

Re-Imagining Labour Law for Development

Informal Work in the Global North and South

Edited by
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Introduction: Narratives of Informality and Development

DIAMOND ASHIAGBOR

I. Introduction

This collection examines the role of law in development; more specifically, the changing role of *labour* law in industrial, post-industrial and developing countries, and the challenges which the informalisation of work poses to our understanding of labour law's functions.

The aim is to explore labour law's conceptual and normative narrative. If labour law, as Harry 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 post-war 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?

A. Rationale and Scope

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 of regulation of primarily Fordist productive relations; regulation which has evolved along with the protective

¹ H Arthurs, 'Labour Law After Labour' in B Langille and G Davidov (eds), *The Idea of Labour Law* (Oxford, Oxford University Press, 2011).

² J Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptualizing Labour Law' in B Langille and G Davidov (eds), *The Idea of Labour Law* (Oxford, Oxford University Press, 2011).

capacities of industrialised states during the twentieth 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 proved incorrect. In particular, it is clear that the Polanyian trajectory predicted within economic sociology,³ of the creation of a link between wage labour in the formal economy and social citizenship at the core of the welfare state, has not occurred in the South; industrialising states have never enjoyed the protective capacities witnessed within the North.

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. The contributions to this book will therefore ask what shape does or should labour law 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?

B. Objectives, Impact, Implications: Development as a Continuing Process

This collection offers a contribution to labour law scholarship, and to reappraising the discipline. Whilst there has been extensive literature on rethinking the personal scope and substantive underpinnings of labour law, much of this has taken place, first, by reference to employment contract doctrine and attempts to reconfigure that doctrine; and second, by reference to the characteristics and changing patterns of work within the global North. The scholarship within this book will build on what

³ The argument here, following Polanyi, is that many industrialised states of the global North were able to successfully construct (a version of) a welfare state through what Polanyi refers to as a 'counter-movement' of society in response to the domination by the market under capitalism, with the forces of *laissez-faire* economic liberalism offset by principles of social protection: K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston, MA, Beacon Press, [1944] 2001); E Webster and R Lambert, 'Markets Against Society: Labor's Predicament in the Second Great Transformation' in A Denis and D Kalekin-Fishman (eds), *The ISA Handbook in Contemporary Sociology: Conflict, Competition, Cooperation* (London, SAGE Publications Ltd, 2009).

is so illuminating in that scholarship, but also address its shortcomings by providing a platform for research which is empirically grounded as well as being doctrinally astute, and which turns its attention to the global South. This focus on the South will provide the necessary level of detail for reappraising what are the most appropriate ‘tools and institutions for regulating work that falls outside the traditional regulatory repertoire of labour law’.⁴ Accordingly, the ambition of this book is to recast the conceptual underpinnings of labour law, through an analysis of informal work.

The topic is particularly timely. 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’⁵ 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. In understanding development as a continuing process, which affects all countries which have undergone or are undergoing the transition to a market economy, it is the task of this book to reimagine labour law for development. This Introduction has three overlapping aims, whilst also providing an overview of the book’s chapters: first, it examines what law and development thinking might mean in the context of the labour market; second, it focuses on the persistence of informality; third, on the question of formalising the informal in an era of labour market flexibility.

II. Law, Institutions and Development: The Logic of Formalisation

Labour law, formality and development are intertwined: the chapters in this collection test assumptions about the ‘correct’ route to economic development,

⁴ Fudge, above n 2.

⁵ S Deakin, ‘Editorial: The Sovereign Debt Crisis and European Labour Law’ (2012) *Industrial Law Journal*, 251–53.

and what this means for the role of law in general and labour law in particular. More specifically, they interrogate the question where states are located on the ‘path’ towards economic development, how one defines development, and indeed the very understanding of capitalist modernity or ‘formality’ to be aspired to.⁶

A. Development and Legal Formality

A prior question for this introductory chapter is, how convincingly does orthodox thinking about law and development explain the phenomenon of the labour market? What role is played by law in the economic development process? The adoption of formal legal institutions has so long been argued as a precondition for economic development more broadly; are formal legal institutions such as the contract of employment also a prerequisite for the proper functioning of labour markets and employment relations?

