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REAPPRAISING DOMINANT NARRATIVES IN LABOUR LAW:
INFORMAL WORK IN THE GLOBAL NORTH AND THE GLOBAL SOUTH

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INTRODUCTION

The aim of this paper is to explore labour law's conceptual and normative narrative. If labour law, as Arthurs puts it, 'takes its purpose, form, and content from the larger political economy from which it originates and operates',¹ what shape does or should labour law assume in response to the transformation of the political economy in countries of the global North, with the declining prevalence of the postwar model of full employment within a formal welfare state regime? Correspondingly, what is the proper role to be played by labour law and labour relations institutions in the development process within industrialising countries of the global South?

Dominant narratives within labour law scholarship reflect and give legitimacy to the traditional regulatory mechanisms and institutions of labour relations, and also shape which types of employment relationships are deemed suitable for regulation. These prevailing narratives, and the scholarly framing of the discipline which have originated in the 'hegemonic' countries of the global North,² have in large part been transplanted to the global South. Yet these narratives are closely allied to a particular economic history

¹ Harry Arthurs, 'Labour Law After Labour' in Brian Langille and Guy Davidov (eds) *The Idea of Labour Law*, OUP, 2011.

² Judy Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptualizing Labour Law' in Langille and Davidov n 1 above.

of regulation of primarily Fordist productive relations; regulation which has evolved along with the protective capacities of industrialised states during the 20th century. Thus, traditional regulatory frameworks for governing work relations have taken as their starting point and as their main (sometimes, only) subject of regulation, the post-war ideal type of the ‘standard’ employee within the ‘standard employment relationship’, buttressed by institutions of social citizenship.

In contrast, informal employment has long been the predominant form in the labour markets of developing countries, and predictions that work would become formalised as these economies modernised have proven incorrect. In particular, it is clear that the Polanyian trajectory predicted within economic sociology of the creation of a link between wage labour in the formal economy and social citizenship at the core of the welfare state,³ has not occurred in the South; industrialising states have never enjoyed the protective capacities witnessed within the North. One of the questions for this paper is thus the extent to which labour law scholarship offers alternatives to the dominant (modernisation) thesis with regard to economic development. The assumption that there is a universal path towards economic development is one which has been adopted by the World Bank and other international financial institutions, which have co-opted Weber’s ideal type of ‘logically formal rationality’ as a prerequisite for economic growth and development.⁴ Thus, in the view of the World Bank, the key to economic development is converting the ‘informal’ into the ‘formal’.⁵ This approach, that developing countries should adopt formal legal institutions – in particular the rule of law and protection of private property – so as to ensure the predictable and effective enforcement of ‘background’ rules necessary for capitalist economic growth, also requires them to eschew labour market institutions, which are assumed to have a largely negative impact

³ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, Beacon Press, [1944] 2001; Edward Webster and Robert Lambert, ‘Markets Against Society: Labor’s Predicament in the Second Great Transformation’ in Ann Denis and Devorah Kalekin-Fishman (eds) *The ISA Handbook in Contemporary Sociology: Conflict, Competition, Cooperation*, SAGE Publications Ltd, 2009.

⁴ Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, Guenther Roth & Claus Wittich (eds), University of California Press, [1921/22] 1978; Duncan Kennedy, ‘The Disenchantment of Logically Formal Legal Rationality, or Max Weber’s Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought’ (2004) 55 *Hastings Law Journal*, 1031-1076.

⁵ Shelley Marshall, John Howe and Colin Fenwick, ‘Labour Law and Development: Creating an Enabling Regulatory Environment and Encouraging Formalisation’, Paper presented at Conference on Regulating for Decent Work: Innovative Labour Regulation in a Turbulent World, 8-10 July 2009, on file with ILO; available at <http://www.ilo.org/public/english/protection/condtrav/pdf/rdwpaper27a.pdf>.

on growth and economic development. Whilst not sharing the World Bank's view that informality arises in large part in order to avoid overly burdensome or 'rigid' labour regulation, the International Labour Organisation, in its promotion of its decent work agenda, similarly advocates formalisation of the informal economy. How does or should labour law respond to these apparently incommensurable aims: of promoting formalisation whilst retaining (labour market) flexibility?⁶

Further, the process of informalisation is not confined to developing countries. Indeed, it is increasingly arguable that, even in the global North, the model of formal employment, with an implicit or psychological contract, existed only for an elite group of mostly male workers, and is now unravelling. Accordingly, dominant narratives, which were never particularly apt for the global South, are also becoming less relevant for the global North. A key element in this declining relevance is the pervasiveness of informal work. This paper will therefore examine what shape labour law takes or should take, in light of the declining dominance of forms of labour linked to the political economy of 'hegemonic' countries of the global North. What are the challenges for labour law in both industrialised and developing countries posed by the refashioning of economies in response to trade liberalisation and the related rise of market rationality as the governing metric of economic life?

LAW, INSTITUTIONS AND DEVELOPMENT: THE LOGIC OF FORMALISATION

What is the role played by law in the economic development process? Is the adoption of formal legal institutions – so long argued as a precondition for economic development more broadly – also a prerequisite for the proper functioning of labour markets and employment relations?

