and democratisation*. It was also based on a thorough examination (and underlying knowledge) of the existing institutional framework, and how to develop it incrementally. Conceptual and legal consistency were paramount considerations, showing therefore a high degree of focus on the question of *systemic fit*. International norms were highly influential,[204] and the Office played an important strategic role. The reform goals combined a concern for protecting fundamental human rights with economic goals, and indeed conceptualised them as interrelated.

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[199] The violence that has featured in certain high-profile disputes, perpetrated in some cases by the police, and in others by striking workers, is a further indication in this respect: P. Benjamin, *Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)*, ILO Dialogue Working Paper No. 47, April 2013.

[200] J. Theron, *Non-standard Workers, Collective Bargaining and Social Dialogue: The Case of South Africa* ILO, Dialogue Working Paper No. 28, September 2011, at pp. 11–12.

[201] Ibid., at 12.

[202] Benjamin, 'Beyond the Boundaries', above n. 186, at p. 188.

[203] Although there is significant emphasis on social protection in the Reconstruction and Development Programme.

[204] International standards had also played a role in the development of national law under apartheid: judges developed the meaning of 'unfair labour practices' to develop principles around protection against unjustified dismissal, by drawing on ILO Convention No. 158: C. Thompson, 'Borrowing and Bending: The Development of South Africa's Unfair Labour Practice Jurisdiction' (1993) 9 *International Journal of Comparative Labour Law and Industrial Relations* 183–205.

Assessing the extent to which the laws were designed to take account of the need for *context dependence* poses some challenges. On the one hand, there has been innovation in the legal regulation of the employment relationship, precisely in order to attempt to respond to conditions in the labour market. Yet, as noted, this innovation has had limited effects in practice, and, more broadly, the standard employment relationship remains, to a large extent, the conceptual centrepiece of the laws,[205] even though the role and significance of that relationship in the labour market were already changing when the laws were designed.[206] Arguably, the organising strategies of independent trade unions under apartheid were themselves focused on legal mechanisms best associated with 'standard' employment: 'trade union recognition, wage negotiations, and protection against arbitrary dismissal'.[207]

For a liberation struggle, it makes perfect sense that a key demand would be for inclusion in the existing legal order, rather than for conceptual re-organisation of that order. And the impact of the struggle to end apartheid, and to grapple with its legacy, can hardly be over-estimated: as Benjamin has noted, the shift from apartheid fell in the middle of the evolution of South African labour law.[208] In practice, developing a 'new' labour law system based on 'old' – or at least 'existing' – ideas may be among the limitations. But, as Benjamin argues, the security that conventional labour law protection can provide is much reduced by the de facto flexibility that employers enjoy due to the high rate of unemployment.[209]

Thus, the legal regime was significantly improved, but at the same time African workers, who began to be better protected during the 1980s, are now 'being pushed back into greater insecurity'.[210] Business has been restructuring,[211] with the result that as many as 30 per cent of workers remain beyond the reach of collective bargaining and unfair dismissal laws. And, 'while these workers have political rights not enjoyed under

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[205] Benjamin, 'Beyond the Boundaries', above n. 186, at 182.

[206] These trends were already evident in the early 1990s. As noted above, the RDP adverted to these issues, and the Task Team considered them in preparing the initial draft Bill: Benjamin, 'Beyond the Boundaries', above n. 186, at p. 182.

[207] Benjamin, 'Ideas of Labour Law', above n. 172, at 211.

[208] '[T]he evolution of a modern labour law in South Africa . . . spans the last decade and a half of the struggle against apartheid and the first decade and a half of the struggle to undo its deep-rooted legacy of inequality', Benjamin, 'Ideas of Labour Law', above n. 172, at 210.

[209] Benjamin, 'Beyond the Boundaries', above n. 186, at p. 185.

[210] Benjamin, 'Ideas of Labour Law', above n. 172, at 219.

[211] Ibid., at 217.

apartheid, their working conditions are increasingly beginning to resemble those of the workers of an earlier era'.[212]

8. DISCUSSION AND CONCLUSION

The case studies illustrate that the ILO has for many years worked in ways that are in keeping with some of the ideas put forward elsewhere in this volume. Arguably they offer interesting insights into certain elements of Deakin and Marshall's checklist, especially the matters of *context dependence* and *systemic fit*. Given the ILO's orientation towards tripartism, it is no surprise to find that the case studies show the ILO endeavouring to promote *inclusivity and democratisation*. The case studies also serve to highlight some fundamental assumptions which it may be useful to reconsider, about how the ideas advanced elsewhere in this book can be implemented practically. At a more profound level, they expose certain implicit assumptions about the powers of states and the significance of the role – and the rule – of law.

8.1 Context Dependence and Systemic Fit

Both BFC and the Cambodian Arbitration Council are important examples of legal institutional innovation that show a high degree of consideration for context dependence. Each was developed and tailored in response to perceived failures in the regulatory – specifically the enforcement – capacity of the existing system. The ILO's proposal in Nepal for a form of hybrid regulatory system for labour inspection, in which private actors would be able to seek permission to carry out certain labour inspection functions, also had its origins in the goal of innovation that would respond to a perceived deficiency. At the same time, these examples pose some difficult questions: at present neither BFC nor the Arbitration Council could operate independently of donor funding. Nor could either function legitimately if it were a state institution. In Nepal, meanwhile, the proposal for a hybrid regulatory model appears not to have been adopted.

Efforts to expand the legal definition of the employment relationship – and so to expand the effective protective coverage of labour law – fall into the same category. This happened in South Africa – although as noted, perhaps to less effect than might have been hoped. It has also been proposed for both Liberia and Nepal. In the latter case, the mere fact that the

[212] Ibid., at 222.

proposed law would not be limited only to enterprises with ten or more workers would be a significant step forward, regardless of any attempt at innovative legal (re)definition of the employment relationship. In the case of Nepal, the ILO policy proposal was perhaps an example of an attempt to pursue the ambition to move beyond the discourse of orthodox labour law: it is much closer to being a concept of holistic labour market regulation, with its explicit link to an unemployment insurance scheme.

The issue of the argued need to expand the scope of the employment relationship, however, raises the fact it is not an easy thing to do, either conceptually or in practice. The work of the ILO that led to the adoption of Recommendation No. 198 shows that, across the world, there is a relatively limited number of drafting and policy techniques that can be implemented to pursue this goal.[213] One of the underlying reasons for this is that in virtually every labour relations and legal system, it is accepted that there is a basic or common-sense distinction between those who work autonomously, and those who work in a relation of dependence upon or subservience to others.[214] In addition to this, there is the fact, much noted in the work of Brian Langille, that our present conceptual map of labour law has its own effects in shaping the way we understand the field.[215] Moreover, in many cases the data that would be necessary to determine how to approach the topic differently are inadequate or missing altogether. In short, in practice, 'thinking outside the box' is not easy.

8.2 Inclusivity and Democratisation

The case studies clearly illustrate the ILO's emphasis on promoting inclusivity and democratisation by working through tripartite processes. This overlaps to a large degree with the emphasis by other contributors to this book on civil society participation in the process of policy design. This in turn is directly linked to the emphasis in several chapters on institutional design that is appropriate to national conditions (and thus to context dependence and systemic fit). Here the example of Liberia is pertinent:

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[213] ILO, *The Employment Relationship* (ILO, Geneva, 2006); ILO, *The Scope of the Employment Relationship* (ILO, Geneva, 2003): both available at: http://www.ilo.org/ifpdial/areas-of-work/labour-law/WCMS_CON_TXT_IFPDIAL_EMPREL_EN/lang--en/index.htm (accessed 6 February 2014).

[214] See, for example, H. Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 353–380.

[215] See, for example, B. Langille, 'Does "Labour Law" Still Exist in Australia?' (2007) 20 *Australian Journal of Labour Law* 239–243.

the Office facilitated the establishment of an ad hoc tripartite consultation mechanism, then presented its proposals through tripartite processes, and finally proposed law that would establish a statutory body for these purposes. Given the range of responsibilities proposed for it, the National Tripartite Council might serve as an important channel for reflexive labour market regulation.

Nevertheless, the realities of ILO practice in providing advice to member states expose some critical, but implicit, assumptions about the concept of participatory dialogue for policy design. Blackett praises the ILO for its insistence on participation by 'empowered tripartite actors'.[216] These, however, can be easier to describe than to find in practice. Moreover, the question arises what might properly be understood by 'empowered'? In a formal sense, reforms in Nepal and Romania, for example, were pursued under existing legal structures for tripartite consultation, but this does not necessarily equate to empowered participation in a substantive sense: that is, in the sense that the social partners were able to participate in a way that meant their voices were fully heard and respected. In Nepal it has been difficult to judge, not least because many of the ILO staff (and consultants) who have done much of the work do not speak Nepali.[217] In Romania in 2011, it might be said that significant limits were imposed on the social partners – that they were, to an extent, *disempowered* – by the government's insistence on a rapid process that limited the scope for debate and participation. In Cambodia, the 1993 reforms went forward without tripartite discussion at all, and in Liberia it has not been obvious that either the employers or the workers benefitted from independent legal advice on any of the draft legislative texts that were prepared.

In El Salvador, the trade unions that participated in the process clearly had important political legitimacy, given their role in the struggle to end the civil war and their representation in the Forum. And, if it was the unions' initiative to invite the ILO to participate, and if this helped to reach a conclusion, then clearly they had, and they exercised, a degree of power in the process. At the same time, official data show that the unions were well short of being 'representative' in a simple numerical sense of percentage of workers enrolled as members. Although at least in this case, there were data available.

In other words, the idea of 'empowered tripartite representatives' also tends to assume that those who participate are in fact representative.

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[216] Blackett, above n. 2.

