

Challenging the Legal Boundaries of Work Regulation

EDITED BY

Judy Fudge, Shae McCrystal and Kamala Sankaran



ONATI INTERNATIONAL SERIES IN LAW AND SOCIETY

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Preface

The chapters in this collection were first presented at a workshop with a group of researchers from across the developed and the developing world held at the International Institute for the Sociology of Law (IISL) in Oñati, Spain on 1–2 July 2010. The collection benefited from the lively and collegial discussion in the quiet and lovely surroundings of the Institute. Adelle Blackett, Beata Nasca, Ashwini Sukthankar and Anne Trebilcock contributed to the book through their participation in the workshop; we hope we have reflected some of their insight and knowledge. We would also like to thank IISL for hosting the workshop and providing financial assistance to enable some of our participants to attend the workshop. At the Institute, Malen Gordo Mendizabal provided seamless and attentive logistics, Cristina Ruiz graciously guided us through the publication process, and Sol Picciotto offered us intellectual support and hospitality. In addition, we are indebted to Gregor Murray and the Inter-University Research Centre on Globalisation and Work (Centre de recherche interuniversitaire sur la mondialisation et le travail—CRIMT) for providing additional financial support to enable developing world scholars to attend the workshop.

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1

Blurring Legal Boundaries: Regulating for Decent Work

JUDY FUDGE*

INTRODUCTION

DECENTRALISED PROCESSES OF production and service provision, which are facilitated by digital technologies and an international trading and financial regime that promotes the free movement of capital, goods and services across national borders, are transforming labour markets and paid work in both developing and developed countries.¹ Policies that emphasise labour market flexibility and deregulation have resulted in deteriorating working conditions and labour standards for a large proportion of the working population.² These changes have led to the informalisation and commercialisation of employment processes by which work arrangements are constructed outside the scope of employment and labour protection. At the same time, a large proportion of the population in developing countries engage in subsistence activities, some of which, such as street vending, are not connected with the formal economy, and others, such as waste picking, are linked to the formal economy through complex networks of intermediaries and firms. Moreover,

* I would like to thank the Social Sciences Research Council of Canada for support for my research. I would like to thank Anne Trebilcock, Shae McCrystal and Kamala Sankaran for very helpful comments on an earlier draft. All errors are my own.

¹ Benería, L and Floro, M, 'Distribution, Gender, and Labor Market Informalization: A Conceptual Framework with a Focus on Homeworkers' in N Kudva and L Benería (eds), *Rethinking Informalization: Poverty, Precarious Jobs and Social Protection* (New York, Cornell University Open Access Repository, 2005) 6, available at: www.wiego.org/publications/Rethinking_Informalization.pdf and Teklè, T (ed), *Labour Law and Worker Protection in Developing Countries* (Oxford, Hart Publishing, 2010). The nomenclature for describing groups of countries in terms of their type and level of economic development is controversial and ideological. In this Chapter, the terms 'developed' and 'developing' countries are used.

² International Labour Organization, *Declaration on Social Justice for a Fair Globalization* (Declaration presented to the International Labour Conference, 97th Session, Geneva, 2008), available at: www.ilocarib.org.int/projects/cariblex/conventions_24.shtml.

many women in both developed and developing countries continue to be paid to perform domestic work in households that are not their own. Some of this work is performed on an informal basis outside the scope of regulation, while in other cases it is officially recognised and regulated.