In her account of the troubled evolution of 'law and development' or 'legal development' scholarship, Amanda Perry-Kessaris notes that Trubek and Santos have identified the beginnings of a (post-modernisation theory, post-neoliberalism) 'third

⁶ Kerry Rittich, 'Modeling Informal Labor Markets and Development: Exit, Exclusion and the Paradoxes of Labor Market Flexibility', Paper presented at Feminist Theory Workshop, Fall 2009, Columbia Law School.

moment' in law and development among both academics and practitioners.⁷ This new approach is characterised by 'the new attention to the limits of markets, the effort to define development as freedom not just growth, the stress on the local, the interest in participation, and the focus on poverty reduction'.⁸

However, this 'new mainstream' or 'third moment' within law and development thinking does not offer a complete break with earlier periods of orthodoxy, in particular those approaches which placed the 'rule of law' centre stage in the understanding of the development process.⁹ What is notable about this more recent stage in mainstream law and development theory is that it remains marked by a (mostly unreconstructed) market fundamentalism, although offering what David Kennedy refers to as a 'chastened neoliberalism'.¹⁰ In contrast, critical law and development scholars interrogate and challenge the assumptions which have led new and old mainstream theorists and practitioners, especially the international development institutions and other transnational actors, to be so dedicated to the notion that particular legal forms and institutional frameworks are necessary for economic growth and development. Most notably, development strategies of international development institutions such as the World Bank have coalesced around the 'rule of law' as the key to transforming developing countries into market economies although, as Santos notes, several competing conceptions of the 'rule of law' might be in play at any one time.¹¹

The relationship between law, institutions and development is one which preoccupied Weber, and indeed a (possibly distorted) version of Weberian thinking is central to mainstream law and development thinking, as is a Hayekian conception of the rule of law.¹² Weber's observations on the central role of 'rational' legal systems in the

⁷ Amanda Perry-Kessaris, 'The Case for a Visualized Economic Sociology of Legal Development' (2014) *Current Legal Problems*, 1-30, 2.

⁸ David M. Trubek and Alvaro Santos, 'Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice' in David M. Trubek and Alvaro Santos (eds) *The New Law and Economic Development: A Critical Appraisal*, Cambridge University Press, 2006, 7.

⁹ See Alvaro Santos, 'The World Bank's uses of the "Rule of Law" promise in economic development' in David Trubek and Alvaro Santos (eds).

¹⁰ David Kennedy, 'The "Rule of Law," Political Choices, and Development Common Sense' in Trubek and Santos (eds).

¹¹ Santos, n 9, 257 et seq.

¹² In his taxonomy of differing conceptions of the rule of law, all of which are to some extent discernible in World Bank policy prescriptions, Santos distinguishes between institutional and substantive conceptions; and within both conceptions, intrinsic and instrumental versions. A Hayekian vision

emergence of modern capitalism and on economic development more generally have been implicitly and explicitly co-opted by the World Bank and other international financial institutions.¹³ According to Weber, one of the most important preconditions for the development of market economy ('capitalistic enterprise') was the 'rationalization and systematization of the law in general', namely the predictability and security gained from a formal legal process.¹⁴ In an interpretation which located Weberian thought at the centre of development theory, policy and praxis in 20th century US,¹⁵ but has been criticised for simplifying Weber,¹⁶ Talcott Parsons outlined a 'modernisation' theory, which posited that:

(1) there is a universal path towards economic development which features the emergence of a highly differentiated social structure; (2) this path features the centrality of free market entrepreneurs; and (3) states that wish to succeed in economic development should do as much as possible to free constraints on entrepreneurs and investors.¹⁷

Parsons' interpretation of Weber has arguably misapplied Weber's typology in order to develop a universalistic account of economic growth, and placed Weber 'in the service of a particularly American version of capitalism'.¹⁸ However, the orthodoxy which took hold has been very influential within the international financial institutions, feeding into the 'Washington Consensus', namely the view that *all countries* 'should adapt their institutions to a global template based on constitutional guarantees for private property, a minimalist state, and the liberalization of trade and capital flows'.¹⁹

would, accordingly regard the rule of law as a system that articulates a free market economy, with the rule of law being 'the legal embodiment of freedom': Santos n 9 esp at 263, 264.

¹³ Santos, n 9, 272-3; Ibrahim F.I. Shihata, Franziska Tschofen and Antonio R. Parra, *The World Bank in a Changing World: Selected Essays*, Martinus Nijhoff, 1991.

¹⁴ Max Weber, *Economy and Society*, G. Roth & R. Wittich (eds) Ephraim Fischhoff et al. trans., 1968 (1956), at 883.

¹⁵ Chantal Thomas, 'Max Weber, Talcott Parsons and the Sociology of Legal Reform: A Reassessment with Implications for Law and Development' (2006) 15 *Minnesota Journal of International Law*, 383-424

¹⁶ Jere Cohen, Lawrence Hazelrigg & Whitney Pope, 'Deparsonizing Weber: A Critique of Parsons Interpretation of Weber's Sociology' (1975) *American Sociology Review*, 229; David M. Trubek, 'Max Weber on Law and the Rise of Capitalism' (1972) *Wisconsin Law Review*, 720-753.

¹⁷ Thomas n 15, 423.

¹⁸ *Ibid*, 409-410; 416.

¹⁹ Simon Deakin, 'The Contribution of Labour Law to Economic and Human Development' in Brian Langille and Guy Davidov (eds).