[217] Although two lawyers who speak English, one each working with the employers and the unions, have played an active and important role.

Making that observation does not suggest in any way that any organisation that has participated in any of the processes described does not – or did not – meet that standard. (In any event it would be virtually impossible to make such an observation given the nature of the sources used here.) It might be noted, however, that there can be challenges in this respect, both for trade unions and for employer organisations. In either case, for example, an organisation that represents most of their potential constituents (in comparison with other organisations to which they might belong) is highly likely only to represent a plurality rather than a majority.[218]

8.3 Underlying Assumptions: State Capacity and the Effect(s) of Law(s)

The case studies also help to highlight how arguments about the goals and merits of labour law are built on assumptions – again largely implicit – about the characteristics and the nature of states, and about the essential function and operation of law, considered as an instrument of social regulation. This is not to say that the other authors here are ignorant of the difficulties associated with translating a policy proposal into action in *any* state, much less a developing state. Nevertheless, there is an irony in the fact that many chapters, while dealing with challenges that particularly affect developing countries, offer suggestions which in large part assume levels of state capacity which may often not be present in practice.

A very simple example is the suggestion that labour market regulation should be devised in a broad policy framework, and in coordination with other government policies and responsibilities. It is not necessary to be an expert in public administration to realise that this may not be easy to achieve in practice. In Nepal, for example, the underlying goal of the ILO's work has been to offer legislative means of implementing a policy for holistic, that is, overall labour market regulation. But the different Ministries involved appear to have little or no communication with each other.[219] Moreover, there have been social policy initiatives, including

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[218] On the challenges to the ILO's emphasis on representative organisations of workers and employers, see, for example, S. Cooney, 'Testing Times for the ILO: Institutional Reform for the New International Political Economy' (1999) 20 *Comparative Labor Law and Policy Journal* 365–399. For interesting observations on these issues see the report of the Director General to the 2013 International Labour Conference, *Towards the ILO Centenary: Realities, Renewal and Tripartite Commitment* (ILO, Geneva, 2013), pp. 16–18 (available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_213836.pdf [last accessed 6 February 2014]).

[219] Ironically enough, for administrative (bureaucratic) reasons, there was also limited coordination between the ILO officials involved in the drafting work.

social insurance developments, occurring in Nepal on a regular basis, but which appear to have little or no connection with the ILO's goal – in collaboration with the government – of promoting an unemployment insurance scheme as a first step towards a subsequent, more comprehensive social insurance mechanism. In Liberia, the lack of coordination between government departments appeared to be more or less chronic, although ILO support helped to enhance coordination between the Ministry of Labour and other arms of government. But this has not been sufficient to create a framework for holistic policy making. The challenges described here are merely instrumental failures – no comment is made on other challenges that are likely to arise, such as competition and disagreement between parts of government. Moreover, *no* state is monolithic or univocal, and this poses challenges for the generation and implementation of policy no matter the level of development of the country in question. But in developing countries the challenges can be all the greater.

A further point that should be made here is that, in developing countries, as in any other, states are likely to be responding to a range of influences and pressures when embarking on reforms to labour legislation. Among these may well be international influences, norms and sources of regulation. Thus, in El Salvador and South Africa, the content and/or the process of the ILO's supervisory system and the ILO's freedom of association standards were highly influential, in a particular and instrumental way. Liberia's policy direction for labour law reform also had an international orientation, given its place in the Poverty Reduction Strategy, and the goal of promoting a better functioning labour market. (And in this there are some similarities also with the policy programme pursued in South Africa.)

In Cambodia and El Salvador, access to international trade privileges acted as a key driver for action either by the government, or by the ILO and the international community, or both. And to what effect, in these cases? On one view, the Cambodian legal architecture now boasts two innovative structures – but they would have difficulty sustaining themselves without external financial support. In the case of El Salvador, although ratification of core ILO conventions was a key goal of the 1994 reforms, this did not eventuate until 2006.

The case studies also illustrate how states may be influenced by the World Bank's *Doing Business* report. Regardless of any weaknesses that may fairly be said to exist in the *Doing Business* exercise,[220] the simple

[220] J. Berg and S. Cazes, 'Policymaking Gone Awry: The Labor Market Regulations of the Doing Business Indicators' (2008) 29(4) *Comparative Labor*

and appreciable method of ranking countries has a direct impact in many cases. In Romania, law reform was pursued first to harmonise national law with EU norms, and then, twice, to respond to advice from the EU and the IMF on economic and labour market policy. Here, the *Doing Business* report had its influence in the framework of the IMF's advice.

The fact that a state is responding to international influence(s) does not indicate that the state, or at least some part of it, is not genuine about its desire or intention to carry out reform. But there may well be a difference between embarking on labour law reform to improve a *Doing Business* ranking or to maintain or to improve a trading relationship, and embarking on reform of labour market regulation in the interests of promoting broad economic and social development outcomes.[221] This raises the challenging question – beyond the scope of the present exercise – of how to account for the national and international politics of labour law reform.

A further important point is that, in all parts of this discussion, there are deep assumptions about the nature, functions and effectiveness of law itself as a means of social regulation. It is true that a number of authors – including in this book – have deliberately sought to move beyond a concept of law as 'command and control' regulation. Kolben, for example, argues in favour of harnessing non-state actors in the labour regulation project; while elsewhere Deakin has called for consideration of the effects of collective bargaining.[222] The point here, however, is that any discussion of law (or regulation) as an instrument to promote development proceeds from necessary presumptions about the capacity of a state to enact and

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Law and Policy Journal; S. Lee, D. McCann and N. Torm, 'The World Bank's 'Employing Workers' Index: Findings and Critiques – A Review of Recent Evidence' (2008) 147 *International Labour Review* 416–432.

[221] Goodpaster makes the related point that it is a mistake to consider that law reforms fail because of a lack of political will: legal systems in developing environments exist as they do *precisely because* they function well enough for those who have an interest in the outcome of their functioning. Moreover, political elites are more likely to be responsive to the local and national political forces that might affect their hold on power, than to intervention directly at their 'level' by extra-national forces: G. Goodpaster, 'Law Reform in Developing Countries', in Lindsey, above n. 109, 106–139, at 130–131. Compare Kennedy, who points out that instantiation of a 'properly-functioning' court system may be both difficult and fruitless: 'there is little reason a priori to imagine that courts would be any less subject to local prejudices, incompetence or rent-seeking than administrators – or any easier to reform'. D. Kennedy, 'Political Choices and Development Common Sense', in D. Trubek and A. Santos (eds), *The New Law and Economic Development – A Critical Appraisal* (CUP, 2006), 95–175, at 159.

[222] Deakin, 'The Contribution of Labour Law to Economic and Human Development', above n. 160.

to implement 'law', and about the effects that this will have on the regulated community in question. Even in the most sophisticated developed economies, this is not always a well-founded assumption, as a large body of socio-legal literature amply demonstrates. Here, then, even in the midst of an exercise in attempting to think creatively about how labour market regulation may operate as a development institution, it is clear that one must not overlook the fundamental challenges inherent in the project of using law as a tool to promote development.[223]

A key consideration in this respect is the underpinning ideals of governance and the rule of law. It is not irrelevant that, even in the countries which might be considered the 'source' of these notions, they are contested.[224] Thus, it should not be surprising that there can be incoherence between the assumptions and concepts underpinning advice offered 'extra-nationally' and the existing legal system. (And in this sense, the references in the case studies above to the state of governance and the rule of law in certain contexts may be at best superficial and, perhaps, inaccurate and misleading.) Indeed, it would be useful, if it were possible to do so, to understand what forms of regulation – both legal and non-legal – operate in practice in any country where law reform is attempted.[225] It would also be useful to consider the merits of approaching law reform gradually, drawing on the experience of similarly placed developing countries,[226] and in that sense, to consider building national demand for law reform in a way that could promote sufficiently deep engagement from the national political elite.[227] And this raises in turn the question of by what metric, and over what period of time, one might properly seek to assess the effects of law reform?[228] In the case of this chapter, only the most superficial attempts have been made to 'assess' the 'effects' or 'outcomes' of labour law reform in the case studies – to do more than this would be beyond the scope of the present exercise, and require close engagement with a complex and long-running debate in various literatures.[229]

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[223] See generally Trubek and Santos, above n. 221.

[224] See, for example, T. Lindsey, 'Legal Infrastructure and Governance Reform in Post-crisis Asia' in Lindsey, above n. 109, 3–41 at 6–10, and Goodpaster, above n. 221.

[225] Goodpaster, above n. 221. See also V. Taylor, 'The Law Reform Olympics' in Lindsey, above n. 109, 83–105.

[226] Lindsey, 'Legal Infrastructure, above n. 224.

[227] Goodpaster, above n. 221.

[228] See Lindsey, above n. 224, and Taylor, above n. 225.

[229] On ways of measuring the effects of labour law see Deakin, Chapter 2, this volume (for example).