Globalisation and neo-liberalism are the economic and political forces fuelling the transformation of labour markets.³ However, in order to understand the 'enormous increase in precarious employment and informalised production that has resulted from the implementation of neo-liberal policies', Lourdes Benería has advised that it is necessary to examine the 'changes taking place at the level of the firm'.⁴ Firms have segmented production through outsourcing and subcontracting in order to meet the pressures of global markets. Tzehainesh Teklè links the process of informalisation, which places workers beyond the scope of labour protection, to the 'externalization of either production or labour'.⁵ Common to the wide range of different forms of externalisation, from off-shoring production through labour-only contracting to the use of migrant workers to perform dangerous and dirty jobs in host countries, 'is the transfer of risks and responsibilities that are linked to an employment relationship from the enterprise receiving the product or service to third parties (either enterprises or workers)'.⁶ Productive activities that used to be performed in core firms have been relocated to the periphery of smaller and often geographically distant firms and households. The outsourcing of intra-firm services has also expanded.⁷ These processes are related; as Jane Kelsey has remarked, 'internationally integrated supply chains [have] made the traditional economic and legal distinction between trade in goods or agriculture commodities and services increasingly anachronistic'.⁸

These processes of decentralisation, externalisation, fragmentation, and reconfiguration of production and services have resulted in a great deal of heterogeneity in work arrangements. In highly developed countries, self-employment, for example, ranges from freelance professionals to women who provide childcare in their homes, and to men who drive trucks or operate franchises for a living. Informal work, which proliferates in developing countries, is even more varied, ranging from waste picking to employment

³ Harvey, D, *A Brief History of Neoliberalism* (Oxford, Oxford University Press, 2005); Castells, M, *The Rise of the Network Society. The Information Age: Economy, Society, and Culture*, 2nd edn (Oxford, Blackwell, 2000).

⁴ Benería, L, 'Shifting the Risk: New Employment Patterns, Informalization, and Women's Work' (2001) 15 *International Journal of Politics, Culture and Society* 272, 48.

⁵ Teklè, T, 'Labour Law and Worker Protection in the South: An Evolving Tension Between Models and Reality' in T Teklè (ed), *Labour Law and Worker Protection in Developing Countries* (Oxford, Hart Publishing, 2010) 3, 20.

⁶ *Ibid.*

⁷ Kelsey, J, *Serving Whose Interests: The Political Economy of Trade in Services Agreements* (Abingdon, Routledge-Cavendish, 2008) 7.

⁸ *Ibid* at 7.

in unregistered factories, street vending, and paid domestic work performed in households by migrants. Not only are these work arrangements diverse, they are also fluid, shifting across boundaries such as formal and informal employment and, especially for women, paid and unpaid work.⁹ One common feature that unites these different types of paid work is that they trespass traditional economic and legal boundaries—such as the informal and formal economies, employment and commercial law, the productive and reproductive economy, trade and labour, public and private spaces—that are used to distinguish different economic activities for the purposes of regulation. These forms of work also tend to be associated with poor working conditions and low labour standards.¹⁰

In both the developed and developing world the forms of work and numbers of workers outside the scope of labour law has proliferated, and the resulting ‘crisis’ in labour law has led to calls for its reconsideration or rejuvenation by labour law scholars.¹¹ These proposals range from modernising existing concepts, such as the employment contract, to devising new bases of social entitlement, such as social drawing rights.¹² One important consequence of the crisis of labour law is that the search for normative resources and regulatory tools is no longer confined to the field of employment law. Heed has been taken of Mark Freedland’s warning that the belief that the law regulating employment is ‘an oasis of social justice regulation in a desert of neo-liberal laissez-faire for contracts in general ... overlooks the considerable and fast-developing body of regulation addressing issues of unfairness in the making and performance of contracts in general’.¹³ Greater attention is now placed on exploring a wider range of tools and institutions for regulating work that falls outside the traditional regulatory repertoire of labour law.

The focus of this collection is on paid work that blurs traditional legal boundaries and the challenge this poses to traditional forms of labour regulation. Many of the Chapters concentrate on work arrangements that fall outside the employment relationship and several examine forms of

⁹ Benería and Floro, above n 1, at 6; Carr, M and Chen, MA, *Globalization and the Informal Economy: How Global Trade and Investment Impact on the Working Poor* (Geneva, International Labour Organization, 2002); Carr, M and Chen, MA, ‘Globalization, Social Exclusion and Gender’ (2004) 143 *International Labour Review* 129.