One particular concern is 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 drawn upon Max Weber’s ideal type of ‘logically formal rationality’ as a prerequisite for economic growth and development.⁷ The relationship between law, institutions and development is one which preoccupied Weber. But what one might say is a distorted version of Weberian thinking is now central to mainstream law and development thinking, as is a Hayekian conception of the rule of law.⁸ Weber’s observations on the central role of ‘rational’ legal systems in the 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.⁹ According to Weber, one of the most important preconditions for the development of market economy

⁶ D Chakrabarty, *Provincialising Europe: Postcolonial Thought and Historical Difference* (Princeton, Princeton University Press, 2000). See also Rittich, this volume.

⁷ M Weber in Guenther Roth and Claus Wittich (eds), *Economy and Society: An Outline of Interpretive Sociology* (Berkeley, CA, University of California Press, [1921/22] 1978); D 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*, 1031–76. The following paragraph draws from D Ashiagbor, ‘Theorizing the Relationship Between Social Law and Markets in Regional Integration Projects’ (2018) 27: 4 *Social & Legal Studies*, 435–55.

⁸ 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 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’: A Santos, ‘The World Bank’s uses of the “Rule of Law” promise in economic development’ in DM Trubek and A Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge, Cambridge University Press, 2006) esp at 263, 264.

⁹ Santos, above n 8, 272–73; IFI Shihata, F Tschofen and AR Parra, *The World Bank in a Changing World: Selected Essays* (Dordrecht, Martinus Nijhoff, 1991).

(‘capitalistic enterprise’) was the ‘rationalization and systematization of the law in general’, namely the predictability and security gained from a formal legal process.¹⁰

Thus, in the view of the World Bank, the key to economic development is converting the ‘informal’ into the ‘formal’.¹¹ According to this approach, 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. This approach also requires them to reject labour market institutions, which are assumed to have a largely negative impact 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 Organization (ILO), 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?¹²

Both the modernisation theory and the Washington Consensus¹³ 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? Neoliberal law and development thought is 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’.¹⁴

B. 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. As the ILO acknowledges, there is no universally accurate or accepted definition

¹⁰ Weber, above n 7, at 883.

¹¹ S Marshall, J Howe and C 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 the ILO; available at <http://www.ilo.org/public/english/protection/condtrav/pdf/rdwpaper27a.pdf>.

¹² K 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; K Rittich, in this volume.

¹³ The widespread orthodoxy, in particular shared by the international financial institutions located in Washington, as to the necessity to adopt competitive exchange rates, trade liberalisation, deregulation, privatisation, and foreign direct investment liberalisation as the route to economic development. See B Langille, ‘Imagining Post “Geneva Consensus” Labor Law for Post “Washington Consensus” Development’ (2010) 31 *Comparative Labor Law & Policy Journal* 523–52.

¹⁴ DM Trubek and A Santos, ‘Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice’ in DM Trubek and A Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge, Cambridge University Press, 2006), 2.

of informal work or the informal economy, encompassing as it does considerable diversity in terms of workers, enterprises and entrepreneurs.¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸

Modernisation theory predicted that ‘modernity’ would replace ‘traditions’ as economies developed and ‘evolved’.¹⁹ 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.²⁰ 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, where 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.²¹

But contrary to these predictions, economic development in developing countries has not generated enough ‘modern’ jobs to absorb surplus labour from the traditional economy.²² As observed above, the trajectory predicted within

¹⁵ ILO, ‘Resolution concerning decent work and the informal economy’, International Labour Conference, 90th Session, Geneva, 2002, para 3.

¹⁶ The ILO definition has evolved over the years, but owes much to the work of the International Conference of Labour Statisticians (ICLS). See *Resolution concerning statistics of employment in the informal sector, Adopted by the Fifteenth International Conference of Labour Statisticians* (January 1993) and the discussion of the ICLS 1993 and amended 2003 definitions of informal work in the chapters in this volume by Deakin, Marshall and Pinto, and by McHugh-Russell.