8.4 Implications and Future Directions

It seems clear that there is much for the ILO – and other actors – to gain by taking into consideration the arguments made in this book. Perhaps the most important of these is the virtually uniform call for a concept of labour market regulation that goes well beyond the orthodox understanding of labour law built on the assumption of a full-time (usually male), permanent employee. That is, there is a need to try to articulate a workable conceptual framework for labour market regulation that is not dependent necessarily or solely on the standard employment relationship.[230] The simple fact that in most of the countries in which the ILO works the vast majority of workers have never been engaged in this way – and in all likelihood may never be engaged in this way – makes this a matter of pressing urgency.[231] It certainly suggests a need for continuing consideration of the possibilities for innovation in the area of the legal definition of the parties to an employment relationship, and, in particular, of what can be effective in practice in this respect. Similarly, there appears to be much merit in those recommendations which have emphasised the need to link labour law – through a concept of labour market regulation – with other areas of social policy.[232]

The ILO could also perhaps profit from considering Kolben's recommendation for increased joint regulation between state and non-state actors, and is arguably already doing so.[233] The programme that began

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[230] This, however, is not obviously an easy thing to do. For an alternative perspective, using the concept of social drawing rights, see Supiot, above n. 8. On the conceptual possibilities, see also, for example, L. Vosko, 'Precarious Employment and the Problem of SER-Centrism in Regulating for Decent Work' in S. Lee and D. McCann (eds), *Regulating for Decent Work – New Directions in Labour Market Regulation* (ILO/Palgrave, 2011), at pp. 58–90, and M. Freedland, 'Regulating for Decent Work and the Legal Construction of Personal Work Relations' in D. McCann et al. (eds), above n. 29, at pp. 63–84. Compare N. Zatz, 'The Impossibility of Work Law' in Davidov and Langille, *The Idea of Labour Law*, above n. 160, at pp. 234–255.

[231] For an interesting analysis of the structure of work relationships in the informal economy and the challenges of bringing them into a labour law framework, see D. Tsikata, 'Toward a Decent Work Regime for Informal Employment in Ghana: Some Preliminary Considerations' (2011) 32 *Comparative Labor Law and Policy Journal* 311–342.

[232] All the more so if measures of social protection were historically essential to the creation of wage-labour markets: S. Deakin and F. Wilkinson, *The Law of the Labour Market* (OUP, 2005).

[233] In this respect, see the similar proposals by Goodpaster, above n. 221, and Taylor, above n. 225.

as BFC is now the ILO-IFC sponsored Better Work Programme, with operations in seven countries.[234] At the same time, there will necessarily be limits in some respects to this approach. First, it might not be acceptable to states: as noted, something of a 'co-regulatory' nature was proposed in Nepal, but is seemingly not likely to be adopted. Secondly, it might not be feasible: Better Work's operations are predominantly funded by international donors and not by the states in which it operates. Thirdly, while states might effectively harness the benefits of co-regulation by public and private actors in some economic sectors, there would seem to be some tension between this idea, and the goal of making labour law more effective by expanding its scope. By the very nature of these schemes – as Kolben acknowledges – they operate predominantly in export industries, where consumer pressure in other countries plays a key role in their establishment and effectiveness. The vast majority of workers, however, and especially those in the informal economy, are not engaged in forms of work that would be directly improved by participation in such schemes.

In the end, the most significant implication for the ILO – and other actors – may lie in the checklist designed by Deakin and Marshall. This has the potential to serve as a means of analysing and understanding labour law that is much richer in its approach, and which will develop much more subtle results than any other. A critical point of distinction between this checklist and, for example, the *Doing Business* indicators is that it offers a means to develop a qualitative rather than a quantitative assessment. On the other hand, this is necessarily a much more complex task. Preliminary reactions to the checklist have been positive; when used as a way to present ILO comments on proposed changes to employment protection laws in Romania, for example, the framework was well received. A key challenge for the ILO will be to work to develop this into an operational tool for labour law reform work at the national level, while also capitalising on its obvious potential for higher level analysis and engagement in broader policy debates about the role of labour law in development.

[234] http://betterwork.org/global/ (accessed 6 February 2014). Moreover, in December 2013 the ILO hosted a meeting of experts on Labour Inspection and the Role of Private Compliance Initiatives. Information and documentation available at: http://www.ilo.org/labadmin/events/WCMS_230788/lang--en/index.htm (accessed 6 February 2014).

9. Revitalising labour market regulation for the economic South: New forms and tools

Shelley Marshall

1. INTRODUCTION

The effect of labour market regulation on economic outcomes is the subject of an ongoing and often heated debate among economists and policymakers. To some, regulations are detrimental to economic efficiency and therefore an impediment to growth and prosperity. To others, they are essential tools to correct market imperfections and achieve social goals of redistribution and protections.

In this debate, the promotion of improved working conditions through labour regulation is pitted against economic growth. The two goals are often treated like a balancing act, a little like composing good music. If you turn the labour regulation dial up too high, development (in the form of economic and employment growth) is drowned out and muted. According to this logic, if a country wants development, it should implement weak labour laws until development is strong enough to cope with mixing in labour law (Botero et al. 2004). But what are we talking about when we say that labour law is either weak or strong? In order to consider labour law in terms of its strength, we have to think of labour law in particular terms – as being protective and taking a particular *form*; as if there is only one version of labour law, and the dial can either be turned up high or low.

There is now a vast literature that suggests that this is a limited way to think of labour law. Labour law has many more functions than solely being protective. This chapter, along with other chapters in this book, argues that in order to understand how labour market institutions can be seen to be development friendly, it helps to take a broader view of the functions of regulation than those normally considered in the labour economics literature. Although offering protection is an important function of labour law, if we understand labour market regulation as 'constituting' the market, as the contributors to this volume do, a much wider range of

functions can be observed. Viewing labour market regulations as one of the factors (among many) that shape and produce markets allows us to move beyond debates around the extent to which labour law 'creates rigidities' or is 'market restricting'. This broader conception of labour market regulation also allows us to explore more extensively the various ways in which the functions of labour market regulation could be consistent with collective or national development goals, such as increasing productivity and industrial upgrading, as well as individual welfare development goals such as enhancing human capacities and reducing Senian 'unfreedoms' (Sen 2000, Sen 2005).

Yet this broader conception of labour market regulation only gets us so far. Part of the problem seems to be that separate conversations are taking place. Economic libertarians continue to argue that labour market regulation is market restricting, and in separate literatures labour market regulation defenders examine the various ways that labour market regulation is market constituting. No genuine conversation is taking place. A second problem is that very little of the evidence and data for either school of thought is drawn from poor countries. As a consequence, the standoff does not seem to be yielding new insights into the future direction of labour law and how it could be revitalised for the economic South. The chapter in this volume by Deakin is a particularly useful contribution, then, as it brings together data from poor and middle-income countries which addresses key debates about the impact of labour market regulation on the operation of markets. A further important concern is that the debate tends to accept that labour market regulation takes, or ought to take, a particular form – labour codes that establish the right and obligations of parties to the contract of employment, social insurance, minimum wages, and so on.

It is the premise of this chapter that we ought to also consider *what kinds* of labour law institutions are appropriate for different countries, different levels of development and different institutional complexes. This entails exploring new institutional *architectures* and *forms*. This chapter, along with the other contributions to this volume, argues that in most less-developed and transitional economies, labour law fails to meet its promise as a development institution due to flaws in its form. Far from failing to promote development because it is 'too rigid' or 'too protective', labour laws err in promoting the human development of the majority of workers because it is irrelevant for them. Elements of labour laws may be too rigid or too protective for the small proportion of workers that they cover, but when labour law only covers 6 per cent of non-agricultural workers, as in India, the problem of greatest concern is their limited application.

There is a fundamental mismatch between the realities of the economic

South and the form that labour law predominantly takes around the world. This mismatch is the result of longstanding factors related to colonial histories and the manner in which labour laws were transferred or adapted to local settings. It is also a result of newer factors flowing from the manner in which global economic and social integration has occurred. Labour law in both the economic North and the South remains (with a few exceptions) bound in its form to the employment relationship, which has developed in relation to a 'standard' or 'typical worker' in the West – a stereotypical (male) worker performing well-defined tasks in a large production unit, in a subordinate position to the employer or representative of the employer (Bronstein 2009: 10). However, as has been well documented elsewhere, the overwhelming majority of workers in poor, less-developed and transitional economies are 'atypical', own account and informal workers (ILO 2015: 13). The scope of labour law is also generally national, though capital and labour move across national borders. As a consequence of these governance deficits, the majority of workers in developing countries fall outside the effective coverage of labour law and all the benefits and protections it affords. This can only be described as a crisis for labour law's legitimacy.

The first consequence of recognising the mismatch between the form of labour law and the realities of Southern labour markets is that the scope of labour market regulation should be expanded so as to realise the right to development of all workers. A number of new models and tools are identified by the contributors to this book. Most commentators agree that it is necessary to expand the scope of labour market regulation beyond merely those relationships which resemble contractual employment. They also agree that innovative regulatory methods are required to grapple with the complex work relations arising from 'vertical disintegration' and complicated supply chains. An important question for countries engaged in reframing labour market regulation remains that of how to distinguish between dependent and autonomous labour.

Although much attention has been given in the burgeoning literature on 'rethinking labour law' to expanding the definition of 'employee' or 'worker', this chapter argues that it may be more important, still, to re-define the 'employer' (Prassl 2015). Often, the problem is that it is difficult to identify a single responsible or controlling employer. Control may be jointly, indirectly or diffusely wielded by a number of parties. The question is how to ensure that labour law continues to regulate these responsible actors.

A further important matter for consideration is how to expand the scope of labour law beyond national boundaries. Both labour and capital have increasing transnational mobility, and work often occurs in transnational

supply chains. Expanding labour market regulation across national boundaries requires a radical rethinking of its architecture. Mechanisms that regulate labour conditions with transnational reach are proliferating, including procurement codes of conduct, transnational collective agreements, cross-border social dialogue forums, international framework agreements, quasi-judicial human rights mechanisms such as the International Finance Corporation's Compliance Advisor Ombudsman and trade agreements that include clauses regarding labour standards (considered by Cheong and Ebert in Chapter 4). More formal, state-based labour market regulations have been slower to expand their reach, but some examples exist.