¹⁰ International Labour Organization, above n 2.

¹¹ Teklè, above n 5, at 3.

¹² See Davidov, G and Langille, B (eds), *Boundaries and Frontiers of Labour Law* (Oxford, Hart Publishing, 2006); Supiot, A, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford, Oxford University Press, 2001); Vosko, L, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford, Oxford University Press, 2010); Davidov, G, and Langille, B (eds), *The Idea of Labour Law* (Oxford, Oxford University Press, 2011).

¹³ Freedland, M, ‘From the Contract of Employment to the Personal Work Nexus’ (2006) 35 *Industrial Law Journal* 1, 24.

regulation that do not fit within the classification of labour law. Some of the Chapters look at the regulation of work arrangements in developing countries, and this focus provides a useful counterpoint to labour law's traditional preoccupation with models of employment that are embedded in the political economy of the developed world.¹⁴ The collection has been designed to decentre traditional legal categories and norms of employment by examining forms of work that deviate from these categories and norms. Moreover, the emphasis on the heterogeneity of work arrangements is perfectly compatible with an attention to a hierarchy of work arrangements ranked in terms of the security of the work and the adequacy of the income generated.¹⁵ In developing this hierarchy, it is important to be attentive to how the social location of the worker—gender, family status, migration status, race and ethnicity, and age, for example—is linked to different forms of work and the working conditions and employment security of the worker.¹⁶ It is also important to recognise that neither the hierarchy of work arrangements or social locations are stable. The goal of the collection is to explore the capacity of different legal approaches and techniques to protect the dignity of these workers, promote their self-determination, and protect them against social risks.

Before looking at the specific examples of paid work and regulatory techniques that are presented in the following Chapters, it is necessary to provide the broader context and interlocking themes that connect the different case studies. The terminology used to describe the changes in the contemporary world of work differ from country to country. The goal in this introduction is not to stipulate nomenclature, but, rather, to identify broader processes that tend to shift work outside the scope of labour protection. The next section is devoted to explaining how the process of 'informalisation' helps to understand the changes that are occurring to work arrangements. It begins by discussing informal work in developing and developed countries, and traces the changes in the meaning of 'informal' as it pertains to economic activities since the early 1970s when the term 'informal sector' was coined. Adopting an approach that encompasses subsistence work in the developing world and the process of informalisation that is changing work around the globe, this section identifies a hierarchy of work arrangements and links this hierarchy with the social location of the workers who perform the work. Informalisation is linked with commercialisation, which is discussed

¹⁴ Teklè, above n 1 and Blackett, A 'Labor Law and Development: Perspectives on Labor Regulation in Africa and the African Diaspora' (2011) 32 *Comparative Labor Law & Policy Journal* 303 are very important recent contributions that revise the dominant narrative of labour law by turning to the global south.

¹⁵ Carr and Chen, *Globalization and the Informal Economy*, above n 9; Carr and Chen, 'Globalization, Social Exclusion and Gender', above n 9.

¹⁶ Lamphere, L, Zavella, P and Gonzales, F, *Sunbelt Working Mothers: Reconciling Family and Factory* (Ithaca, Cornell University Press, 1993).

in the following section. Commercialisation is a multidimensional process that is transforming labour markets at the local, national, and global levels. It refers to the contraction of the standard employment relationship,¹⁷ the disintegration of vertically integrated firms, and the shift in the legal framework for regulating international services. Commercialisation has also affected the provision of care, which increasingly involves paid work performed in the household or other institutional settings. The examination of paid care work in the fourth section is critical because it blurs boundaries between productive and reproductive activities, and the spheres of the market and the family. Moreover, paid care work demonstrates the significance of the institutions in which the work is embedded for the effectiveness of labour regulation. These themes are then drawn together in the fifth section of this Chapter, which considers how the blurring of the boundaries between employee and independent contractor, between formal and informal employment, between productive and reproductive work creates problems for defining and achieving the goals of labour law. If protection is the justification for employment law, there is a range of work relationships in which the individuals may be in as much need of protection as employees.¹⁸ If the goal of labour law is to secure workers' rights and dignity, the traditional boundaries continue to create arbitrary distinctions. The section ends by touching upon the capacity of the International Labour Organization's (ILO) Decent Work Agenda to provide labour and social protection to all workers regardless of their employment status. The concluding section briefly describes the following Chapters in this collection, and links them to the key themes discussed in this introductory Chapter.