¹⁷ ILO, ‘Resolution concerning decent work and the informal economy’. See also International Labour Conference 90th Session 2002, Report VI, *Decent work and the informal economy*, Sixth item on the agenda, ILO 2002.

¹⁸ 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 (eg factories’ or commercial acts, tax or social security laws, professional groups’ regulatory acts).

¹⁹ W 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* 139–91.

²⁰ R 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) (Bingley, Emerald Group Publishing, 2009) 315–42, 319.

²¹ C Kirkpatrick and A 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.

²² See, eg, the discussion of Argentina in the chapter by Lorena Poblete in this volume.

Polanyi-inspired 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, has not occurred in the South.²³ As Nancy Fraser has noted: 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’.²⁴ 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.²⁵ In coining the term ‘informal sector’ in 1973, Hart also exposed the limits of modernisation theory, with 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.²⁶

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 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 of new technology, coupled with governmental encouragement (in the UK) of the shift towards more flexible work contracts in particular through labour market deregulation.²⁷ Using different terminology, Martha Chen and Hugh Collins both identify a calculated process of increased informalisation within advanced capitalist economies,²⁸ wherein production is reorganised into ‘small-scale, decentralized, and more flexible economic units’²⁹ 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).³⁰ 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

²³ Polanyi, *The Great Transformation*, above n 3; Webster and Lambert, above n 3.

²⁴ N Fraser, ‘A Triple Movement? Parsing the Politics of Crisis after Polanyi’, *New Left Review* 81 May–June 2013, 119–32, at 126.

²⁵ ILO, *Decent work and the informal economy*, above n 17, 1.

²⁶ Agarwala, above n 20, 322.

²⁷ S Fredman, ‘Labour Law in Flux: The Changing Composition of the Workforce’ (1997) *Industrial Law Journal*, 337–52.

²⁸ M 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_WP1.pdf; H Collins, ‘Independent Contractors and the Challenge of Vertical Disintegration for Employment Protection Laws’ (1990) *Oxford Journal of Legal Studies*, 353–380.

²⁹ Chen, above n 28, 2–3.

³⁰ Collins, above n 28, 353.

developing states, since such flexible specialisation is increasingly associated with cross-border commodity and value chains in which the lead enterprise is located in an industrialised country, with the final producer an own-account worker in a micro-enterprise or a homemaker in a developing or transition country.³¹

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 the range of much employment protection legislation.³² However, in developing states, informal work has been and remains the main source of employment and income for the majority of the workforce and population.³³

C. Formalising the Informal in an Era of Labour Market Flexibility

‘[D]ecent work deficits are most pronounced in the informal economy.’³⁴ 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 informal work as that 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 it generally lacks basic social or legal protections or employment benefits.³⁵ As such, informal *employment* may be found in the formal *sector*, the informal sector, or within households. Informality has long been associated with exclusion from legal and regulatory frameworks designed to cover employees (and workers); but it is also very likely to be associated with vulnerability.

Whilst some workers who fall outside the standard employment relationship – for instance those at the high end of the spectrum such as ‘knowledge workers’,

³¹ International Labour Conference, 90th Session, 2002, Report VI, *Decent work and the informal economy*, ILO 2002, above n 17, at 2. See also Chen, above n 28, 13.

³² Collins, above n 28.

³³ Chen, above n 28, 20.

³⁴ ILO, ‘Resolution concerning decent work and the informal economy’, International Labour Conference, 90th Session, Geneva, 2002, para 9.

³⁵ *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.

associated with the rise of the ‘new economy’ and networked organisations – are not typically considered to be in need of labour protection,³⁶ at the other end of the spectrum are ‘precarious’ or vulnerable workers who do not enjoy a privileged social location or access to social and economic capital. The weaker social location of those engaged in the informal economy further exacerbates 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.³⁷

In about half of the countries surveyed by the ILO, the share of informal workers in total employment is higher for women than for men, although it notes that the gender bias in the informal economy is probably underestimated.³⁸ Why is this the case? With regard to developing countries, it is argued that no country has successfully industrialised via 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.³⁹ Consequently, the vast majority of the working poor are located in informal markets, and a disproportionate number of those in informal markets are women.⁴⁰ 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.’⁴¹ 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 recognised, 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.⁴²

³⁶J Fudge, ‘Blurring Legal Boundaries: Regulating for Decent Work’ in J Fudge, S McCrystal and K Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Oxford, Hart Publishing, 2012), 12.