A second consequence of recognising that most workers *and* employers in the South are 'atypical' is that new institutions of social dialogue are required to reflect and voice the concerns of both parties, and to mediate between their interests. This chapter argues that in order to maintain valuable functions of labour market regulation such as democratisation and empowerment, the agonistic and deliberative aspects of the institutions must also be retained, but in new forms. Bargaining and deliberation might include jointly responsible 'employers' or 'responsible entities' who include buyers, agents and brands. Workers might be represented by representative organisations that play different roles from those traditionally assumed by unions and who better represent atypical and precarious workers. Cross-border social dialogue is also increasingly necessary where companies are operating in the same industry across more than one country, or where workers are experiencing similar problems across multiple countries involving multiple companies, such as low wages in the clothing industry.

A third consequence is a requirement for greater coordination with a broad range of policymakers. In principle, labour market regulation is vital for transitional and less-developed economies, yet development goals are too often considered separately from labour market regulation goals. Most often the developmental or poverty alleviating functions of government and bureaucracies fail to be coordinated with employment promotion and protective functions. Workers should be 'regarded as an indispensable component of every calculus of public policy which might affect them' (Arthurs 2006: 388). This demands a re-conceptualisation of poverty reduction schemes, which currently tend to be restricted to social assistance schemes and targeted programmes that are not rights based and are unable to deal with the systemic causes of 'impoverishment' (Sankaran, Chapter 7 in this volume). These schemes are rarely linked with social security and labour market regulation and policy. Various contributors to this book have argued that labour conditions are governed by a broader range of instruments than just national labour laws. Labour conditions

are equally shaped by trade laws, investment instruments, public international law and soft laws: collectively known as 'transnational labor regulation' (Kolben 2007). At the very least then, labour regulations ought to be integrated on equal terms with trade, investment and industrial policy at national and regional levels (see the chapter by Marlese von Broembsen and Shane Godfrey in this volume for further development of this argument), and the interlinking impact of these different policy areas should be at the heart of policy decisions.

This chapter is structured as follows: section 2 explores the functions of labour market regulation. Although market libertarians often assume that the primary function of labour market regulation is to provide protections to workers, in fact, a far broader range of functions can be observed. Section 2 explores how these functions, in principle, promote economic and human development. Section 3 proposes some core principles that ought to be adhered to as labour laws are revised in order to revitalise them and give them wider application. Experiments which have simply widened the scope of labour laws to include, for instance, home-based workers, have not been effective. Further measures are explored in this part of the chapter. The final section concludes.

2. IN WHAT WAYS DO LABOUR MARKET REGULATIONS PROMOTE ECONOMIC AND HUMAN DEVELOPMENT?

A starting point for setting a new regulatory agenda is to re-examine the *functions* of labour market regulation. If we accept that labour market regulation does much more than 'provide protections' and 'allocate responsibilities', this begs the question, what else does it do?

In his contribution to this collection, Simon Deakin proposes five functions of labour market regulation:

- Economic coordination;
- Risk distribution;
- Demand management;
- Democratisation; and
- Empowerment.

In addition to these functions, this chapter proposes another function of labour market regulation:

- Redressing the specific vulnerabilities and unfreedoms of the region or country.

Some of the functions proposed here are traditionally associated with labour market institutions. Other functions have been thought to be performed by other institutions. Yet labour market institutions often make an important contribution and bolster the effectiveness of these other institutions (Rodrik 2008). In practice, which institution performs a particular function is generally dependent upon path dependency, political expediency and so on, rather than the fact they are the most efficient of all the options. This section of the chapter considers how each of these functions of labour law – discussed in some detail by Deakin in his chapter – might contribute decent work and development.

Deakin suggests that labour law facilitates *economic coordination* by setting some of the ground rules which overcome collective action problems both at the level of individual firms or organisations and at the level of the broader labour market. At a generalised level, it does so by setting clear ground rules both regarding the 'terms and conditions' under which work is to be conducted but also with regards to determining who participates in decisions about those terms and conditions and according to what rules that decision-making occurs. In any given labour law system, the law stipulates that managers have discretion over particular matters, and appoints joint decision-making or negotiation powers to both managers and labour over other matters. For instance, the legal institution of the contract of employment provides both a legal recognition of and an underpinning to the exercise of managerial authority within the firm. This feature of organisations is seen as saving on transaction costs (Williamson et al. 1975). Such a function can be conducted by labour market institutions which are constituted according to a vast range of forms.

Another way in which labour market regulation facilitates economic coordination and overcomes collective action problems is by contributing to industrial and technological upgrading (Lall 1987, Lall 1990). Industrial upgrading is the process of improving the processes and technologies used in the production and the provision of services. It involves organisational learning and capital investment to improve the position of firms or nations in international trade networks (Gereffi and Korzeniewicz 1994, Gereffi 1996). Economic development through industrial upgrading entails shifting resources away from diminishing return activities and towards increasing return activities (Wade 1990). Increasing return activities are closely associated with higher levels of real incomes in a 'virtuous circle'. However, the opposite is also true: diminishing return activities are associated with a 'vicious circle' of lower incomes.

A raft of regulations associated with labour market adjustment policies have been employed to encourage industrial upgrading, thus contributing to the national development aims outlined in the previous section. These techniques include offering incentives or placing obligations upon organisations to conduct worker training, apprenticeships and other such schemes.

Labour economists have also demonstrated various indirect ways in which labour market regulation has facilitated industrial upgrading. For instance, Deakin suggests that by requiring employers to internalise certain costs, both employment protection and minimum wage laws provide an incentive for them to use labour efficiently and to make related investments in technology and organisational design (Deakin and Wilkinson 2005, Kaufman 2009). This is a particular feature of coordinated market economies in which the wide coverage of collective bargaining takes wage costs out of competition, creating an incentive for businesses to compete on the grounds of efficiency. Various studies have shown that similar incentives are presented by minimum wages in liberal market economies. Health and safety laws, in particular, have also been shown to encourage technological upgrading. There is evidence that longer employment tenure, encouraged by labour market regulation, has a positive effect on aggregate productivity in OECD settings (Auer et al. 2005). The actual effects of labour market regulation on productivity and innovation are mediated by the type of industrial relations system within which they operate (Storm and Naastepad 2007). Labour market regulation can set incentives and reduce transaction costs so as to encourage greater coordination and technological upgrading. Labour market institutions may be 'second best' with regards to industrial upgrading, as other market institutions may more directly contribute to this objective. However, it is clear that labour market institutions can potentially play an important role, particularly when they are carefully coordinated with other institutions which aim to enhance productivity. In his chapter, Deakin addresses various contradictory strands of evidence regarding the impact of labour market regulation on productivity in different contexts.

The labour market function of economic coordination relates to the decent work component of *promotion of employment* and work in a number of ways. The aim of promoting employment as articulated in the Decent Work Agenda not only concerns increasing the volume of work but also the *quality, productivity and remuneration of work* (referred to here as job quality). Increasing remuneration contributes to the development goal of poverty alleviation. Increasing job quality is intertwined with various development goals as it relates a wide range of standards at work that affect the economic, social and psychological well-being of

workers. Improving job quality entails not only employing the 'protective' functions of labour market regulation, but also those functions which overcome the coordination or collective action problems which prevent upgrading and increased productivity. From a human capability point of view (see Kolben's contribution to this volume), low job quality means that the capabilities of workers are underdeveloped and underutilised. Job quality across the workforce is best improved when the nature of jobs improves – from the most precarious, dangerous work with a high manual labour component, to those which are safer, more stimulating and offer labour market opportunities to engage and develop a wider range of human capabilities.

A second function of labour market regulation proposed by Deakin is *risk distribution*. This function of labour market regulation maps onto the decent work component of social protection for vulnerable situations. In his contribution, Deakin focuses on the role of social insurance in distributing risk. Rules regarding hiring and firing also distribute risk by stipulating who bears the cost of financial downturns for an organisation. Where the ease of firing is high, workers may bear the risk of a financial downturn as labour can be shed quickly and alternatives are not considered, such as drawing upon financial reserves or withholding dividends from owners. Where the ease of firing is low, the risk of financial downturns is distributed to other stakeholders. In practice, societies balance this risk in a variety of ways, and buffer the risk of job loss as a consequence of hiring and firing rules with a range of social security schemes. There is a range of institutional forms that can be utilised to distribute risk.

It has also been suggested that a further role which labour law and social protections plays in redistributing risk is to create a social pact between labour and capital within industrialised capitalist systems (Supiot 1999). This is both an incentive to, and compensation for, participating in a risky system in which workers lend their labour power for the profits of business. Risk distribution thus contributes to social cohesion. However, when only a small proportion of workers are covered by the rights and protections afforded by labour laws, as in the case of less-developed and transitional economies, it is likely to have the opposite effect: it will reinforce elite power and social divisions. This element of labour market regulation is explored further below in the context of 'empowerment'.

The *maintenance of demand for goods and services* is another goal addressed by Deakin in his account of the functions of labour market regulation. Deakin provides the example of the introduction of minimum wage legislation and duty to bargain laws in the US New Deal of the 1930s, which was partly motivated by the aim of maintaining purchasing power under conditions of economic depression (Kaufman 2009: 38–41).

This function of labour market regulation is particularly important in less-developed country contexts for a number of reasons. For example, low wages generate low aggregate demand, stifling local demand for new industrial products. This undermines the extent to which the local economy is integrated or interlinked. When an economy is not integrated, it can suffer from current account imbalances and precarious access to the goods and services required to produce because of currency fluctuations and trade access issues. There are other means of stimulating demand. For instance, fiscal policy is currently favoured. However, fiscal policies such as the lowering of interest rates have very little impact upon the poor in less-developed countries. Increasing income has a far greater impact upon the ability of the poor to purchase goods and services.