Both the modernisation theory and the Washington Consensus accord significant priority to private law rights, as can be seen in the focus on the formalisation of property rights. But what of regulatory law, of the sort which labour lawyers typically advocate? Trubek and Santos characterise neoliberal law and development thought as focused primarily on the law of the market, with regulation often presented as an unnecessary intrusion on the market, and ‘relatively little concern ... shown for law as a guarantor of political and civil rights or as protector of the weak and disadvantaged’.²⁰

In her studies of land-titling in Peru and microfinance in Bangladesh, Antara Haldar illustrates the limits of the ‘formalist model’ or the law and economics paradigm.²¹ She interrogates the dominant paradigm within law and development thinking – ‘an amalgamation of Chicago-school law and economics, new institutional economics and the “rule of law” orthodoxy’ – contrasting it with an alternative, ‘law and society’ perspective, which sees markets as fundamentally embedded in society. As an example of development policy heavily influenced by the law and economics approach, with its advocacy of interventions which are ‘linear, procedural, instrumental and formal’, Haldar offers the illustration of the land-titling programme in Peru established by Hernando De Soto, with its preoccupation with state-enforced law over more community-based regulatory mechanisms, ‘vesting paramount faith in law as written down in statutory form’.²² In contrast, the microfinance model, which exemplifies the law and society approach, is less preoccupied with a written code ‘but rather adopts an informal view of the law as lived practice’.²³ The perspective that formal law is superior to other more informal mechanisms is shown to be flawed in Haldar’s empirical work, which finds that the informal, more socially rooted, model performed better than the formalist model on counts of both efficiency and equity.²⁴

What lessons might this examination of the limits of the formalist model have for labour markets?

Informal work and informal norms

²⁰ Trubek and Santos, n 8, 2.

²¹ Antara Haldar, ‘Law and development in crisis: An empirical challenge to the current theoretical frames’ (2014) *Northern Ireland Legal Quarterly*, 303-321.

²² *Ibid*, 316.

²³ *Ibid*, 316.

²⁴ *Ibid*.

THE PERSISTENCE OF INFORMALITY

One of the most significant challenges facing work and its regulation in market economies is the persistence of informal work and the growth of informalisation. Whilst there has been extensive literature on re-thinking the personal scope and substantive underpinnings of labour law, much of this has taken place, firstly, by reference to employment contract doctrine and attempts to reconfigure that doctrine; and secondly, by reference to the characteristics and changing patterns of work within the global North. This paper builds on what is so illuminating in that scholarship, but also addresses its shortcomings by turning its attention to the global South, and also taking a somewhat empirically-grounded as well as doctrinally astute approach. This focus on the South will provide the necessary level of detail for re-appraising what are the most appropriate ‘tools and institutions for regulating work that falls outside the traditional regulatory repertoire of labour law’.²⁵

As the economic crisis in Latin America in the 1980s highlighted – and the post-2008 global financial crisis is reiterating – during periods of economic or financial crisis, employment in the informal sector increases instead of, or in addition to, the increase in unemployment. The unfolding European Union example illustrates how governmental (and supranational) responses to the current crisis, in particular the crisis in sovereign debt, have placed labour and employment law centre-stage in the array of policy responses. In particular, EU member states receiving financial support from the ‘Troika’ of the European Commission, European Central Bank and International Monetary Fund have been required to undertake ‘[r]adical, deregulatory labour law reforms’²⁶ which intensify the process of informalisation. This phenomenon provides an opportunity for scholars in the North to learn from those in the South, as the EU experience mirrors the effect of structural adjustment programmes (SAPs) implemented by the International Monetary Fund and the World Bank on labour markets in developing states from the 1970s onwards. Both ‘crisis response’ and ‘structural adjustment’, and the accompanying informalisation, present challenges to labour law and to conceptions of the role of law in economic development.

²⁵ Judy Fudge, ‘Labour as a “Fictive Commodity”: Radically Reconceptualizing Labour Law’ in Brian Langille and Guy Davidov (eds) *The Idea of Labour Law*, OUP, 2011.

²⁶ Simon Deakin, ‘Editorial: The Sovereign Debt Crisis and European Labour Law’ (2012) *Industrial Law Journal*, 251-253.

At a broader theoretical level, it is important to interrogate the ‘fetishisation of the formal’ which one observes in much of the orthodox law and development discourse, which involves a preoccupation with the rule of law and, relatedly, a view of law that is excessively formalistic.²⁷ A common problem within the rule of law orthodoxy is inattention to the evidence that the best way of implementing the law ‘is not through external imposition but rather through drawing agents into the system through a process of building internal legitimacy’.²⁸ A similar critique of excessive legal formalism was articulated by legal realists, who questioned the assumptions that legal form determines outcome. To this might be added a critique of the ‘unthinking transfer’ of categories developed in the global north to the economic and social structures of developing countries.²⁹

As the ILO acknowledges, there is no universally accurate or accepted definition of informal work or the informal economy, encompassing as it does considerable diversity in terms of workers, enterprises and entrepreneurs.³⁰ However, a working definition adopted by the ILO refers to all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements. Thus, informal work is understood to embrace activities either not included in the law, namely operating outside the formal reach of the law; or not covered in practice, namely where the law is not applied or not enforced or compliance is inappropriate, burdensome, or imposes excessive costs.³¹ The ILO further describes the informal economy as consisting of unregistered and/or small unincorporated private enterprises engaged in the production of goods or services for sale or barter.³² The enterprises typically operate at a low level of organisation, with little or no division between labour and capital as factors of production and on a small scale. Labour

²⁷ See Haldar n 21.

²⁸ Haldar n 21, 317.

²⁹ See Keith Hart, ‘Informal Income Opportunities and Urban Employment in Ghana’ (1973) *Journal of Modern African Studies*, 61-89, 61.

