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Panel: Informal Employment, Labor Law and the Challenge of Enforcement

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Question: Incorporating informal work and the implications for the employment contract and collective bargaining.

The Debate over the Basis of Labour Law

Should we broaden the scope of labour law (both in its individual and collective aspects) beyond the contract of employment to encompass work? How we answer this question helps us to answer the following questions. Should people who sort through trash for a living in the outskirts of Cape Town, Kolkata, and Buenos Aires be entitled to bargain collectively with the purchasers of their cull? How do we provide street vendors in Durban with maternity pay? Should Uber drivers or self-employed domiciliary care workers be entitled to the minimum wage and to the right to participate in collective bargaining over the conditions of their work? The answers to these questions are complex because they have conceptual, empirical, and normative dimensions.

Essentially the question is whether we can develop a basis for labour law that can operate in a wide range of work settings across different levels of economic development. I believe that if we continue to draw the boundaries of labour law by reference to the legal device of the contract of employment the legal regulation of work will continue not only to exclude the vast majority of informal workers but also the armies of workers in the digitalized service economy.¹

The Gendered Exclusion of the Contract of Employment

The divide between an employment contract and other work relations has always presented particular difficulties for women. There is a fundamental mismatch between the binary divide that is inscribed in law and many women's experience, in which the boundaries between paid and unpaid work, between public and private, between formal and informal work and between the labour market and social security are permeable and shifting. The effects of this mismatch are particularly felt among those women who predominate among 'non-standard' and 'informal' workers, who find themselves characterized as 'independent' or 'quasi-independent' despite the reality of their lack of real autonomy or self-sufficiency in the market.

Feminists have long criticized mainstream labour studies and labour law scholarship for ignoring the pervasiveness and importance of boundary-drawing

strategies it.² The problem with the traditional scope of labour law, which focuses on the contract of employment, and its dominant normative narrative, which targets unequal relations between capital and labour, is that it ignores all of the workers who were excluded from its domain.

The effect of these boundary-drawing strategies has been to narrow the scope of labour law and to constrain the normative justifications offered for it. Currently, labour law depicts the question of work-related injustice in a particular way. It is part of a cognitive map that frames the conflicts in the labour market as requiring only temporary adjustments and as occurring primarily between workers and employers, and only secondarily as between employees. Collective bargaining and minimum standards address the first conflict, whereas human rights law addresses the second. Labour law has, however, ignored the problem of incorporating labour into the labour market as well as the fundamental question of the reproduction of labour, which involves its procreation, socialization, and nurturance on a daily and generational basis. Today, however, there is increasing awareness that labour law in its traditional form is inapposite for growing numbers of workers and the types of work relationships in which they are engaged.

The Regulation of Work

The standard employment relationship emerged as one of the key institutions of labour markets in industrialized democracies in the first half of the 20th century, shaping the terms under which labour power is supplied to and utilized within firms. It took the legal/judicial form of the contract of employment, and its function is to link workers' subordination to managerial prerogatives to protections against the abuse of this power. Moreover, through the contract of employment, labour law is also linked to other areas of regulation such as social security, tax and corporate law, which, in turn, protect workers against a range of social risks through various mechanisms of redistribution.³

While the standard employment relationship varies in its specific characteristics, there was a normative model of employment in industrial capitalist and democratic countries. As the pillars (other institutions and political alliances that support them) upon which this normative model of employment, known as the standard employment relationship, have weakened there has been a proliferation of employment and work relationships that fall outside the norm and, consequently, beyond the scope of labour law and its associated labour standards and techniques of regulation, such as collective bargaining.

Over the past forty years the prediction that the informal sector, which was characterized as a residual sector in developing countries, would be absorbed into the formal, or modern capitalist, economy as economies modernized, has proven to be incorrect. In fact, in developing and developed countries the informal economy has persisted, and with it low skilled, poorly paid, intermittent, and insecure employment. Although wage and salary employment is gradually growing as a

percentage of total employment worldwide, informal employment and work remains stubbornly high in many regions. Informal employment comprises more between 40 per cent and 50 per cent of nonagricultural employment in South Asia, in Sub-Saharan Africa, East and Southeast Asia and Latin America. Changes in production and the ways in which firms pursue flexible forms of labour, such as casual labour, contract labour, outsourcing, home working, and other forms of subcontracting that offer the prospect of minimizing fixed non-wage costs, have strengthened the links between informal and formal economic activities. Thus, we have witnessed a process of 'informalization' whereby 'employment is increasingly unregulated and workers are not protected by labour law'.⁴