The fourth function which Deakin proposes for labour market regulation is democratisation, in the sense of encouraging participatory forms of governance and decision-making. This function has a clear corollary in the decent work component of the *promotion of social dialogue*. Labour law is, in one sense, the *consequence* of democratisation, but can also *contribute* to democratisation and the development of 'freedoms' in the Senian sense discussed in Kolben's chapter in this volume. The institutions of industrial democracy, including freedom of association and the political and technical roles of trade unions, employers' associations and tripartite institutions all contribute to the extension of democracy into the industrial realm. Although the importance of democratic citizenship in the civil and political realms of society is broadly accepted, democratic citizenship of the industrial realm or working life is often overlooked and remains underdeveloped (Marshall 1950). This does not reflect the importance of this realm in terms of time contributed or impact upon well-being; most adults spend a large proportion of their waking hours engaged in work of some kind, whether remunerated or not, as do many children. Consequently, industrial citizenship has *intrinsic value* – as Kolben expands upon in his contribution – as workers want influence in decisions affecting their working lives. Industrial citizenship also has *instrumental value*. First, it helps to increase workers' capabilities to be effective political actors in a democratic society. This occurs, for example, through participation in democratic workplace arrangements. Such arrangements contribute a 'constructive' value by helping workers to shape their institutions of social dialogue. This in turn increases the capabilities of participants to form values through deliberation and political demands. The process can also assist in the articulation of wants and ideas, as Sen describes it. Participation assists in the development of democratic skills by individuals and collective bodies which can then be applied in other realms of life, such as while consuming goods and services, in school communities, while

voting in local elections and while lobbying. As such, the promotion of social dialogue has the potential to enfranchise citizens. The second instrumental function of industrial citizenship is that it can help lead to the creation of institutions, such as representative bodies, that can become important actors in the institutions and processes of social dialogue.

The final function of labour market regulation that Deakin identifies, and which is also related to the Decent Work component of social dialogue, is *empowerment* and *social cohesion* associated with rules aiming to promote economic opportunity and higher levels of *equality*. Here, Deakin refers to contributions to development goals such as the positive freedom of individuals to achieve a range of desired activities or outcomes through (in this context) employment and higher income (Sen 1999). Discrimination laws, which enhance access to the market on the part of excluded or disadvantaged groups, are among the types of labour law regulation which can be seen as addressing a capability-based agenda for social policy (Deakin and Wilkinson 2005). The contribution of labour market regulation to redistributing wealth also reflects this function. By promoting empowerment and greater equality, labour regulation constituted in particular ways can act as an important complementary institution to other institutions which encourage efficient markets.

A number of other institutions can also play a role in redistributing power and income, and can contribute to egalitarianism within societies. However, labour market institutions have generally developed into forms which make them particularly well placed to perform this function. One reason why labour market institutions have been particularly good at playing a redistributive function is because they can operate in a way which is independent of predatory or corrupt states if they are established as autonomous institutions.[1] Labour market institutions, such as collective bargaining and wage-setting institutions, often involve only labour and capital, or labour and capital alongside government. Where they are constituted democratically, they represent longstanding examples of the deliberative and participatory decision-making forms trumpeted in development literature as mechanisms for overcoming capture by elite groups and predatory states (Elster 1998, Melo and Baiocchi 2006). Labour market institutions need to be constituted so as to increase the bargaining power of workers in order to play a power and income redistributive role (Santos 2007). Kolben has elsewhere addressed ways that labour

[1] Not all labour market institutions are redistributive in a manner which is 'employee' friendly. Some distribute power to employers by increasing the bargaining power of capital over labour.

market regulations can be designed so as to assist in overcoming corruption and bolster the capacity of civil society organisations (Kolben 2007). John Howe (Howe 2008) has shown that in certain national contexts, because the wage-setting functions of labour market institutions have been deliberative, they have performed this role in ways that are market sensitive and which facilitate technological upgrading and productivity increases. Labour market institutions can be reflexive and decentralised in ways that are difficult to replicate in other redistributive institutions, such as progressive taxation which is a centralised, state-based function. As such, labour market regulations may play important primary functions in constituting labour markets, and important secondary functions which contribute to the better functioning of the system of institutions that constitute other markets.

In addition to the functions put forward by Deakin, this chapter proposes that labour market regulations should *redress the specific vulnerabilities and unfreedoms* which exist in the country in which labour laws are being revised. In poor and rich countries alike, there are specific types of vulnerability and discrimination – what Nussbaum and Sen (1995) would call 'unfreedoms' – that form part of the socio-economic background to the structure of labour markets, explained in Kolben's chapter in this volume. Labour market regulation should be drafted so as to address these country- and regional-specific vulnerabilities and discriminations, such as caste in India and racial and ethnic discrimination elsewhere in the world, and gender disparities seen everywhere, though with specific expressions. Otherwise, it runs the risk being less effective or, worse yet, it could perpetuate these factors of underdevelopment.

3. CORE PRINCIPLES FOR REVITALISING LABOUR MARKET REGULATION FOR THE SOUTH

As Colin Fenwick's chapter in this collection shows, labour law reform is often a process of drafting what he refers to as the 'orthodox approach to legal regulation of formal employees', with some tweaking to account for the local setting and the legal traditions of the country. This orthodox approach has the benefit of lending normative legitimacy to the new labour laws, but it generally results in laws that are only relevant or applicable to a small proportion of the working population: those in formal employment relationships. The approach leads to laws that are aspirational rather than realistic.

What would it take to genuinely rise to Sen's challenge to create new

institutions and the better working of existing institutions to facilitate decent work? What would it mean to consider labour law reform afresh, taking into account the institutional capacity of the state and civil society, the level of development, the character of working relationships and the range of socio-economic factors that shape labour markets?

This section proposes a number of principles that could guide a new approach to labour law reform. It discusses form or design issues regarding the revision of labour market regulations. The section first proposes that those responsible for drafting labour laws should consider local institutional settings. Secondly, it suggests that policymakers should consider which institutional form fits with the institutional complex. As different institutions can perform the same function, which one is chosen depends upon issues of institutional complementarity, as well as political willingness and capacity. Thirdly, it suggests that labour market regulation needs to be decoupled from the contract of employment and expanded in its scope and application so as to cover 'atypical' and informal workers. Lastly, it explores a range of tools which may be employed in the design of innovative labour market regulation.

3.1 Take into Account the Local Institutional Setting

As Deakin observes in his contribution to this volume, leading paradigms of law and development, while offering different policy prescriptions, generally employ a linear logic. As such, they find it hard to accommodate varied country-level experiences which do not conform to the expected pattern of development, and have difficulty explaining reversals of historical trends which contradict the hypothesis of a linear and teleological process towards modernity. Scholars of labour market regulation, too, are not immune from sequential views of the evolution of labour regulation, linked with ideas about the proper or most likely path to modernity and industrialisation.

If we accept, to the contrary, that different countries have developed different regulatory styles (Milhaupt and Pistor 2008), then we also have to accept that a range of institutions and institutional forms might contribute to economic development. Societies and nations organise institutional systems differently due to a range of factors related to political economy, culture and other historical factors: there is no universal form of labour market regulation which is most likely to foster development across different developmental conditions, societies and institutional complexes. This understanding is reflected in the experimentalism and innovation which can currently be witnessed across different national and regional contexts, including Latin America and China.

The different ways in which labour market institutions are organised, and how they complement and interact with other institutions have been studied within themes of comparative labour relations, comparative political economy and, more recently, what is referred to as 'varieties of capitalism' literature (Whitley 1992, Boyer and Rogers Hollingsworth 1997, Hall and Soskice 2001, Hall and Thelen 2007). Labour market regulation occurs in the context of these multipart institutional complexes or systems. These institutional systems are made up of informal norms (culture, custom and so on) and formal norms (laws, statutes, regulations, bylaws and so on).

Proposals for law reform and institutional redesign should be compatible with local regulatory styles, as well as being politically viable; in other words they should take into account the *systemic* interaction of proposed labour law reforms with other regulation and institutions.

Von Broembsen and Godfrey's chapter in this volume shows the dangers of ignoring such issues in their case studies of the South African and Lesotho clothing sectors. Their chapters explore the way that trade and industrial policy interact with labour market policies. Similar policies of trade liberalisation in both countries have had dramatically different outcomes in relation to labour conditions and upgrading in the clothing industry.

3.2 There are a Number of Ways that Institutional Design and Reform might be Approached because More than One Institution Can Perform the Same Function

An institution or regulation may perform largely the same function as another institution which is different in its form and architecture; institutions have *functional equivalents*. This idea can be demonstrated through an example of labour market regulation. One of the purposes of labour laws is to provide protections for workers to reduce the risk of loss of income. This can be performed by different labour market institutions which perform the same function. For instance, it can be performed by 'arms-length' restrictions on firing which make the tenure of workers more secure. However, an income-protective function can also be conducted by social security schemes. These may be privately funded in the form of employer or employee contribution insurance schemes or, alternatively, the state may provide for social security through taxation and other revenue-raising methods. Furthermore, state ownership of enterprises which aims to provide full employment also protects incomes. In practice, a mix of these labour market regulations may be employed in any one economy.

The idea of functional equivalents has two significant implications, one which can be kept in mind when conducting analyses of institutions, and the other when assessing both the necessity and appropriateness of policy reform. Firstly, it is essential to go beyond examining the 'form' of an institution; rather, it is necessary to examine the intended function as well as the particular role institutions play in a given context and their specific impact. The second implication is more normative in nature: there are a number of ways that institutional design and reform might be approached.

As the variety of institutional forms that prevail in advanced countries suggests, each one of these ends can be achieved in a large number of different ways (Rodrik 2007). Effective institutions have taken a range of forms along a spectrum that runs the full gamut between private ordering (with no room for public enforcement) to state ownership (with no room for private enterprise). The appropriate choice depends on a number of factors which are canvassed in Deakin's chapter and summarised in the concluding section of this chapter.