INFORMALISATION

Over the past 40 years, the prediction that the informal sector, which was characterised as a residual sector in developing countries, would be absorbed into the formal, or modern capitalist, economy as economies modernised, was proven to be incorrect. In fact, the informal sector has expanded in developing and developed countries, and with it low-skilled, poorly paid, intermittent and insecure employment.¹⁹ Changes in the economy, the types

¹⁷ I am using the term 'standard employment relationship' to refer to the regulatory norm. See Tham, J-C 'Towards an Understanding of Standard Employment Relationships under Australian Labour Law' (2007) 20 *Australian Journal of Labour Law* 123; Vosko, above n 12.

¹⁸ Hyde, A, 'What is 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).

¹⁹ Benería, above n 4; Sankaran, K 'The ILO, Women and Work: Evolving Labor Standards to Advance Women's Status in the Informal Economy' (2002) 3 *The Georgetown Journal of Gender and the Law* 851, 854.

of activities measured, the nature of statistics collected, and different foci of study have led to a proliferation of different conceptions of informality.²⁰

During the 1950s and 1960s it was assumed that poor traditional economies could be transformed into dynamic modern economies and that, in the process, the traditional sector comprising petty traders, small producers, and a range of casual jobs would be absorbed into the formal, or modern capitalist, economy. However, by the mid-1960s, concerns about widespread unemployment led the ILO to send a series of large, multi-disciplinary missions to several developing countries.²¹ Significantly, the mission to Kenya reported in 1972 that the traditional sector had expanded to include profitable and efficient enterprises as well as marginal activities. Relying on a study of economic activities in urban Ghana by the British economist Keith Hart, in 1972 the ILO used the term 'informal sector' to describe the activities of the working poor who were working very hard but who were not recognised, recorded, protected, or regulated by the public authorities.²² Hart's emphasis 'on the productivity and growth potential of informal economic activities in developing economies' prompted a debate about economic development and the role of the informal sector, and led to a range of approaches to examining the informal sector.²³

Instead of focusing on the dichotomy between the informal and formal sectors, in the 1980s Alejandro Portes and his colleagues conceptualised the relationship as a process of informalisation, which they understood as a specific feature of global capitalism.²⁴ Thus, they expanded research on informal economic activities to include changes that were occurring in advanced capitalist economies, where production was reorganised into small-scale, decentralised, and more flexible economic units. The significance of this approach, according to Elizabeth Hill, is that 'the social processes that underlie the development of the informal economy are highlighted and significant emphasis is put on the relationship between social processes and the wider context of economic change in the world economy'.²⁵

²⁰ Trebilcock, A, 'Using Development Approaches to Address the Challenges of the Informal Economy for Labour Law,' in G Davidov and B Langille (eds), *Boundaries and Frontiers of Labour Law* (Oxford, Hart Publishing, 2006) 64, 64–6.

²¹ International Labour Organization, *Women and Men in the Informal Economy: A Statistical Picture* (Geneva, International Labour Office, 2002).

²² International Labour Organization, *Employment, Incomes and Equality: A Strategy for Increasing Productive Employment in Kenya* (Geneva, International Labour Office, 1972).

²³ For a succinct account of this debate see Hill, E, *Worker Identity, Agency and Economic Development: Women's Empowerment in the Indian Informal Economy* (London, Routledge, 2010) 12.

²⁴ *Ibid* at 20.