³⁰ ILO, ‘Resolution concerning decent work and the informal economy’, International Labour Conference, 90th Session, Geneva, 2002, para 3.

³¹ Ibid. See also International Labour Conference 90th Session 2002, Report VI, *Decent work and the informal economy*, Sixth item on the agenda, ILO 2002.

³² An unincorporated enterprise is a production unit that is not constituted as a separate legal entity independently of the individual (or group of individuals) who owns it; an enterprise is unregistered when it is not registered under specific forms of national legislation (e.g. factories’ or commercial acts, tax or social security laws, professional groups’ regulatory acts).

relations are based mostly on casual employment, kinship or personal and social relations.³³

Modernisation theory predicted that, ‘modernity’ would replace ‘traditions’ as economies developed and ‘evolved’.³⁴ The informal economy was thus a temporary phenomenon, a remnant of feudalism and agrarian production, which would be absorbed within and disappear into the urbanised, formal economy.³⁵ Drawing on classical economic theory and the historical experience of Western industrialised countries, mainstream development theory coalesced around a dualistic model of the development process, wherein the transfer of labour from the subsistence to the capitalist sector came to reflect sectoral differences in the marginal productivity of labour, eventually leading to an integrated labour market and economy.³⁶

On the contrary, however, the informal economy has expanded in both industrialised and developing countries. Indeed, the bulk of new employment in recent years, particularly in developing and transition countries, has been in the informal economy.³⁷ In coining the term ‘informal sector’ in 1973, Hart also exposed the limits of modernisation theory within development economics, given his findings as to the crucial role played by self-employed workers in Ghana’s development, as a source of employment, and of essential cheap goods and services relied on by low-wage urban workers.³⁸

In industrialised (or post-industrial) states the growth of informal work (also variously known as atypical, non-standard, precarious or flexible work) has been explained in large part by reference to changing methods of production and the move by employing

³³ ILO, *Statistical update on employment in the informal economy*, ILO Department of Statistics, June 2011, 12.

³⁴ Walt Whitman Rostow, *Stages of Economic Growth: A Non-Communist Manifesto*, Cambridge: Cambridge University Press, 1960; ‘The Stages of Economic Growth’ (1959) *Economic History Review*, 1-16. See also W. Arthur Lewis, ‘Economic Development with Unlimited Supplies of Labour’ (1954) 23:2 *Manchester School of Economic and Social Studies*, 139-191.

³⁵ Rina Agarwala, ‘An Economic Sociology of Informal Work: The Case of India’ in Nina Bandelj (ed) *Economic Sociology of Work* (Research in the Sociology of Work, Volume 18) Emerald Group Publishing Limited, 2009, 315-342, 319.

³⁶ Colin Kirkpatrick and Armando Barrientos, ‘The Lewis Model After Fifty Years’ Development Economics and Public Policy Working Paper Series, Paper No. 9, September 2004, Institute for Development Policy and Management, University of Manchester; available at http://www.seed.manchester.ac.uk/medialibrary/IDPM/working_papers/depp/depp_wp09.pdf.

³⁷ ILO, *Decent work and the informal economy*, n 31, 1.

³⁸ Agarwala n 35, 322.

enterprises towards increased flexibilisation of employment relationships. Sandra Fredman explains the phenomenon of the rise in what she refers to as ‘atypical’ work as a result of the move from industrial mass production towards the service economy, in addition to global competition and the growth new technology, coupled with governmental encouragement (in the UK) of the shift towards more flexible work contracts in particular through labour market deregulation.³⁹ Using different terminology, Chen and Collins both identify a calculated process of increased informalisation within advanced capitalist economies,⁴⁰ wherein production is reorganised into ‘small-scale, decentralized, and more flexible economic units’⁴¹ as firms show a greater willingness to arrange aspects of production through subcontracting, franchising, concessions and outsourcing (with similar developments occurring in the public sector as a result of privatisation).⁴² Such decentralisation of production and creation of more flexible and specialised production units – typically by formal firms in *industrialised* states – further reinforce the prevalence of informal work in *developing* states, since such flexible specialisation is increasingly associated with cross-border commodity and value chains in which the lead enterprise is located in a industrialised country, with the final producer an own-account worker in a micro-enterprise or a homemaker in a developing or transition country.⁴³

The trend, observed by Chen and Collins among others, toward ‘vertical disintegration’, wherein the management of large enterprises substitute commercial contracts for employment relations, places many workers in industrialised states who would previously have been within the paradigm of the ‘standard employment relationship’ outside this paradigm and thus beyond range of much employment protection legislation.⁴⁴ However, in developing states, informal work has been and remains the main source of employment and income for the majority of the workforce and

³⁹ Sandra Fredman ‘Labour Law in Flux: The Changing Composition of the Workforce’ (1997) *Industrial Law Journal*, 337-352.

⁴⁰ Martha Alter Chen, ‘The Informal Economy: Definitions, Theories and Policies’, Women in Informal Employment: Globalizing and Organizing (WIEGO) Working Paper No 1, August 2012, available at http://wiego.org/sites/wiego.org/files/publications/files/Chen_WIEGO_WPI.pdf; Hugh Collins ‘Independent Contractors and the Challenge of Vertical Disintegration for Employment Protection Laws’ (1990) *Oxford Journal of Legal Studies*, 353-380.

⁴¹ Chen n 40, 2-3.

⁴² Collins n 40, 353.

⁴³ International Labour Conference, 90th Session, 2002, Report VI, *Decent work and the informal economy*, ILO, 2002, at 2. See also Chen n 40, 13.

