# *New frontiers for Labour Law: Collective Bargaining for Workers in Global Supply Chains and Informal Self-Employed Workers*

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[VBRMAR002]

SUBMITTED TO THE UNIVERSITY OF CAPE TOWN

In fulfilment of the requirements for the degree of Doctor of Laws

Faculty of Law

UNIVERSITY OF CAPE TOWN

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Date of submission: [February 2024]

Word count: [64 362]

## Declaration

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2. Von Broembsen, Marlese. 'Collective Bargaining for Self-Employed Street Vendors?' (2022) 2 *Global Labor Rights Reporter* 36.

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**Acknowledgments**

For the last eight years, I have worked with organisations of homeworkers across the world whose members produce goods for global supply chains. I have worked with the Clean Clothes Campaign and the Asia Floor Wage Alliance; participating in the global struggle for corporations from the global North to take responsibility for the working conditions of the workers from the global South who produce their goods. My organisation has also supported organisations of street vendors, who struggle to engage local governments to enter into collective negotiations in relation to accessing public space to trade. These organisations have opened my eyes to the limitations, and the potential, of labour law. A desire to challenge labour law to "see" workers from the global South has inspired this thesis.

My thanks to my supervisors, Prof. Rochelle le Roux and Dr Shane Godfrey, for our robust debates, and for all their support, wisdom and encouragement.

Special thanks to my husband, Deon de Klerk, for his unfailing support (over many years and in many forms) without which this thesis would not have been possible. I am also grateful to my daughter, Ami Louise de Klerk, for her support and understanding during the finishing stages, which coincided with her summer holidays. My son, Kyle David de Klerk was overseas, but I appreciate his supportive interest and our shared commitment to reducing inequalities in the world. A special thanks to both my parents for their moral support at a very crucial time and to my Dad, Varick von Broembsen, for his practical help right near the end.

## ABSTRACT

Since the 1990s, labour law scholarship has been shaped by, and has responded to, what has been called the 'existential crisis' of labour law. Scholars have questioned labour law's 'constituting narrative' as 'the law of collective relations' and the relevance to most of the workforce of its two core institutions — the contract of employment and collective bargaining. Focusing on two categories of worker in the global South — garment workers in global supply chains and street vendors — the thesis explores the shifts required of the institution of collective bargaining to realise collective bargaining rights for these workers. These sectors constitute a significant percentage of the workforce in developing countries and challenge the discipline of labour law, which is shaped by the political economy and the labour-market structure of the global North. Through case studies, and against a political-economy background that reflects a global South perspective, the thesis discusses transnational supply-chain bargaining for garment workers, and collective bargaining between street vendors and the local governments that control vendors' workplace (public space). The thesis argues that the theory of labour law as 'personal work relations' can incorporate informal self-employed workers into its scope despite the absence of a contractual relationship with the entity that controls their workplace. Realising street vendors' rights to collective bargaining as subjects of labour law (rather than of other law) matters for vendors, but also for labour law. Garment workers in global supply chains challenge the institution of collective bargaining in various ways. 'Lead' firms (in the global North) structure the terms and conditions for workers (in the global South). In order to achieve positive distributive consequences for garment workers, collective agreements must regulate relations across the (transnational) supply chain, rather than only the employment relationship; but in the absence of a contractual nexus, it is difficult to bring lead firms to the bargaining table. By challenging labour law scholars to take seriously the theoretical implications of incorporating such categories of (global South) worker, the thesis contributes to re-asserting labour law as 'the law of collective relations'.