Given the historical and spatial specificity of the standard employment relationship and the employment contract we need to consider a range of platforms for labour law, which would be more accurately called the regulation of work.⁵ This regulation would include the traditional techniques – collective bargaining, substantive and procedural laws, -- to include a wide range of regulatory techniques, such as licensing. Moreover, its goals would encompass what Simon Deakin and Shelley Marshall had identified as the goals of labour market regulation, which include:

- Economic coordination;
- Risk distribution;
- Demand management;
- Democratization;
- Empowerment and
- Redressing the specific vulnerabilities and unfreedoms in a region or country.⁶

In some cases, the regulation of work would be similar in many respects to the traditional forms of labour law as it would focus on work as a relationship between an 'employing entity' – an employer, a retailer, a supplier, purchaser – or some sort of entity that either exercises economic or labour process control over the worker. Here we can think of work as a relationship. However, in other contexts, such as household workers who are family members, street vendors who do not depend upon one or two suppliers, or self-employer seamstresses, there is no entity that exercises control over the worker. In these cases, work much be considered as an activity and it is important to find other platforms and techniques for regulating work and protecting workers that those traditionally associated with labour law.

Whether we regulate work on the basis of a relationship or an activity, we need to look for functional equivalents to the institutional role that the employer played in the standard employment relationship. Shelley Marshall advises that in order to regulate the broad range of work activities it is critical to go beyond the form of an institution and look at its function since there are a number of different institutions that can serve a particular function.⁷ She notes, for example, that the

income protective function performed by firms in employment relationships can be accomplished by a range of social security schemes that can be funded by a variety of revenue-raising methods.

Work as a Relationship: Beyond Contract

Mark Freedland and Nicola Kountouris focus on the legal construction of personal work relations.⁸ The benefit of their approach is that they break free of the tradition of conceptualizing all work relations in terms of the subordinated employee, and its alter ego, the independent contractor. Instead of simply attempting to finesse the binary divide, they have detached the legal analysis of personal work arrangements from its anchor in the contract of employment. They have also decisively moved away from a map of personal work relations that depicts them as a series of concentric circles with the contract of employment at its core, a map that served to reinforce, rather than diminish, the hold of a contractual analysis as the foundation of labor law.

Freedland and Kountouris's approach is explicitly centered on the worker,⁹ and from this focal point they define a series of linked concepts with an eye to developing a critical taxonomy of personal work relations that is grounded in the normative goal of cultivating personality in work. The foundational concept is the personal work relation, which is defined as a 'connection or set of connections, between a person – the worker – and another person or persons or an organization or organizations, arising from an engagement or arrangement or set of arrangements for the carrying out of work or the rendering of service or services by the workers personally, that is to say wholly or primarily by the worker himself or herself.'¹⁰ This conception is narrower than work since there must be a relationship and not simply an activity, and it requires that the worker be personally involved in performing the work.

Work as an Activity: Beyond Relationship

Focusing on the relationship with an employer leaves out, not just the reality of workers who are not truly independent, but also the possibility of other or shared sources of responsibility, including the state, mutual funds which spread the cost among all parties involved and even private insurance. The absence of an 'employer' against whom employment rights can be claimed has been the scourge of attempts to find appropriate ways of regulating the informal sector, which constitutes the vast majority of workers in the developing world, and among whom women predominate.¹¹

Once the focus is on the worker and her activities rather than on the contractual relationship, it is possible to begin to consider this problem. One way forward is to regard maternity benefits as simply a matter for social security, which is the approach adopted by the International Labour Organization.¹² Another

technique is to adopt minimum wages, either on a sectoral or general basis, that apply regardless of employment status.¹³ When seeking to regulate the activity of work it is better to think of economic risk rather than employment risk. In the context of informal workers who are engaged in substance activities, the idea of a guaranteed annual income, sometimes known as a citizenship or basic income, has been discussed as a policy reform for over 30 years, may be more suitable than unemployment insurance.¹⁴ The two key design questions are the level at which the income is set and the method of funding it.