²⁵ Hill, above n 23, at 20 citing A Portes, M Castells and LA Benton (eds), *The Informal Economy: Studies in Advanced and Less Developed Countries* (Baltimore, John Hopkins University Press, 1989).

Castells and Portes described the informal economy not as 'an individual condition but a process of income-generation characterized by one central feature: *it is unregulated by the institutions of society, in a legal and social environment in which similar activities are regulated*'.²⁶ They emphasised the links between informal and formal economic activities, and their focus was on changes in production and the ways in which firms pursue flexible forms of labour, such as casual labour, contract labour, outsourcing, home working, and other forms of subcontracting that offer the prospect of minimising fixed non-wage costs. The link between informalisation and labour market flexibility was taken up by Guy Standing, who argued that there has been an 'informalisation' of employment in developed countries, such that 'a growing proportion of jobs possess what may be called informal characteristics, i.e. without regular wages, benefits, employment protection, and so on'.²⁷

As the Chapter by Kamala Sankaran in this collection demonstrates, this process of informalisation is also occurring in developing countries such as India.²⁸ Alongside this shift from regulated to precarious employment, developing countries have continued to experience the growth of subsistent activities generated by the inability of their economies to absorb the unemployed and underemployed.²⁹ These activities constitute the more traditional urban informal activities in developing countries, as typified by the street vendors and waste pickers in many urban centres. Some of these informal workers, such as the waste pickers described by Poornima Chikarmane and Lakshmi Narayanan in their Chapter,³⁰ are connected to the formal economy; however, others are not.

Focusing on informalisation recognises the tremendous heterogeneity of informal activities and gets beyond the informal/formal divide. Far from being the low-productivity, 'backward' sector described in the early literature, the informal economy has proved to be dynamic and a source of growth in many areas and sectors, even if representing extreme forms of precariousness in others.³¹ The blurred boundary between formal and

²⁶ Castells, M and Portes, A, 'The World Underneath: The Origins, Dynamics, and Effects of the Informal Economy' in A Portes, M Castells and LA Benton (eds), *The Informal Economy: Studies in Advanced and Less Developed Countries* (Baltimore, John Hopkins University Press, 1989) 12 (emphasis in original).

²⁷ Standing, G, 'Global Feminisation Through Flexible Labor: A Theme Revisited' (1999) 27 *World Development* 583, 585.

²⁸ Sankaran, K, 'Flexibility and Informalisation of Employment Relationships' in this collection.

²⁹ Benería and Floro, above n 1. See also Tsikata, D 'Toward a Decent Work Regime for Informal Employment in Ghana: Some Preliminary Considerations' (2011) 32 *Comparative Labor Law & Policy Journal* 311.

³⁰ Chikarmane, P and Narayanan, L, 'Transform or Perish: Changing Conceptions of Work in Recycling' in this collection.

³¹ Guha-Khasnobis, B, Kanbur, R and Ostrom, E (eds), *Linking the Formal and Informal Economy Concepts and Policies* (New York, Oxford University Press, 2006).

informal economic activities has led to the recognition of a continuum of informal economic activities.

In June 2002, the International Labour Conference adopted a resolution containing Conclusions concerning Decent Work and the Informal Economy that focuses on activities that are 'appropriate for regulation or protection under labour or commercial law'.³² This approach recognises a continuum of production and employment relations and stresses the linkages between formal and informal activities. However, it also excludes activities that are treated as criminal, as well as the reproductive or care economy that consists of unpaid domestic work and care activities.³³ Criminalised sex work would, for example, fall outside even the ILO's expanded definition of work. In its report, *Decent Work and the Informal Economy*, the ILO identified the following broad range of informal workers:

[O]wn-account workers in survival-type activities, such as street vendors, shoeshiners, garbage collectors and scrap- and rag-pickers; paid domestic workers employed by households; homeworkers and workers in sweat-shops who are 'disguised wage workers' in production chains; and the self-employed in micro-enterprises operating on their own or with contributing family workers or sometimes apprentices/employees.³⁴