³⁷*ibid.*, 13.

³⁸ILO, *Decent work and the informal economy*, above n 17, 12.

³⁹K Rittich, ‘Feminization and Contingency: Regulating the Stakes of Work for Women’ in J Conaghan, RM Fischl and K Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford, Oxford University Press, 2002), 118.

⁴⁰A Trebilcock, ‘Using Development Approaches to Address the Challenge of the Informal Economy for Labour Law’ in G Davidov and B Langille (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford, Hart Publishing, 2006), 63.

⁴¹International Labour Conference, 103rd Session, 2014 Report V(1) *Transitioning from the informal to the formal economy*, ILO 2014, para 2.

⁴²*ibid.*, paras 25–26.

Accordingly, the ILO has come to see formalisation of the informal economy as an essential component of its ‘decent work’ agenda.⁴³ As Rittich notes, formalisation is itself imagined *as* development⁴⁴ and arguments for formalisation ‘now sound both in the registers of better work and economic development’.⁴⁵ Indeed, the overlap between these two agendas has been articulated by the ILO itself: in its 2014 report on *Transitioning from the informal to the formal economy*, the ILO referred to the need to implement ‘a range of integrated and coherent policies’ to ‘move economic units into the formal economy’ including the extension of social protection and the promotion of labour rights.⁴⁶

The ILO’s formalisation strategy – most clearly articulated in the adoption of Recommendation No. 204, 2015 on Transition from the Informal to the Formal Economy⁴⁷ – 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’.⁴⁸ Thus, it is clear that the preoccupation with formalising economic activity in general similarly affects labour and employment relations. Formalisation is seen as the answer to economic development; and also to the decent work deficit arising from the persistence of informal work. Rittich, however, cautions that labour market formalisation as a development strategy may be in tension with the goal of better or ‘decent’ work.⁴⁹

The stress on formalisation of working relations takes place against a backdrop 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. 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 United States. Such ‘labour market rigidities’ were routinely blamed for high European unemployment, and this was certainly the conclusion of the *OECD Jobs Study*.⁵⁰

⁴³ *ibid.* Initially articulated in ILO, *Decent work and the informal economy*, 2002, above n 17.

⁴⁴ Rittich, in this volume.

⁴⁵ Rittich, above n 12.

⁴⁶ ILO, *Transitioning from the informal to the formal economy*, above n 41, 31.

⁴⁷ Recommendation No 204, 2015: Transition from the Informal to the Formal Economy. This Recommendation codifies the definition of informal work contained in the 2002 Resolution: ILO, ‘Resolution concerning decent work and the informal economy’, International Labour Conference, 90th Session, Geneva, 2002, para 3.

⁴⁸ ILO, *Decent work and the informal economy*, 2002, above n 17, 5.

⁴⁹ Rittich, above n 12, 6.

⁵⁰ Organisation for Economic Co-operation and Development (OECD), *The OECD Jobs Study: Evidence and Explanations and Facts, Analysis, Strategies* (Paris, OECD, 1994).

Of relevance to *developing* states is that whilst the discourse and policy prescription of labour market flexibility was initially developed to remedy the 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.⁵¹ And as noted above, these ‘radical deregulatory’ prescriptions are now being applied to Europe.

The logic underpinning the approach to labour market regulation of the *Jobs Study*, the IMF and the World Bank’s *Doing Business* reports,⁵² 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.⁵³ 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.⁵⁴ What is unclear, however, is whether this softening of neoliberal orthodoxy amounts to a new paradigm or a chastened form of neoliberalism?⁵⁵

Two key policy instruments which may point towards a greater tolerance of (labour market) institutions is the World Bank’s Comprehensive Development Framework,⁵⁶ 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* reports. The then World Bank president described the CDF as an approach which ‘balances good macroeconomic and financial management with sound social, structural and human policies’.⁵⁷

The World Bank has long placed great store by measures of business and employment regulation (the ‘*Doing Business*’ Report and ‘Employing Workers

⁵¹ Rittich, above n 12, 17.