In the case of health and safety for informal workers who are engaged in economic activities without a relationship to an entity that controls either their labour process or income, it is crucial to consider functional equivalents. For street vendors and waste pickers, the municipality, which controls the use of land and has a tax base, may be the appropriate entity. Health and safety interventions will require innovative low cost work organization and engineering solutions from occupational hygienists and occupational medicine specialists. Since informal workers will be unable to afford these costs, local government and the formal private sector may have to contribute to these costs under a broader umbrella of health protection.¹⁵

Collective Bargaining, Social Dialogue and Empowerment

Collective representation of informal workers is critical both in terms of shaping the workers' self-interests as workers and for aggregating and articulating their needs and interests. The ILO defines the term 'social dialogue' to include 'all types of negotiation, consultation or information sharing either among the bipartite parties in the workplace or industrial sector, or by tripartite partners at the national level, on issues of common interest'.¹⁶ Collective bargaining is seen as one form, but not the only form, of social dialogue. According to Minawa Ebisui, the term social dialogue better encompasses the collective organisation and representation of many groups of informal workers than does the term 'collective bargaining'.¹⁷

There are a variety of organisational forms that can represent informal workers, although the critical ones must be membership based in order to cultivate accountability of the organisation to the informal workers. There are three key types of different forms of membership-based organisations, and these different forms overlap:¹⁸

1. Unions represent workers with the goal of engaging in collective bargaining on their behalf with corporate enterprises, workers cooperatives and public authorities that directly or indirectly employ workers. In addition, when jurisdictions allow for sectoral collective bargaining, unions can negotiate sectoral agreements with employers' associations that represent individual employers, including households, as well as non-profit or for-profit enterprises. Some unions also place and train workers using a variation on the traditional hiring hall.

2. Worker cooperatives, are a form of enterprise that is owned and democratically controlled by their members, who are also workers/employees themselves.¹⁹
3. Associations are membership-based groups that typically do not engage in collective bargaining.

The main counterparts of these informal workers organisations are large companies, employer associations, the state or central governments, municipalities, the police and employers. Thus, it is critical for informal workers' organisations to identify 'the entity or authority most responsible for the issues over which they wish to negotiate' and that the identified entity then become the negotiating partner.²⁰ Moreover, it is important to recognize that the negotiating partner may differ for different issues even for a single group of workers.

Legal support, even if only in the form of lifting anti-combination or competition law, is critical for fostering sustainable forms of social dialogue. Moreover, when considering and developing social dialogue structures it is important, as Kamala Sankaran advises, to move from traditional tripartite to broader based dialogue institutions.²¹

Conclusion

In order to regulate to improve and formalize informal work it is imperative to adopt a strategic conception of work regulation that draws upon a range of regulatory theories, techniques and models that is applicable to informal work. Its starting point should be the social activities bound up in work relations and not the existing legal categories of employee, worker, or independent contractor nor on pre-existing legal jurisdictions, such as labour, immigration, housing and planning law.²² Regulatory power, understood, as measures or interventions that seek to change the behaviour of individuals or groups, is not held solely by governments but dispersed throughout a number of bodies or groups such as firms, non governmental and supra-governmental agencies, standard-setting organisations, credit-rating agencies business and professional associations, trade unions, religious organisations, courts, tribunal per groups, and others. Successful regulatory strategies must engage with social actors whose behaviour is the subject of regulation with the broader goal of building capacities in order to ensure that labour market actors internalize norms, thus ensuring the sustainability of regulatory interventions to improve the terms and conditions under which informal workers work.

¹ Judy Fudge, 'Challenging the Borders of Labour Rights' in Darcy DuToit (ed) *Labour Law and Social Progress Holding the Line or Shifting the Boundaries?* Bulletin for Comparative Labour Relations– 92 (Kluwer 2016) 73-88.

2. Judy Fudge, 'From Women and Labour Law to Putting Gender and Law to Work' in Margaret Davies and Vanessa Munro (eds) *A Research Companion to Feminist Legal Theory* (Ashgate 2013) 321; Judy Fudge, 'A New Vocabulary and Imaginary for Labour Law: Taking Legal Constitution, Gender, and Social Reproduction Seriously' In Douglas Brodie, Nicole Busby, Rebecca Zahn, (eds) *The Future Regulation of Work: New Concepts, New Paradigms* (Palgrave 2016); Judy Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction,' (2014) 22(1) *Feminist Legal Studies* 1-23.