⁴⁴ Collins n 40.

population.⁴⁵ Contrary to earlier predictions, economic development in developing countries has not generated enough ‘modern’ jobs to absorb surplus labour from the traditional economy.

The informal economy comprises half to three-quarters of all non-agricultural employment in developing countries. More precisely, whilst the averages conceal large disparities between individual countries, the ILO has estimated that non-agricultural employment in the informal economy represents 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.⁴⁶ If subsistence agriculture is considered, the percentage of employment in the informal economy is even larger than the figures presented above.⁴⁷

In her review of the competing explanatory frameworks for informality, Martha Chen identifies Dualist, Structuralist, Legalist and Voluntarist accounts of informal work, contending that, given the heterogeneity of the informal economy, there is cause to recognise the explanatory purchase of each of these perspectives.

The legalist school, as exemplified by De Soto,⁴⁸ focuses on the formal regulatory environment, arguing that ‘plucky’ micro-entrepreneurs who choose to operate informally in order to avoid the costs, time and effort of formal registration. The answer thus lies in easing the path to formalisation through recognition of property rights: the introduction of simplified bureaucratic procedures to encourage informal enterprises to register so that informal operators are able to convert their assets into legally recognised assets.⁴⁹ In contrast, structuralists (such as Chen herself, and Collins)⁵⁰ argue that informalisation is driven by the nature of capitalist growth, with formal firms seeking to reduce labour costs and improve competitiveness by divesting themselves of

⁴⁵ Chen n 40, 20.

⁴⁶ International Labour Conference, 103rd Session, 2014 Report V(1) *Transitioning from the informal to the formal economy*, ILO 2014, para 15.

⁴⁷ *Ibid*, 16.

⁴⁸ Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, New York: Basic Books, 2000; *The Other Path: The Economic Answer to Terrorism*, New York: HarperCollins, 1989.

⁴⁹ Chen n 40, 4-6.

⁵⁰ Collins n 40.

responsibilities (such as for taxation or social legislation) by means of ‘vertical disintegration’.⁵¹

Polanyian trajectory: link between wage labour in the formal economy and social citizenship;

*Nancy Fraser: postcolonial states never enjoyed protective capacities equal to those of ‘the core’, thanks to ‘long histories of colonial subjection, as well as to the continuation, after independence, of imperialist predation by other means’.*⁵²

FORMALISING THE INFORMAL IN AN ERA OF LABOUR MARKET FLEXIBILITY

‘[D]ecent work deficits are most pronounced in the informal economy’.⁵³ With this statement, the ILO has acknowledged the undeniable link between informality and substandard or precarious working conditions. If one recalls that the definition of work in the informal economy is centered around work not covered or insufficiently covered by formal arrangements, operating outside the formal reach of the law, or where the law is not applied or not enforced, then a central feature of informal work is that such work generally lacks basic social or legal protections or employment benefits.⁵⁴ As such, informal *employment* may be found in the formal *sector*, the informal sector, or within households. Indeed, informal working may also include *employees*, who are considered to have *informal* jobs if their employment relationship is, in law or in practice, not

⁵¹ Chen characterises other schools of thought as follows: the voluntarist school argues that informal operators choose to operate informally, with informal entrepreneurs deliberately seeking to avoid regulations and taxation; dualists, as exemplified by Hart (Keith Hart, n 29) see the informal economy as comprising marginal activities – distinct from and not related to the formal sector: Chen n 40, 4-6.

⁵² Nancy Fraser, ‘A Triple Movement? Parsing the Politics of Crisis after Polanyi’, *New Left Review* 81 May June 2013, 119-132, at 126.

⁵³ ILO, ‘Resolution concerning decent work and the informal economy’, International Labour Conference, 90th Session, Geneva, 2002, para 9.

⁵⁴ Ibid:

Workers in the informal economy are not recognized, registered, regulated or protected under labour legislation and social protection, for example when their employment status is ambiguous, and are therefore not able to enjoy, exercise or defend their fundamental rights. Since they are normally not organized, they have little or no collective representation vis-à-vis employers or public authorities. Work in the informal economy is often characterized by small or undefined workplaces, unsafe and unhealthy working conditions, low levels of skills and productivity, low or irregular incomes, long working hours and lack of access to information, markets, finance, training and technology. Workers in the informal economy may be characterized by varying degrees of dependency and vulnerability’.

subject to national labour legislation, income taxation, social protection or entitlement to certain employment benefits (e.g., advance notice of dismissal, severance pay, paid annual or sick leave, etc).⁵⁵

In order to determine which group of workers the law should aim to protect, namely, workers for which employing enterprises should have responsibilities, most systems of labour law (along with taxation, social protection and welfare systems) draw a fundamental distinction between workers who are categorised as financially dependent on one employer, and those categorised as independent or autonomous workers (e.g. operators of micro-enterprises). Informality has thus long been associated with exclusion from legal and regulatory frameworks; but it is also very likely to be associated with vulnerability.