3.3 A Broad View of Labour Market Regulation is Required in Less-Developed and Transitional Contexts

One of the main challenges facing labour market regulation and the promotion of decent work through labour regulation is the incongruity between the realities of the working world and the foundational premises of labour laws. As discussed earlier in this chapter, this discrepancy has both older, structural features and more recent features due to the impact of global economic integration and structural adjustment policies aimed at liberalising economies. In the economic South, a large proportion of the active labour market has never performed work that corresponds with the industrial employment model around which labour law protection is based. Agricultural and own account workers, self-employed, domestic and home workers, contributing family workers, unpaid care workers within the family and community workers have all traditionally represented the largest part of the workforce in the developing world. One ILO study across seven developing countries found that micro- and small enterprises accounted for 97.5–99.7 per cent of all enterprises (ILO 2002: 19). (For more recent data see ILO 2014.) Most of this workforce is self-employed, with 73 per cent of all workers engaged in own account enterprises in India, signalling the sheer scale of the self-employed sector (see Sankaran in this volume). These statistics point to the overlap of the concepts of 'enterprise' and 'worker' and challenge legal definitions of 'employee' and 'employer'.

Understandably, then, there is considerable domestic pressure in many

less-developed countries for labour market regulation to formally respond to non-standard work and extend protection to those who survive through informal work. For less-developed countries, this means facing the challenge of the 'new' and the 'old' informality. As Sankaran argues in this volume, the overlap of the concepts of 'enterprise' and 'worker' in much of the economic South points to the need for labour law to cover own account workers who are simultaneously both employer and worker. The key terms within this perspective are not just jobs, subordination and social security, but also work (understood in all its forms, not just as wage labour), skills and economic security (Supiot 2006: 109).

Most of the contributors to this volume support the contention that labour market regulation must be decoupled from the narrow conception of employment to which it is currently tied. The question which follows is which rights should be expanded (or created) for which categories of workers and through which institutions and legal techniques, and how the goal of inclusiveness can be reconciled with the diversity of situations. There are various international models which can be followed. ILO Employment Relationship Recommendation, 2006 (No. 198) provides guidance for policymakers on how to define an employment relationship, suggesting broadening the scope of the application of national labour laws (Bronstein 2009).

The expansion of the definition of 'employee' that has already taken place in Swaziland, Tanzania and South Africa provides a useful case study of the benefits and pitfalls of this approach. One problem with these approaches is that they do not cover the full complexity of work relations, which often take place in supply chains (also known as value chains) or in triangular employment relations, as demonstrated in von Broembsen and Godfrey's case studies of the Lesotho and South African clothing industries. Because of this complexity, expanding the definition of 'employee' still leaves most workers outside the coverage of labour law. The laws fail to provide a way to hold those with economic power in value chains (other than their employers) accountable for the conditions of workers. Supply chain regulation in Australia in the transport industry and in the clothing sectors provides a model for allocating responsibilities for workers' conditions to parties within the supply chain who are one or two steps removed from directly contracting with the worker (Rawling 2006, Marshall 2010, Rawling and Kaine 2012). In Chile, where outsourcing is extremely widespread, Law No. 20 123 establishes vicarious liability for 'recipient companies' for the obligations of contract workers (see Bensusán's description of this law in Chapter 6 in this volume).

Though these are useful models for the regulation of work in supply chains, they are still bounded by national jurisdictions, while supply chains often span many nations. A crucial next step for regulation of this

type is to be able to hold companies in 'home countries' responsible for the actions of their subsidiaries and dependent affiliates and suppliers in 'host countries'. Various quasi-judicial mechanisms do this, and these could act as a model for state-based legislation or coordination between states. One example which allows for mediation and some form of adjudication is the National Contact Points in OECD countries where complaints can be made against 'lead companies' regarding breaches of the Guidelines for Multinational Enterprises (see http://mneguidelines.oecd.org/) in their supply chains. Procurement codes of conduct are increasingly being formed when large enterprises or lead firms engage in sourcing out activities to dependent affiliates (off shoring) or to independent suppliers (outsourcing) in developing countries, where the governance quality is often relatively low and the cultural and institutional gap between the lead company and the supplier is relatively high. The procurement codes of conduct are both a way to mitigate risk and overcome these institutional gaps. A large number of these procurement codes address supply chain issues such as human rights, labour standards or the right to association (Tulder et al. 2009). Collectively made transnational agreements and framework agreements are also an important innovation in this arena. The agreement that the International Federation of Building and Wood Workers formed in 1998 with IKEA is an example. The IKEA International Framework Agreement includes the whole supply chain with approximately 1 million workers (Tulder et al. 2009).

A further way of internationalising labour regulation and integrating it with trade policy is through social clauses in trade agreements. Cheong and Ebert's chapter in this volume shows that there is no evidence for protectionist or trade-impeding effects of labour provisions in trade agreements. Such provisions, therefore, do not seem to impede the expansion of trade or any trade-induced economic development in developing countries. However, the effects of labour provisions on social development are highly context dependent. Their success hinges on the political and economic contexts in which the labour provisions are applied and in a number of cases the labour provisions have not been applied, regardless of serious problems in the country concerned. Action by intermediaries such as civil society organisations and unions seems to be required to ensure that such clauses are activated.

Other options for reforming labour law aim to lessen the hold of the employment contract on the form of labour market regulation. The Supiot Report (Supiot 1999), for example, proposes establishing a common labour law, certain branches of which could be developed to cover different kinds of work relationships. According to this report, the scope of labour law should cover not only wage work, but also other types of

contract entailing the performance of work for others and even non-market forms of work. It contends that labour market regulation should encompass breaks in paid work and changes of occupation. Translating this type of model into a workable policy exercise in the economic South entails considerable challenges, but the model still has translatable ideas.

The 2008 report of the United Nations Commission on Legal Empowerment of the Poor which focuses on the problem of informal work outside of the rule of law provides a further model. The Commission recommends that a floor of minimum rights be established and enforced for the working poor in the informal economy. This minimum floor of rights should be realistic, enforceable and allow for progression to a fuller set of rights (UNCLEP 2008: 151). The platform proposed by the Commission includes those rights protected by the ILO's Declaration on Fundamental Principles and Rights at Work: the abolition of forced labour and child labour; the promotion of freedom of association and collective bargaining; and the elimination of discrimination (UNCLEP 2008: 149). In addition, the Commission proposes that rights to health and safety at work, minimum hours of work and minimum income should be extended to workers in the informal sector (UNCLEP 2008: 158). Ratification and enforcement of many of the ILO's conventions, which are either neutral in terms of their applicability and thus cover employees and broader categories of workers, or specifically target non-traditional workers, would also create a 'floor' of this type (ILO 2013).

The adoption of 'minimum wages', regardless of employment status, has occurred in India (Chen et al. 2002). Uruguay, likewise, has established minimum wages for a range of previously informal workers such as domestic workers. Fewer than 20 000 domestic workers were registered in 2005 compared with over 60 000 in 2012, according to Bensusán (Chapter 6, this volume). Debates have arisen regarding whether minimum wages should be national or sectoral. There is an ongoing tension between the articulation of general duties of wide application across the labour market as a whole and the need to proscribe specific abuses or give specific guidance. A question for drafters is then whether to adopt sectorial minima or national minimum wages. Experience in southern Africa suggests that where the emphasis is on sectoral minima, many workers remain unprotected because they fall outside of the established sectors which have minimum wages (and perhaps other standards). This may require the adoption of a 'safety net' determination applicable to those not covered by any other standard.

This debate around how to define the scope of protections has also encompassed questions regarding how to extend social security to 'atypical' workers. Policy debates are based both on practicality and principle. There is a certain practical convenience to providing social security through the

institution of 'employment' (and thus availing social security only to those in a 'dependent' relationship). Indeed, a whole raft of practical regulatory solutions is provided by the institution of employment. These include solutions to such issues as how to gain taxation revenue (payroll taxes) and how to provide health insurance (through employer contributions in some countries). In principle, some argue that social security should be provided to workers based upon the distinction between dependent and autonomous labour, because a condition of employment entails the subordination of the worker and thus the loss of control over certain economic factors. The worker is dependent upon the employer for longevity and supply of work. In this sense, linking social security to employment recognises the risk assumed by the employee due to their dependence upon the employer. Social insurance schemes are generally premised on a divide between 'subordinate' and 'autonomous' labour, with different contribution rates and benefit entitlements for the two groups.

One proposal for determining the scope of social security provision is to extend it on the basis of 'economic risk' instead of 'employment risk'. Social security could be made available on the basis of the precariousness of work and the vulnerability of the worker to economic risk, rather than linking it to employment. It is possible to make social insurance schemes more egalitarian and to reduce their male bias through methods such as: granting national insurance credits to workers (mostly female) whose employment is interrupted by child rearing or other family commitments; allowing contributions to be built up over a longer period of time; and basing pension entitlements on career averages rather than final salary levels (De Gobbi 2007; Gundogan 2009; Lundvall 2009). Chile and Argentina have developed such pro-poor forms of social insurance, described by Bensusán in Chapter 6.