³ The next two paragraphs draws on Judy Fudge, 'The future of the standard employment relationship: Labour law, new institutional economics and old power resource theory' (2017) 59(3) *Journal of Industrial* 374-392.

⁴ This paragraph draws on Fudge (n 1).

⁵ Judy Fudge, Shae McCrystal and Kamala Sankaran (eds) *Challenging the Legal Boundaries of Work Regulation* (Oxford: Hart, 2012).

⁶ Simon Deakin, 'Labour law and development in the Long Run' in Shelley Marshall and Colin Fenwick (eds) *Labour Regulation and Development: Socio-Legal Perspectives* (Edward Edgar 2016) 33; Shelly Marshall, 'Revitalizing labour market regulation for the economic South: New forms and tools' in Shelley Marshall and Colin Fenwick (eds) *Labour Regulation and Development: Socio-Legal Perspectives* (Edward Edgar 2016) 288, 292-3.

⁷ Marshall (n 6) 300.

⁸ Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (Oxford University Press, 2011). See the discussion in Sandra Fredman and Judy Fudge, 'The Legal Construction of Personal Work Relations and Gender,' 7 (1) *Jerusalem Review of Legal Studies* 112-122.

⁹ Freedland and Kountouris (n 8) 339.

¹⁰ Ibid. at 31.

¹¹ Judy Fudge, 'Blurring Legal Boundaries: Regulating Work', in Judy Fudge, Kamala Sankaran and Shae McCrystal (eds) *Regulating Work: Challenging Legal Boundaries* 1 (Oxford: Hart, 2012).

¹² The Maternity Protection Convention, 2000 (No. 183).

¹³ Marshall (n 6) 304.

¹⁴ Guy Standing, *Beyond the New Paternalism: Basic Security as Equality* (Verso, 2002); P Van Parijs (ed.), *Arguing for Basic Income: Ethical Foundations for a Radical Reform* (Verso, 1992); A. McKay, 'Why a Citizens' Basic Income? A Question of Gender Equality or Gender Bias' (2007) 21 *Work Employment & Society* 337-48; A. Gorz, 'Critique of Economic Reason' in P. Waterman and R. Munck (eds.), *Labour Worldwide in the Era of Globalisation: Alternative Union Models in the New World Order* (Macmillan, 1999).

¹⁵ Francie Lund and Rajen Naidoo, 'The Changed World of Work' (2016) 26(2) *New Solutions* 145-154.

¹⁶ Minawa Ebisui, *Non-standard workers: Good practices of social dialogue and collective bargaining*. Working Paper No. 36. Industrial and Employment Relations Department (Geneva: International Labour Office, 2012) 4.

¹⁷ Ibid.

¹⁸ Debbie Budlender, 'Informal Workers and Collective Bargaining: Five Case Studies' WIEGO Organizing Brief N° 9 October 2013.

¹⁹ A cooperative is defined by the International Cooperative Alliance, the International Labour Organization and the Government of South Africa as 'an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise.' ILO Promotion of Cooperatives Recommendation, 2002 (No. 193).

²⁰ Pat Horn, 'New forms of collective bargaining: Adapting to the informal economy and new forms of work' (2005) 38 (1&2) *TRAVAIL, Capital and Society* 1.

²¹ Kamala Sankaran, 'Labour Law in South Asia: A right to development perspective' in Shelley Marshall and Colin Fenwick (eds) *Labour Regulation and Development: Socio-Legal Perspectives* (Edward Edgar, 2016) 207.

²² Judy Fudge and Deirdre McCann, *Unacceptable Forms of Work: A Global and Comparative Study* (Geneva: ILO, 2015); Deirdre McCann and Judy Fudge, 'Unacceptable forms of work: A multidimensional model' (2017) 156(2) *International Labour Review* 147-184; Marlese von Broembsen and Shane Godfrey, 'Labour law and development viewed from below; What do case studies of the clothing sectors in South Africa and Lesotho tell us?' in Shelley Marshall and Colin Fenwick (eds) *Labour Regulation and Development: Socio-Legal Perspectives* (Edward Edgar, 2016) 127; Sankaran (n 21).