Whilst some workers who fall outside the standard employment relationship – e.g. those at the high end of the spectrum such as ‘knowledge workers’, associated with the rise of the ‘new economy’ and networked organisations – are not typically considered to be in need of labour protection,⁵⁶ at the other end of the spectrum are ‘precarious’ or vulnerable workers who do not enjoy privileged social locations or access to social and economic capital. The vulnerable social locations of those engaged in the informal economy further exacerbate their vulnerability as workers and the decent work deficits. Women workers, workers from ethnic minorities and racialised groups, and workers with precarious immigration statuses, whether temporary or undocumented, are overrepresented in precarious work arrangements that fall outside the norm of the standard employment relationship.⁵⁷

In about half of the countries surveyed by the ILO, the share of informal in total employment is higher for women than for men, although it notes that the gender bias in the informal economy is probably underestimated.⁵⁸ Why is this the case? With regard to developing countries, it is argued that no country has successfully industrialised via

⁵⁵ ILO, *Statistical update on employment in the informal economy*, ILO Department of Statistics, June 2011.

⁵⁶ Judy Fudge, ‘Blurring Legal Boundaries: Regulating for Decent Work’ in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds) *Challenging the Legal Boundaries of Work Regulation*, Hart, 2012, 12.

⁵⁷ *Ibid*, 13.

⁵⁸ ILO, *Decent work and the informal economy*, n 31, 12.

export promotion without drawing upon a pool of low wage female workers. Similarly, most industrialised countries rely on low wage women workers, a disproportionate number of whom are immigrants or racial and ethnic minorities, for increasing amounts of service and production work.⁵⁹ Consequently, the vast majority of the working poor are located in informal markets, and a disproportionate number of those in informal markets are women.⁶⁰ The ample empirical research showing that workers in the informal economy face higher risks of poverty than those in the formal economy has led the ILO to conclude that ‘there is a significant, but not complete, overlap between working informally and being poor and vulnerable’.⁶¹ The informal economy, according to the ILO, is marked by acute decent work deficits: individuals and enterprises may be trapped in a spiral of low productivity and poverty; informal workers are not recognized, registered, regulated or protected under labour and social protection legislation, and are not therefore able to enjoy, exercise or defend their fundamental rights; there are varying degrees of dependency and vulnerability, in particular experienced by women, young persons, migrants and older workers, including child labour and bonded labour.⁶²

Accordingly, the ILO has come to see formalisation of the informal economy as an essential component of its ‘decent work’ agenda.⁶³ As Rittich notes, arguments for formalisation ‘now sound both in the registers of better work and economic development’.⁶⁴ Indeed, the overlap between these two agendas has been articulated by the ILO itself:

decent work is at the heart of the global discussion on the post-2015 Development Agenda, which aims to help define the future global development framework. These meetings emphasized the need to implement a range of integrated and coherent policies aimed at moving economic units into the formal economy, including policies

⁵⁹ Kerry Rittich, ‘Feminization and Contingency: Regulating the Stakes of Work for Women’ in J Conaghan, RM Fischl & K Klare (eds) *Labour Law in an Era of Globalization: Transformative Practices and Possibilities*, OUP 2002, 118.

⁶⁰ Ann Trebilcock, ‘Using Development Approaches to Address the Challenge of the Informal Economy for Labour Law’ in Guy Davidov and Brian Langille (eds) *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work*, Oxford: Hart, 2006, 63; see also Rittich n 6.

⁶¹ International Labour Conference, 103rd Session, 2014 Report V(1) *Transitioning from the informal to the formal economy*, ILO 2014, para 2

⁶² *Ibid*, paras 25-26.

⁶³ *Ibid*. Initially articulated in ILO, *Decent work and the informal economy*, 2002, n 31.

⁶⁴ Rittich n 6.

for employment generation, the extension of social protection, a favourable regulatory environment, the promotion of labour rights, support for entrepreneurship and skills, local development and strengthened social dialogue.⁶⁵

The ILO's formalisation strategy entails promoting decent work along the entire continuum from the informal to the formal end of the economy, in particular, by ensuring that those who are currently in the informal economy are 'recognized in the law and have rights, legal and social protection and representation and voice'.⁶⁶ Thus, it is clear that the preoccupation with formalising economic activity in general similarly affects labour and employment relations.

*Rittich, however, cautions that labour market formalisation as a development strategy may be in tension with the goal of better or 'decent' work.*⁶⁷

The context in which thinking about labour market regulation takes place is dominated by the same neoliberal orthodoxy which recognises the importance of law for the operation of private markets, but is sceptical about state intervention or the protection of human rights. In particular, a key part of this orthodoxy, when applied to the regulation and governance of labour markets, is a scepticism – most forcefully articulated by the OECD and the IMF – towards labour market institutions, which are perceived to be an exogenous interference, and a powerful faith in labour market flexibility. Both organisations identified the interaction of the two oil price shocks of the 1970s and the inability of many labour markets to adjust to rapid change as key causal factors of high unemployment, especially European unemployment.⁶⁸

Orthodox economic thinking has long held that the systems of labour market regulation which exist(ed) in most EU member states were the major cause of their high unemployment in the 1970s and 1980s, and that the EU would therefore do best to adopt the more flexible wage systems, employment practices and labour laws of the

⁶⁵ ILO, *Transitioning from the informal to the formal economy*, 31.

⁶⁶ ILO, *Decent work and the informal economy*, 2002, n 31, 5.

⁶⁷ Rittich n 6, 6.

⁶⁸ Organisation for Economic Co-operation and Development (OECD), *The OECD Jobs Study: Evidence and Explanations and Facts, Analysis, Strategies*, Paris: OECD, 1994; see also *OECD Employment Outlook 2004*, Paris: OECD, 2004 and International Monetary Fund (IMF), *World Economic Outlook*, Washington: IMF, 1999; Chapter IV Chronic Unemployment in the Euro Area: Causes and Cures.