Despite their heterogeneity, these different groups of workers 'share one important characteristic: *they are not recognised or protected under the legal and regulatory frameworks. This is not, however, the only defining feature of informality. Informal workers and entrepreneurs are characterised by a high degree of vulnerability*'.³⁵ Not only are these workers outside the scope of labour law, and thus deprived of legal and social protection and legal enforcement regimes, 'they are rarely able to organise for effective representation and have little or no voice to make their work recognised and protected'.³⁶

However, the informal nature of these activities does not mean that the workers lack agency. Chikarmane and Narayanan's discussion of waste pickers in Pune demonstrates that informal workers are able to establish a collective occupational identity as workers, and that if they do they will express demands for social protection and formal recognition of their work.³⁷ Their Chapter also demonstrates that simply because work is informal does not entail 'that there are no rules or norms regulating the activities

³² International Labour Conference, 90th Session, *Decent Work and the Informal Economy: Report VI* (Geneva, International Labour Office, 2002) 4.

³³ *Ibid* at 31 for a copy of the Guidelines concerning a statistical definition of informal employment, endorsed by the Seventeenth International Conference of Labour Statisticians (November–December 2003).

³⁴ *Ibid* at 2.

³⁵ *Ibid* (emphasis in original).

³⁶ *Ibid* at 3.

³⁷ Chikarmane and Narayanan, above n 30.

of workers or enterprises'.³⁸ These workers have their own group rules, arrangements, institutions, and structures. The key question is what 'these informal rules or norms are based on and whether or how they observe the fundamental rights of workers'.³⁹

Marilyn Carr and Martha Chen have developed a hierarchy of employment statuses in the informal economy.⁴⁰ At the top of the pyramid they locate employers in unregulated or unregistered business, followed by own-account self-employed, wage workers, casual day labourers who are placed above domestic workers, and contract workers (workers who are provided to producers through a third party) who are situated at the bottom of the hierarchy. While they acknowledge that the exact shape of the pyramid of employment statuses is temporally and geographically specific, this hierarchy also tends to map onto vulnerabilities to exploitation that results from a worker's social location. Social location refers to the way in which regional and local political economy interact with social relations of subordination that are linked to workers' attributes, such as sex, ethnicity, caste, race, immigration status, linguistic group, and skill and ability levels.⁴¹ For example, rural workers who migrate to urban areas are overrepresented amongst own-account workers such as street vendors.⁴² Women, who are often either intra- or inter-national migrants, predominate within domestic work, and they are often drawn from groups that are subordinated on the basis of race, ethnicity, caste, or language.⁴³ Social location combines with work arrangements to increase a worker's vulnerability to exploitation within informal employment.

It is important, however, not to reify the distinction between formal and informal employment. As employment relations are individualised with the contracting scope of unionisation and collective representation, employees who are entitled to legal protection may not, in fact, be able to access employment-related rights. Research by Anna Pollert and Andy Charlwood indicates that many employees who fit within the paradigmatic standard employment relationship are unable to avail themselves of

³⁸ International Labour Office, above n 22, at 3.

³⁹ *Ibid.*

⁴⁰ Carr and Chen, *Globalization and the Informal Economy*, above n 9; Carr and Chen, 'Globalization, Social Exclusion and Gender', above n 9.

⁴¹ Lamphere, Zavella and Gonzales, above n 16.

⁴² Sankaran, K, Sinha, S and Madhav, R, *WIEGO Law Pilot Project on the Informal Economy: Street Vendors in India* (undated), available at: http://previous.wiego.org/informal_economy_law/india/content/sv_background_note.pdf.

⁴³ Razavi, S, *The Political and Social Economy of Care in a Development Context: Conceptual Issues, Research Questions and Policy Options* (Gender and Development Programme Paper No 3, United Nations Research Institute for Social Development, Geneva, June 2007).