⁵² The most recent iteration is *Doing Business 2019: Training for Reform* (Washington, World Bank, 2018).

⁵³ N Adnett, *European Labour Markets: Analysis and Policy* (London, Longman, 1996), at 278.

⁵⁴ Trubek and Santos, above n 14, 11.

⁵⁵ *ibid.*, 3.

⁵⁶ 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.

⁵⁷ 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 to 2005; Fischer was First Deputy Managing Director of the International Monetary Fund from September 1994 to August 2001.

Index')⁵⁸ 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.⁵⁹ The 2013 World Development Report⁶⁰ 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'.⁶¹

The 'Comprehensive Development Framework' and the incorporation of a social agenda into the policy recommendations of international development institutions,⁶² 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.

D. The Epistemology of Informality

At a broader theoretical level, as seen above, much of the orthodox law and development discourse fetishes the formal, which involves a preoccupation with the rule of law and, relatedly, a view of law that is excessively formalistic. 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'.⁶³ 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

⁵⁸ The Employing Workers Indicator or Index (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 inclusion into the overall aggregate *Doing Business* indicator or for ranking countries. Following important criticism from academia, civil society, and other international organisations it underwent an independent evaluation and examination by a consultative group and a review by an independent panel: World Bank, *Independent Panel Review of the Doing Business Report, 2013*; available at: <http://www.dbrpanel.org/.Bank>.

⁵⁹ For a detailed analysis of a dynamic process of institutional *convergence* and *divergence*, 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* (Oxford, 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* (Bruges, Vanden Broele Publishers, 2009).

⁶⁰ World Bank, *World Development Report 2013: Jobs* (Washington, World Bank, 2012).

⁶¹ McCann, above n 59, 405.

⁶² K Rittich, 'The future of law and development: Second generation reforms and the incorporation of the social' in DM Trubek and A Santos (eds), *The New Law and Economic Development*, above n 8.

⁶³ A Haldar, 'Law and Development in Crisis: An Empirical Challenge to the Current Theoretical Frames' (2014) *Northern Ireland Legal Quarterly*, 303–21, 317.

transfer' of categories developed in the global North to the economic and social structures of developing countries.⁶⁴

As Deakin, Marshall and Pinto note in their chapter, official statistics in different jurisdictions adopt distinct approaches and use competing measures and terms. The definitions used by international agencies, whilst not uniform, are however coalescing around an expanded definition which includes 'employment in the informal sector' as well as informal employment.⁶⁵ Throughout the literature, one finds use of competing and sometimes overlapping terms, definitions and classificatory schemes. Rather than seeking to provide a definitive account of 'the informal', I wish to instead reflect on the epistemology of 'informality', the drawing of distinctions between formal and informal, which encode other binaries: those which perpetuate colonial binaries, equating the North with progress, order and enlightenment and the South with backwardness and chaos.⁶⁶

There has long been a strong interdisciplinary tradition within labour law scholarship, with the discipline (in the UK) in conversation with the social sciences, in particular sociology and industrial relations.⁶⁷ But with regard to the 'binary divide' and questions of classification of working relationships, there has been a tendency to adopt a predominantly doctrinal methodology, based on close textual analysis and meticulous scrutiny of doctrine. The more recent move to greater engagement with empirical method to understand working lives in an *individualised* legal environment⁶⁸ is thus to be welcomed, enabling and facilitating as it has a richer and more meaningful engagement with the particularities of jurisdictions in the global South.⁶⁹ Such a grounded approach can reveal how the simple transplant of doctrines or laws developed in the context of the global North simply does not capture the realities of a predominantly informal economy.