United States. Such ‘labour market rigidities’ were routinely blamed for high European unemployment, and this was certainly the conclusion of the OECD *Jobs Study*.⁶⁹

Of relevance to developing states is that whilst the discourse and policy prescription of labour market flexibility was initially developed to remedy perceived ‘Eurosclerosis’ that afflicted one region of the industrial world, it was soon deployed as a general approach to the regulation and governance of labour markets. As Rittich notes, such prescriptions soon came to be adopted by the international economic and financial institutions and incorporated as part of standard reform advice, and sometimes lending conditionality.⁷⁰ The logic underpinning the approach to labour market regulation of the *Jobs Study*, the IMF and the World Bank’s *Doing Business* reports,⁷¹ is that since only free, unrestricted operation of market forces produces optimal results – in labour markets, as in commodity markets – state intervention through regulation serves to distort labour supply and demand, restrict job creation and increase unemployment.⁷²

It is relevant here to revisit some of the most frequently repeated assertions of the labour market flexibility debate. *First*, the institutions of the welfare state are said to distort the labour supply. Generous social insurance and unemployment benefit levels in European countries have meant and mean that workers are under less pressure to seek jobs.⁷³ *Second*, the wage structure: labour market institutions, such as collective bargaining (and employment protection legislation, see below) are also said to impair the equilibrating function of the market mechanism, for example by influencing bargaining behaviour.⁷⁴ *Third*, there is the critique of employment protection legislation. Such institutional arrangements allegedly weaken the demand for labour, making it less attractive to hire workers.⁷⁵

⁶⁹ OECD, *ibid.*

⁷⁰ Rittich n 6, 17.

⁷¹ See below.

⁷² Nick Adnett, *European Labour Markets: Analysis and Policy*, London: Longman, 1996, at 278.

⁷³ OECD, *The OECD Jobs Study: Evidence and Explanations. Part II: The Adjustment Potential of the Labour Market*, Paris: OECD, 1994, 213.

⁷⁴ Horst Siebert ‘Labor Market Rigidities: At the Root of Unemployment in Europe’ (1997) 11:3 *Journal of Economic Perspectives*, 37-54, 43.

⁷⁵ *Ibid.*, 43. In spite of the ‘extensive public debate and much economic research’ on the links between EPL and labour market performance, even the OECD admits that ‘empirical research to date has not provided a clear-cut answer to this question’: OECD, *OECD Employment Outlook, June 1999* (Paris: OECD, 1999) at 47 and 68. For an extensive critique of the labour market flexibility debate, see Diamond Ashiagbor, *The European Employment Strategy: Labour Market Regulation and New Governance*, OUP, 2005, chapters 2 and 3.

These assumptions about the economically harmful effects of labour market institutions underpin the consensus among the international financial institutions, and the international development institutions, about the appropriateness of labour market flexibility for both industrialised and developing countries. However, a shift which Trubek and Santos identify in what they refer to as the ‘new’ mainstream of (law and) development thinking is a greater acceptance of regulatory law, and of the need for legal intervention to reduce transaction costs and compensate for market failures.⁷⁶ What is unclear, however, is whether this softening of neoliberal orthodoxy amounts to a new paradigm or a chastened form of neoliberalism?⁷⁷

Two key policy instruments which may point towards a greater tolerance of (labour market) institutions is the World Bank’s Comprehensive Development Framework,⁷⁸ which on the face of it represents an attempt to soften the Washington Consensus view of development and formalisation, and the more recent dilution of opposition to labour market institutions of the Doing Business report. The then World Bank president described the Comprehensive Development Framework thus:

The Comprehensive Development Framework (CDF) was proposed by the World Bank in early 1999 as a means by which countries can manage knowledge and resources to design and implement effective strategies for economic development and poverty reduction. It brings together many current trends in development thinking and is centered on a long term vision... that balances good macroeconomic and financial management with sound social, structural and human policies.⁷⁹

However, the World Bank during this period continued to place great store by measures of business and employment regulation (the ‘Doing Business’ Report and ‘Employing

⁷⁶ Trubek and Santos, n 8, 11.

⁷⁷ Ibid, 3.

⁷⁸ World Bank, A Proposal for a Comprehensive Development Framework (A Discussion Draft), 21 January 1999; http://web.worldbank.org/archive/website01013/WEB/0_CO-87.HTM.

⁷⁹ World Bank/IMF, ‘The Comprehensive Development Framework (CDF) and Poverty Reduction Strategy Papers (PRSP)’ Joint Note by James D. Wolfensohn and Stanley Fischer, 5 April 2000; available at <https://www.imf.org/external/np/prsp/pdf/cdfprsp.pdf>. Wolfensohn was President of the World Bank from 1995-2005; Fischer was First Deputy Managing Director of the International Monetary Fund from September 1994 to August 2001.