It is also possible to implement social insurance schemes which deal solely with the self-employed and which focus on the risks particular to them. In India, the Unorganised Workers' Social Security Act 2008 attempts to overcome certain practical hurdles by providing for state contributions equivalent to those made by self-employed workers, bringing the contributions of self-employed workers to the same level as employees whose employer makes a contribution on their behalf, and providing a significant incentive for them to participate in these schemes. The Act followed strong recommendations by various government inquiries (Government of India 2002; Committee on Petitions 2006).[2] Though the

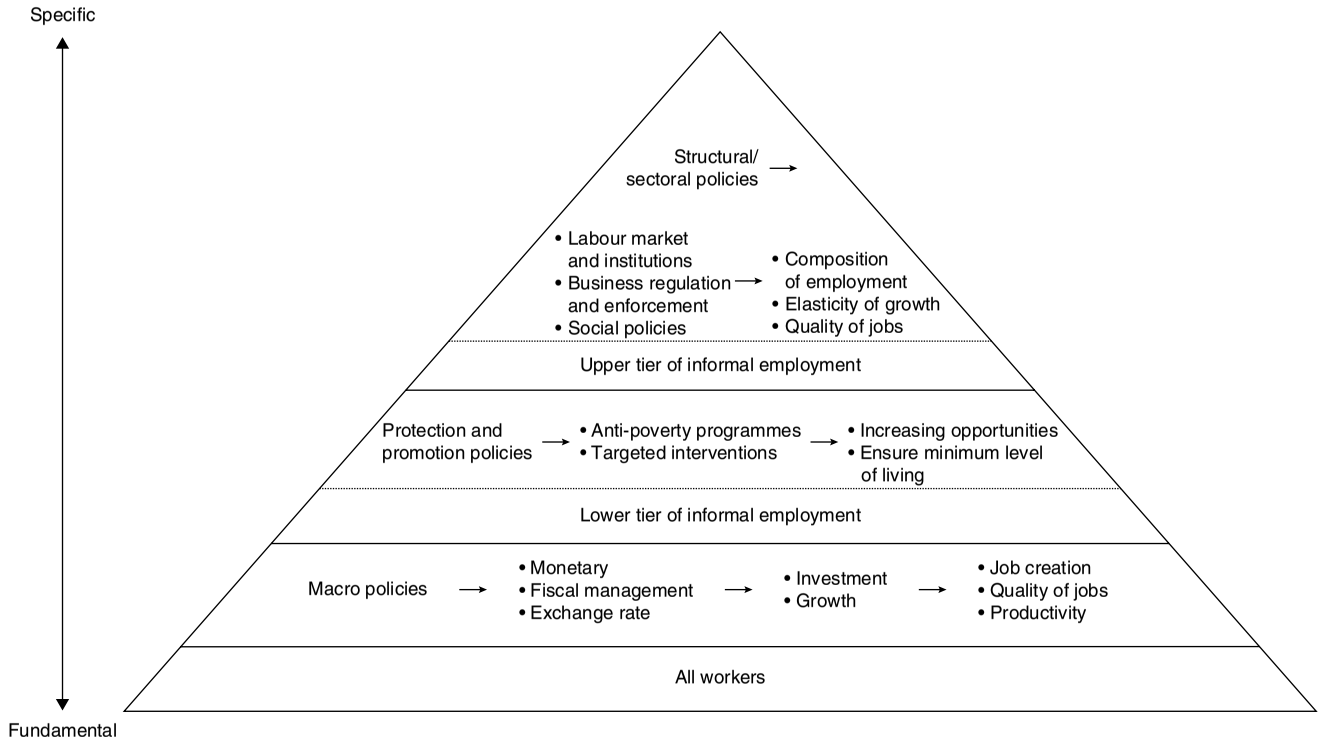
[2] See also the reports by the National Commission for Enterprises in the Unorganised Sector: http://nceuis.nic.in/nceus_earlier_reports.htm (accessed 19 February 2014).

resultant Act was limited compared with the bold recommendations of these committees, it nevertheless provides a starting point for the universal provision of social security for the poor in India and a testing ground for other countries around the world.

It would be naive to think that the problem of the informal economy and the range of workers who remain unregulated can be solved simply by increasing the scope and application of labour law. The 1991 ILO report on the *Dilemma of the Informal Sector* emphasised that the problem of informality should be addressed by 'attacking the underlying causes and not just the symptoms through a comprehensive and multifaceted strategy' (ILO 1991: 1). This was again echoed in the ILO's 2014/15 approach to the problem of informal work (ILO 2014). Widening of the scope and application of national labour law in theory and practice is a necessary cornerstone of policies to address the needs of informal, own account and micro-enterprise workers, but strategies cannot be limited to this alone. The Latin American evidence cited by Deakin in his contribution to this volume seems to indicate that informality can be reversed by a combination of economic growth and incentive-compatible regulation. Decent work for all workers, regardless of status, requires integrated policies touching on rights at work, social protection, social dialogue and employment protection as well as poverty alleviation strategies and economic development. Jütting and de Laiglesia (2009: 161) propose a three-pronged strategy that moves from very general non-targeted policies to very specific policy interventions, shown diagrammatically in Figure 9.1.

3.4 A Full Kit of Labour Market Regulation Tools Should be Employed

Deficiencies in legal and institutional development are most acute in less-developed countries and transition economies (Dixit 2007). Laws in many transition economies have elsewhere been called a 'facade without a foundation' (Murrell 1996: 34). The biggest problem in less-developed and transitional economies is generally not that the labour laws are inadequate (although they may be poorly designed for their circumstances), but rather that they are rarely enforced for the majority of workers. Guy Davidov (Davidov 2010) calls this the 'enforcement crisis'. The weakness of inspectorates, corrupt and slow court systems to which sanctions and penalties need to be applied, the low coverage and limited capacity of unions and other bodies that might enforce standards, corruption (Fajana 2008), and the fact that the risk of sanction alone is not enough to bring about compliance and formalisation all contribute to this enforcement crisis.



Source: Jütting and de Laiglesia (2009).

Figure 9.1 Three-pronged strategy

This enforcement crisis demands the use of new techniques for increasing the effectiveness of labour laws. Avinash Dixit (Dixit 2007), for instance, argues that self-enforcing governance arrangements can be more efficient than formal institutions in the early stages of economic development in light of the substantial fixed costs of establishing the latter. He points out that economic activity does not grind to a halt because the government cannot or does not provide an adequate legal underpinning, as too much potential value would thus go unrealised. As a consequence, groups and societies create alternative (second or third best) institutions to provide the necessary economic governance. State institutions are not the only ones that matter. Indeed, in less-developed and transitional economies people have more incentive to set up and rely upon social arrangements or private institutions compared with countries which have well-functioning states and laws which are enforced. These arrangements have varying degrees of effectiveness.[3] Studies of the development strategies of successful late developers have shown that states relied upon administrative rather than legal institutions to govern markets during their biggest growth periods (Pistor and Wellons 1999). The Asian Tiger economies, for instance, employed administrative measures more than legislative or judicial measures in their development, in part because of the speed with which changes can be administratively mandated.

Even in countries where formal institutions are relatively strong, state institutions can be bolstered by complementary non-state institutions (Amengual 2010). A large number of governments across the developing world have begun experimenting with various regulatory tools to augment hierarchical regulation so that regulation can be more 'reflexive' or 'responsive' to actors, social facts and norms within a given regulatory space. It is seen as a way to overcome a number of the limitations of traditional state-based regulation by bringing in new regulatory techniques and regulatory agents to bolster existing state-based systems (Haufler 2001; Utting 2005; Kolben 2007). Labour law is particularly amenable to such techniques, for although in the economic literature labour law regulations tend to be seen as imposing mandatory terms on the parties, labour law regulations often promote self-regulatory mechanisms. Examples of reflexive regulation currently utilised in less-developed countries include:

[3] Dixit found that repeated transactions linked to ostracisation and other forms of sanctions, organised crime and private arbitration bodies were the most common forms of informal enforcement mechanism in unregulated settings (Dixit 2007).

Greater use of incentives and education by inspectorates

- Escalated punishments as highlighted in the enforcement pyramid developed by Ian Ayres and John Braithwaite (Ayres and Braithwaite 1995). This begins with education and training, then monitoring coordinated with civil actors, warnings and other naming and shaming devices, before the imposition of penalties, fines or gaol (Fenwick et al. 2008). Bensusán describes Argentina, Uruguay and Brazil's policies in this regard in her chapter in this volume.
- The possibility of attending an educational programme regarding labour standards and decent work rather than paying a fine when caught by an inspectorate, as provided for in the Chilean Labor Code (Reinecke 2005).
- Building incentives for employers to comply with labour standards, by linking access to other business development strategies, such as access to microfinance or licences to operate, in order to demonstrate efforts to improve labour conditions (Zuin 2004).
- Monitoring and information provision to facilitate greater access to markets: the ILO's Better Work programmes are possibly the most developed models of this strategy (for descriptions, see Kolben's contribution to this volume and http://www.ilo.org/global/programmes-and-projects/WCMS_084616/lang--en/index.htm).
- Preventative targeting of firms based on risk (Jütting and de Laiglesia 2009: 168).

State–private partnerships

- The advancement of higher labour standards through state procurement: the state acquires goods and services from those that demonstrate compliance with the labour standards (Howe 2008).
- Private–state partnerships in which a government networks with various non-state actors to achieve regulatory objectives that they cannot or will not achieve on their own. Kolben documents the Better Factories programmes in which the ILO has worked with the Cambodian state to enhance the capacity of the state labour department and social partners using US trade incentives (Kolben 2007). The Better Work programme now operates in a number of countries (Better Factories Cambodia 2014). Amengual (2010) documents the interaction of private and state arrangements in the Dominican Republic showing that such initiatives can reinforce, rather than displace, state regulation.

- Private corporate accountability strategies (for an assessment of a number of corporate accountability mechanisms, see MacDonald and Marshall 2010). In von Broembsen and Godfrey's case study of Lesotho in this volume they document retail corporations that include compliance with national labour legislation as a term in their supply agreements.

Efficient and cheap arbitration bodies

- The development of adjudication and arbitration bodies, with members appointed jointly by labour bodies and employer bodies. These bodies could operate 'in the shadow of the law' by offering recourse to courts in the event that an agreement is not reached. Training of part-time and full-time members of these adjudication bodies is particularly important for strengthening capacity.