Guha-Khasnabis, Kanbur and Ostrom rightly question the usefulness of the formal–informal dichotomy, suggesting that 'formal and informal are better thought of as metaphors that conjure up a mental picture of whatever the user has in mind at that particular time.'⁷⁰ In particular, the tendency to associate 'informal'

⁶⁴ See K Hart, 'Informal Income Opportunities and Urban Employment in Ghana' (1973) *Journal of Modern African Studies* 61–89, 61.

⁶⁵ eg ILO, *Decent work and the informal economy*, 2002, 16; Statistical definition of informal employment: Guidelines endorsed by the Seventeenth International Conference of Labour Statisticians (2003), ILO, 2003.

⁶⁶ See Chakrabarty, above n 6.

⁶⁷ See, eg, O Kahn-Freund, 'Intergroup Conflicts and their Settlement' (1954) 5 *British Journal of Sociology* 193–227; Lizzie Barmes, *Bullying and Behavioural Conflict at Work: The Duality of Individual Rights* (Oxford, Oxford University Press, 2016), Chapter 1.

⁶⁸ See Barmes, above n 67, 4.

⁶⁹ See, eg, A Ludlow and A Blackham (eds), *New Frontiers in Empirical Labour Law Research* (Oxford, Hart Publishing, 2015); S Marshall and C Fenwick (eds), *Labour Regulation and Development: Socio-Legal Perspectives* (Cheltenham, Edward Elgar, 2016).

⁷⁰ B Guha-Khasnabis, R Kanbur, and E Ostrom, 'Beyond Formality and Informality' in B Guha-Khasnabis, R Kanbur and E Ostrom (eds), *Linking the Formal and Informal Economy: Concepts and Policies* (Oxford, Oxford University Press, 2006) 1 and 3.

with ‘unstructured’ and ‘chaotic’ is unhelpful.⁷¹ Indeed, empirical research suggests the existence of, for instance, highly structured interactions within groups which do not interact with official governance.⁷² As Hart observes, practices may ‘appear to be informal because their forms are largely invisible to the bureaucratic gaze.’⁷³

One value, however, of holding on to the binary – perhaps better conceptualised as the formal–informal continuum – is that it can still be a useful analytical device or heuristic ‘we can fruitfully use the terminology, formal–informal to characterize a continuum of the reach of official intervention in different economic activities, especially since official statistics already use variants of such a criterion.’⁷⁴

There is irony in that the ILO has come to the same policy conclusions as others (international financial institutions and scholars of development) more traditionally associated with a positivist account of the role of law and the rule of law; faith in the power of formal legal institutions to bring order to the informal world. In recent years, following the developmental logic of formalisation, the extension of formal legal property rights to the ‘informal’ sector has been advocated as a ‘possible powerful policy tool to help the poor make the best of their assets.’⁷⁵ However, the reality of economic activity in developing countries belies such a simplistic transfer of models from the global North to the South.

I want to give an example from outside the world of work of the fetishisation of the formal. 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.⁷⁶ She questions 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.’⁷⁷ 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.’⁷⁸ The perspective that formal law is superior to

⁷¹ *ibid.*, 16.

⁷² *ibid.*, 6.

⁷³ K Hart, ‘Bureaucratic Form and the Informal Economy’ in B Guha-Khasnobis, R Kanbur and E Ostrom (eds), above n 70, 22.

⁷⁴ Guha-Khasnobis, Kanbur and Ostrom, above n 70, 16.

⁷⁵ *ibid.*, 2.

⁷⁶ Haldar, above n 63.

⁷⁷ *ibid.*, 316.

⁷⁸ *ibid.*

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.⁷⁹

What lessons might this examination of the limits of the formalist model have for work relations and labour markets? The persistence of informal work requires us to think more imaginatively about informal *norms* governing informal *work*. Gains for workers may be achieved without necessarily having to resort to formal institutions such as the contract of employment.

III. Overview of the Book

Formalisation is seen as the answer to economic development, and also to the decent work deficit arising from the persistence of informal work. As mentioned earlier, the key to economic development is perceived to lie in converting the 'informal' into the 'formal'. However, whilst the discourse of formalisation gains increasing purchase, within both the ILO and the international financial institutions, the discourse and practice of flexibilisation retains its dominance. For instance, it is unlikely that the vertical disintegration of production will be reversed. So the downward pressure on workers' bargaining power will continue, as will the shift of risk from employers to workers.