Workers Index’)⁸⁰ which were fundamentally rooted in the classic neoliberal critique of labour market institutions outlined above. The relatively recent (2013) decline in the importance of the *Doing Business* project evidences a tentative process of ‘institutional convergence and divergence’ between the differing approaches to labour market regulation of the ILO and the World Bank.⁸¹

The World Bank publishes an annual report on regulations that, in the assessment of the World Bank, enhance or constrain business activity. It uses 30 quantitative indicators on business regulation and protection of property rights, to compare 189 different economies over time. The aim is to shed light on how easy or difficult it is for a local entrepreneur to open and run a small to medium-size business when complying with relevant legal obligations. In addition, the *Doing Business* report examines the tax burden on businesses and different aspects of employment regulation. *Doing Business* measures the regulation of employment, specifically as it affects the hiring and redundancy of workers and the rigidity of working hours. The chapter on ‘Hiring and Firing Workers’ defines a wide variety of labour regulations as obstacles to investment. As Peter Bakvis notes, countries which establish minimum wages above a certain very low level, set maximum weekly hours below 66 hours, require any advance notice for dismissal or specific procedures for job termination are all considered to have rules that hinder their investment friendliness and place them in a worse rank in comparison with other countries, according to *Doing Business*’s ‘ease-of-doing-business’ indicators. Countries can improve their rank by abolishing these and various other kinds of labour regulations.⁸²

The methodology behind the *Doing Business* reports was strongly criticised by international human rights organisations, civil society groups and trade union federations, as it was seen as placing pressure on governments to remove any sort of regulation – from employment protection to the requirement to pay corporation taxes.

⁸⁰ World Bank, *Doing Business 2015: Going Beyond Efficiency*, Washington, DC: World Bank, 2014.

⁸¹ For a detailed analysis of the possibly *converging* approaches, see Deirdre McCann, ‘Labour Law on the Plateau: Towards Regulatory Policy for Endogenous Norms’ in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds) *The Autonomy of Labour Law*, Hart Publishing, 2015. For a historical overview of the tensions between the ILO and the World Bank, see Yaraslau Kryvoi, ‘The World Bank and the ILO: Two Visions of Employment Regulation’ in Roger Blanpain and Clare Grant (eds) *Fixed-term employment contracts: A comparative study*, Vanden Broele Publishers, 2009.

⁸² Peter Bakvis, ‘How The World Bank & IMF Use The Doing Business Report To Promote Labour Market Deregulation In Developing Countries’ ICFTU/Global Unions, Washington,

Following criticism from academia, civil society, and other international organisations this methodology was subject to an independent evaluation by a consultative group and a review by an independent panel.⁸³ From 2009 to 2011 the World Bank Group worked with a consultative group – including labour lawyers, employer and employee representatives, and experts from the ILO, the OECD, civil society and the private sector – to review the methodology of the labour market regulation indicators and explore future areas of research. The consultative group completed its work in 2011, and its guidance has provided the basis for several changes in methodology. The most recent round of data collection for the project was completed in June 2014, and covered additional areas of labour market regulation, including social protection schemes and benefits as well as labour disputes. In particular, the Employing Workers Indicator (EWI), a sub-indicator of the Doing Business indicators developed by the World Bank, has been extensively reviewed and assessed as not being suitable for the inclusion into overall aggregate Doing Business indicator or for ranking countries.

Most importantly, it was determined that, although the World Bank may continue gathering raw data underlying EWI, it would suspend using the EWI to calculate the aggregate Ease of Doing Business indicator or rank countries based on it, as well as stop referring to the EWI when formulating policy advice. According to the Final Report of the Independent Panel ‘The Bank’s decision to suspend the EWI *acknowledged the problems inherent in measuring only the costs of labour-market regulation and not the benefits*. The Panel agrees with the Bank’s reasoning that ‘a comprehensive approach in advice on labour market policies is needed, and that the EWI ‘presents a measure of flexibility in employment regulations, but does not capture other key dimensions of employment policies, such as worker protection measures’.⁸⁴

The 2013 World Development Report⁸⁵ confirmed the diminished importance of the *Doing Business* project, as well as signalling what Deirdre McCann refers to as a ‘new narrative on the scope, purpose and functioning of labour market regulation’.⁸⁶

⁸³ World Bank, *Independent Panel Review of the Doing Business Report*, 2013. Available at: <http://www.dbrpanel.org/>.

⁸⁴ Mariya Aleksynska and Sandrine Cazes, ‘Comparing indicators of labour market regulations across databases: A post scriptum to the employing workers debate’ Conditions of Work and Employment Series No. 50, International Labour Office, Geneva, 2014.

⁸⁵ World Bank, *World Development Report 2013: Jobs*, Washington: World Bank, 2012.

⁸⁶ McCann n 81, 405.

Comparison between the World Bank and the ILO's approach to converting the 'informal' into the 'formal'.

What does the decline of the EWI mean for the labour market flexibility discourse and formalisation of the informal economy?

What is the balance to be struck between private law rights and regulatory law?

Institutionalist approaches which suggest (labour market) institutions as an input into economic efficiency. As Joseph Stiglitz has put it:

we realize that many of our policy frameworks in recent decades have been making things worse [...] we have weakened our automatic stabilizers by weakening social protection, and we have destabilized the economy by making wages more flexible rather than providing job security. We have created greater anxiety, which, in times like this, increases savings rates and weakens consumption. All of these so-called reforms have made our economic system less stable and less able to weather a storm.⁸⁷

The 'Comprehensive Development Framework' and the incorporation of a social agenda into the policy recommendations of international development institutions,⁸⁸ in particular in the turn away from the *Doing Business* mind-set, suggest a chastened form of neoliberalism, and greater tolerance within the international development institutions of public regulation or state intervention of the sort needed to realise the ILO's formalisation agenda.

CONCLUSIONS: TO BE COMPLETED

⁸⁷ Joseph Stiglitz, 'The Global Crisis, Social Protection and Jobs' (2009) Vol. 148 *International Labour Review*, 1-13.

⁸⁸ Kerry Rittich, 'The future of law and development: Second generation reforms and the incorporation of the social' in David Trubek and Alvaro Santos (eds).