These tools involve state and non-state actors. Some primarily entail the involvement of non-state actors but require the state to invest work in establishing them. A number of cautions should be heeded in adopting these regulatory strategies. Firstly, for those that are state-based or state-backed, states have differing institutional capacities to introduce regulatory strategies of this type. Secondly, particularly where corruption is rife, resources can be captured by certain interest groups. Thirdly, the use of these strategies has been found to fail unless the design and implementation of the regulation is specifically targeted at improving job quality in the small and micro-enterprises which constitute the majority of the workforce in less-developed and transitional economies. Fourthly, non-state (private) regulatory systems sometimes enforce norms that conflict with local labour laws or draw resources away from the state, resulting in the privatisation of labour law. These dangers can be partially overcome through design, but no institutional outcome is likely to be optimal. What is important is that the regulation largely facilitates its desired function by contributing to decent work.

It is generally agreed by the contributors to this book that a partial safeguard against these dangers is the involvement of parties to *social dialogue* so as to facilitate 'co-regulation' (Estlund 2010). For Cindy Estlund, co-regulation is a form of workplace and economic governance that improves upon substantive labour standards in ways that respond to workers' varied and changing needs and desires (Estlund 2010: 20). Social dialogue is defined more broadly than this: it is the process of deliberation and decision-making over regulatory and institutional reform which involves

government, labour, employer bodies and other significant representative bodies, and thus recognises the pluralist interests of society.

Traditional labour social dialogue institutions, which consist of only unions and employer bodies, are unlikely to be sufficient in informal economy settings. In her chapter, Bensusán describes how cosy relationships between government and unions in many South American countries have resulted in a focus on formal, organised workers, leaving informal work largely ignored. There is little incentive for these actors to break with the status quo. Democratic and independent organisations of wage workers, own account workers, the self-employed and employers in the informal economy are sometimes not allowed under local or national legislation, and are often excluded from or under-represented in social dialogue institutions and policymaking processes (ILO 2013: 44).

Sankaran (Chapter 7, this volume) proposes that alternative dialogue institutions need to be developed, with traditional tripartite social dialogue structures yielding to more broad-based structures which accommodate consumers, self-employed persons (often not acknowledged as workers) and departments of the government other than labour (such as industries, town planning, social empowerment and environment) so that broad work-related concerns are addressed. Kolben recommends that these dialogue institutions act at a variety of levels. His 'local and national governance councils' would operate in the spirit of democratic deliberation and provide a forum for workers and other stakeholders to engage in open discussion and deliberation over context-specific workplace issues (see Chapter 3, this volume).

While there is no doubt that new institutions are needed – particularly where there are no strong unions – one concern is that these may become a mechanism for diluting the role of existing organised groups. An important question in the context of unorganised sectors is how we ensure that those who speak are representing a community of views and are democratically constituted. As such, the design of these new social dialogue institutions must be sensitive to anti-democratic tendencies. On the other hand, the literature shows that trade unions are not necessarily upholders of internal or external democracy, and there is no reason why other organisations should be less prone to capture, corrupt behaviour or rent seeking. There are other possible problems with widening the range of parties involved in social dialogue, including multiple agency problems and unwieldiness. Multi-party consultation can be extremely time-consuming. It is important to impose limits on consultation processes to allow for effective governance and to reduce opportunities for undermining the process by 'foot dragging'. A growing number of models for multiple-stakeholder

bodies are available for analysis as different social dialogue mechanisms have evolved and been adapted to different settings both in state consultative processes and non-judicial or extra-state processes. In the end, design issues are a matter for local deliberation.

Putting aside these problems with the constitution of social dialogue institutions, it has elsewhere been suggested that participation should occur at three instances in the lifespan of labour institutions (Fenwick et al. 2008):

- Those who will most be affected by regulation, or their representatives, should be *involved in its design*.
- Representative organisations, especially trade unions or NGOs, should be *involved in monitoring and compliance*.
- Representative organisations should be involved in *periodic assessment of the regulatory programme*. The capacity of social partners would be developed through involvement in the institutions, and this would bolster the capacity of the state.

At the beginning of the design and implementation process, a representational deficit may initially result in a lack of capacity by representative bodies. However, studies of consultative processes suggest that the iterative process of repeated consultation, combined with education concerning the process, can assist in building the capacity of representative organisations.

4. CONCLUSION

This chapter began by describing the debate between those who believe that labour laws are hindering economic development, and those who contend that they are an important means of tempering the negative impacts of markets on workers. The effect of orthodox labour market regulations on economic outcomes is likely to continue to be the subject of heated debate among economists and policymakers. This edited volume brings together a number of contributions that together propose that a more important undertaking might be the creation of new institutions and modes of labour regulation which are compatible with the realities of poorer nations and the workers who toil within them, their institutional settings and cultural preferences.

The idea that the development of 'appropriate' institutions differing from those which prevail in rich countries needs to occur so as to foster development is an old theme extending back at least to Alexander

Gerschenkron (Gerschenkron 1962). The transplant of labour laws and institutions designed in Europe has failed workers in poorer countries. The chapters in this book propose a great number of ways that labour regulation could become more inclusive and promote decent conditions for all workers, regardless of their employment status or the size of the enterprise they work for.

The starting point for such an enterprise is an analysis of the labour market conditions and institutional context in which labour reform is to take place. This chapter proposes that factors that could be taken into account include:

1. *Incentive compatibility:* concerning the effectiveness of labour market regulations – that is, whether they invite destabilisation through, for example, incentives for avoiding the rules, free-riding or destructive competition.
2. *Systemic fit:* evaluating how far labour market regulations work in conjunction with other regulatory mechanisms and with their economic and political environment; and how much they are embedded in the broader complex of institutions.
3. *Context dependence:* involving the economic conditions in which labour law rules are expected to operate. This particularly refers to different states of economic development and to the degree of wage dependency (that is, the availability of alternatives to wage labour) and the size of the informal economy in a given country, plus the impact of globalisation or international economic integration upon the given country and region.
4. *Institutional capacity:* the capacity of businesses to observe the obligations imposed by labour market regulations, of nation states to enforce them, and of workers to claim the respect of their rights.
5. *Inclusivity of governance:* the role which can be played by mechanisms of participative decision-making, including both social and civil dialogue, in legitimating labour market regulation, and ensuring that its design and implementation is effective and democratic, and helps to overcome structural discrimination of various types.

(See the checklist in the Appendix below.)

The contributors to this book each provide detailed analyses of the operation of labour regulations in various corners of the world. They assess existing experiments in the regulation of work and propose new ones. Each author answers Amartya Sen's challenge at the International Labour Conference in 1999 to find new ways to enhance decent work, and

together they enrich our understanding of the ways that labour regulation can operate as a development institution.

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APPENDIX CHECKLIST FOR DEVELOPING AND REFORMING DEVELOPMENT FRIENDLY LABOUR MARKET REGULATION BY SIMON DEAKIN AND SHELLEY MARSHALL

Generic Criteria

Incentive compatibility
Is the law compatible with the economic incentives of private parties?
Does the law invite destabilisation through, for example, incentives for avoidance or evasion of rules, free-riding or destructive competition?

Systemic fit
How far does the law work in conjunction with other regulatory mechanisms present in the country in question, including, for example:

- collective bargaining
- diversity and discrimination laws
- occupational regulation
- activities of employers' associations
- the corporate governance and financial framework
- competition law
- tax law.

Context dependence
Is the law compatible with the level of industrialisation?
Does it match the extent of wage dependency, and the mix of informal and formal workers?
Does the law take into account the range of different working arrangements in the state, including dependent, semi-dependent, triangular and own account, as well as periods of unpaid work?

Inclusivity of governance
Does the law encourage participative decision-making, and broader social and civil dialogue, in the formulation of rules?
Will the design of the law further its take-up, effectiveness and impact?

Institutional capacity
Does the state have the capacity to monitor and enforce the law?
Do businesses have the capacity to observe the obligations imposed by this law?

Do business and employer representative organisations have the capacity to inform members about the law and assist with its enforcement?
Do labour organisations have the capacity to inform members about the law and assist with its enforcement?
Is there a place for the involvement of other bodies with an interest in poverty alleviation?
Are there processes in place which will contribute to building the institutional capacity of each of these players?
How can the capacity of these parties be improved through the design of institutions?
Is there a mechanism for continual review of the effectiveness of rules, which contributes to institutional learning and allows parties to share information about what works and what doesn't?
What links are there with international bodies, so that norms set at the international level can be implemented at the local level, and complaints can be made to international or regional bodies?

Specific Criteria

Economic coordination
Does the law provide for appropriate allocation of decision-making powers within and between organisations?
Does the law provide mechanisms for the internalisation of external costs arising from the decisions and activities of individual organisations?
Does the law provide a basis upon which coordination problems can be overcome in the provision of collective or public goods concerning matters such as training, occupational licensing and dispute resolution?
Does the law encourage technological upgrading and improvements in job quality? Are there any additional incentives for compliance and 'going beyond the law'?

Risk distribution
Does the law recognise the unequal bargaining power of parties to work relationships?
Does the law redistribute risk away from vulnerable parties, or does it compound their vulnerability?
Does the law distribute risk in such a way that will create incentives to formality or, to the contrary, to avoid the law because risks are better dealt with by informal means?

Demand management
Does the law contribute to a level of income which will allow workers to meet basic household needs and to participate meaningfully in society?
Is the income level of the workers set by the law at a level which will stimulate local demand for goods and services?

Democratisation
Does the law provide for the involvement of all workers and employers, either directly in workplace governance or through their representatives, in the formulation of rules governing work relationships?

Empowerment
How far does the law promote access to and participation in stable and well-remunerated work relationships?
How far does the law provide for economic security in the event of limits on the availability of stable and well-remunerated work?

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