This collection brings together a carefully chosen group of scholars – with different perspectives on labour, law, markets and development; from industrialised and developing countries; and at different stages in their professional formation as lawyers and social scientists – to examine one of the most significant challenges facing work and its regulation in market economies: the growth of informalisation.

The contributions to this book emerge from a conference, held at the Institute of Advanced Legal Studies (IALS), University of London, in September 2016, which was made possible through the generous support of the SOAS Faculty of Law and Social Sciences, and the Society of Legal Scholars (SLS) and IALS. The conference was badged as the SLS Annual Seminar 2016.

In chapter one, **Kerry Rittich** weaves together many of the themes in the book, in exploring continuities not only between informality in industrialised and developing countries, but also between work in the colonial era (for instance, indentured labour) and contemporary forms of labour. As Rittich makes clear, to understand contemporary projects of formalisation in both global North and South, one needs to look historically. She finds the question of labour and work relationships – the productivity and regulation of 'native' labour, the subjection of 'free' labour to market discipline, and the application of coercion in the creation of a 'free' labour market – deeply interconnected with the colonial project and to

⁷⁹ *ibid.*

development as a governance practice. The contemporary association of formality with modernisation, modernity, and development can be seen to have strong antecedents in the project of British colonial administration.

Rittich's analysis of informality as a category within development thinking is further developed by **Liam McHugh-Russell** in chapter two. His particular focus is on the problems for transnational governance caused by the competing conceptualisations of informality arising from the agendas of different epistemic communities, national authorities and policy actors. However, what his close reading of the evolution of official definitions of informality elaborated by the International Conference of Labour Statisticians and by the ILO reveals is that, despite the lack of analytical rigour or clear boundaries to the concept, 'informality' serves an important purpose as a heuristic: a constructed knowledge object which is a resource in struggles over development practice, and a means to articulate the problem of the relationship between labour law, development discourses and working conditions in the global South.

Deirdre McCann's chapter reviews the discourses of informality within the labour regulation literatures and transnational policy regimes of the World Bank and ILO. The key contribution of this chapter is the carefully drawn distinction between the concept of informality and the process of informalisation. It explores how recent international policy discourses convey informalisation, with a particular focus on the role of legal regulation. What emerges is the more sophisticated understanding of informality emanating from the ILO, which recognises the continuum of formality and informality and the presence of informality within formal enterprises, and encompasses informalisation. Yet, she argues, this more robust concept of informalisation is not matched by the Organization's renditions of the function and potential of labour regulation. She concludes that informalisation must be better integrated into the formalisation project, including to improve and sustain job quality in the formal economy, and calls for a new – pre-emptive – labour law aimed at preventing the unravelling of decent jobs.

In chapter four, **Supriya Routh** questions the 'labour rights as human rights' strategy, in particular with regard to its salience to the subjective experience of informal workers: the 'disembodied abstraction' of rights discourse and the rights standard arguably fails to recognise or address the distinct experience of informal workers, given its abstract generalised legal norms and its use of industrial factory-based workers' experiences as the point of reference. Routh adopts an institutional ethnography approach – an epistemology of society and social relations from the perspective of the marginalised people – to facilitate access to knowledge about the embodied/situated experience of informal workers that tends to be invisible within discourses such as that of human rights. In articulating a 'rights plus' approach, Routh thus outlines the possibility of experience-based policy making complementing a human rights strategy.

Pamhidzai H Bamu offers a case study of Zimbabwe to illustrate a broader claim as to the utility and generalisability of the dominant narratives which underpin labour regulation. She provides a sober account of how the model of formal

regulation of formal employment relations developed for the Fordist workplace of the global North is so problematic when transposed to the global South, illustrating how the multiple harms of colonisation find elements of continuity in the post-independence era. Adopting a political economy approach, which also considers Zimbabwe's labour market in historical context, Bamu surveys the conceptual and methodological challenges with framing formality and informality in a context where workers and households straddle both formal and informal sectors, challenges which are also accompanied, in the Zimbabwean context, by difficulties with obtaining accurate statistics and data with which to measure the phenomenon of informal work.

In a chapter which also pays attention to the foundational narratives of labour law whilst focusing on the industrialised world, in particular the UK, **Ruth Dukes'** study of labour market segmentation explores notions of conflicts of interest contained in the characterisation of labour market insiders and outsiders. Dukes adopts a political-economy approach to develop a case study of the agricultural sector in Scotland: in this, she explores the role of the state in configuring precariousness and low-wage labour, and the role of employer interests in such segmentation, focusing on unease about the use of precarious or informal workers as a means to 'discipline' marginally more secure workers.

Lorena Poblete in her chapter reviews, from a socio-historical perspective, the process of formalisation in Argentina – a process which in its more recent incarnation during an era of neoliberal policy making has been underpinned in particular by the perceived affinity between formality and flexibility. Poblete's study shows how labour law mechanisms (such as redefining the scope of employment protection measures) are not the only ways to ensure informal workers are included and protected by the state. Rather, taking as a starting point the prevalence of informality in the economies of Latin America (in particular, the inability of the industrial sector to absorb the growth in the workforce), Poblete traces the policy experiments within Argentina designed to integrate 'non-standard' workers – own-account workers, economic actors in micro-enterprises, unpaid workers and domestic workers – by bringing them into social security coverage by means of changes to the taxation system.

Tonia Novitz, writing on migrant labour in supply chains, captures how the new and growing patterns of temporary, circular and posted labour migration create new categories of informal worker. As Novitz shows, modern production techniques and new forms of service provision, some facilitated by technological innovation, intensify transnational trade and cross-border contracting. However, the decline of migration for permanent settlement and the growth of temporary migration – which includes circular and increasingly also posted migrant work – is at the heart of these informal workers' precariousness and vulnerability: the interaction of supply chains, trade in services and migrant labour illustrates the literal connections between the global North (where corporate entities at the top of the supply chain are predominantly located) and the global South, the usual although not invariable origin of the workers.

The importance of adopting an empirical *and* comparative approach in order to better understand informality, and the relationship between informal work and labour market regulation, is shown in the final two chapters, on 'What is Actually Regulating Work? A Study of Restaurants in Indonesia and Australia' and 'Labour Laws, Informality, and Development: Comparing India and China'.

In their empirical study of the regulation of work arrangements in one economic sector, the restaurant industry, in two locations (Yogyakarta in Indonesia and Melbourne in Australia) **Petra Mahy, Richard Mitchell, John Howe and Maria Azzurra Tranfaglia** illustrate the value of taking a regulatory pluralism approach, recognising that it is *regulation*, not solely labour, which can be formal or informal. Their dual case studies uncover a variety of norms governing the 'regulatory space' of work arrangements – a spectrum from formal regulation to work arrangements regulated almost entirely informally, with 'inter-legality' in the middle – which suggests the need for scholars and policy makers to move away from a fixation with formal labour law and its effectiveness in order to better understand the production of working conditions and to seek 'solutions' for improving worker security and well-being.

This introductory chapter began with the observation that labour law, formality and development are intertwined, and interrogated the assumption that the key to economic development lies in converting the 'informal' into the 'formal'. The book ends with a concluding analysis, by **Simon Deakin, Shelley Marshall and Sanjay Pinto**, which explores further this relationship between law, institutions and development by placing formalisation and informalisation in historical perspective, and also through a careful comparison of China and India. Appreciating the development trajectories of these two countries is essential for an understanding of formality in the development process, in particular in light of the divergence between the Indian and Chinese cases – with the persistence of informality in the former, and the emergence of a state-directed variant of the standard employment relationship in the latter – which Deakin, Marshall and Pinto's empirical study reveals. This concluding chapter also provides us with a guide for further study, especially comparative study, in its appraisal of the evolution of understandings of informality and how to navigate the multiple meanings accorded to the term given the lack of uniformity in definition and in data collection.