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## Abbreviations and Acronyms

| | |
|---|---|
| ACT | Action, Collaboration, Transformation (a partnership between IndustriALL and the ILO) |
| AFL-CIO | American Federation of Labor and Congress of Industrial Organizations |
| AFWA | Asia Floor Wage Alliance |
| ATC | Agreement on Textiles and Clothing (World Trade Organization) |
| BGMEA | Bangladesh Garment Manufacturers and Exporters Association |
| BKMEA | Bangladesh Knitwear Manufacturers and Exporters Association |
| CCC | Clean Clothes Campaign |
| CCMA | Commission for Conciliation, Mediation and Arbitration |
| CEACR | Committee of Experts on the Application of Conventions and Recommendations |
| CEO | chief executive officer |
| Covid-19 | coronavirus disease |
| DNA | deoxyribonucleic acid; the makeup of something |
| ETI | Ethical Trading Initiative |
| EU | European Union |
| EVA | Economic Value Added |
| FEPTIWUL | Federation of Petty Traders and Informal Workers Union of Liberia |
| G7 | Group of seven major industrial countries, an informal forum of heads of state/government |
| GARCC | Greater Accra Regional Coordinating Council |
| GBV | gender-based violence |
| GFA | global framework agreement |
| GLJ-ILRF | Global Labor Justice-International Labor Rights Forum |
| GMB | GMB Union (formerly General, Municipal and Boilermakers and Allied Trade Union (GMBATU)) |

| | |
|---|---|
| GSI | global standard institution |
| GUF | global union federation |
| H&M | Hennes & Mauritz AB, a multinational clothing company based in Sweden |
| IDSN | International Dalit Solidarity Network |
| ILAW | International Lawyers Assisting Workers |
| ILC | International Labour Conference |
| ILGWU | International Ladies Garment Workers Union |
| ILO | International Labour Organization |
| IMF | International Monetary Fund |
| IC | Implementation Committee |
| IndustriALL | IndustriALL Global Union |
| ICT | information and communication technology |
| INTELL | International Network on Transformative Employment and Labour Law |
| ITGLWF | International Textile, Garment and Leather Workers' Federation |
| ITUC | International Trade Union Confederation |
| MCC | Monrovia City Corporation |
| MNE | multinational enterprise |
| MFA | Multi-Fibre Agreement |
| MOU | Memorandum of Understanding |
| MSI | multi-stakeholder initiative |
| NASVI | National Association of Street Vendors of India |
| NEDLAC | National Economic Development and Labour Council |
| NDMC | New Delhi Municipal Corporation |
| NGO | non-governmental organisation |
| NIE | new institutional economics |
| NTUI | New Trade Union Initiative |

| | |
|---|---|
| OC | Oversight Committee (OC) |
| OECD | Organization for Economic Cooperation and Development) |
| PALU | Pan African Lawyers Association |
| PVH | PVH Corp, formerly known as Phillips-Van Heusen Corporation, an American clothing company |
| PWR | personal work relations |
| POSH | Prevention of Sexual Harassment Act (India) |
| SME | small or medium enterprise |
| SAI | Social Accountability International |
| SOMO | a digital marketing agency |
| SUAS | Students United Against Sweatshops |
| TTCU | Tamil Nadu Textile and Common Labour Union |
| TVC | town vending committee |
| UK | United Kingdom |
| UN | United Nations |
| UNI | UNI Global Union |
| UNITE | Unite the Union, a British and Irish trade union |
| USA | United States of America |
| USD | US dollar/s |
| USDAW | Union of Shop, Distributive and Allied Workers (UK) |
| WIEGO | Women in Informal Employment: Globalizing and Organizing |
| WRC | Workers' Rights Consortium |
| WST | world systems theory |
| WTO | World Trade Organization |
| ZCIEA | Zimbabwean Chamber of Informal Economy Association |
| ZCTU | Zimbabwe Congress of Trade Unions |

# Chapter 1

## Introduction

Since the 1990s, labour law scholarship has largely been shaped by, and has responded to, what has frequently been called the crisis of labour law. In sum, this crisis is attributed to globalisation and a mobile, transnational capital that has exited the national social contract; neoliberalism and the flexible-labour doctrine; decreasing trade union membership; and the disappearance of labour as a political class.[1]

Much of the early scholarship sought to answer hard questions: whether labour law was still relevant; whether labour law could be reinvented to deliver on its normative commitments in this new global order; whether its institutions — collective bargaining and the employment relationship — should be reformed or jettisoned; and whether solidarity among workers continued to be the best form of countervailing force against capital? There was a broad consensus that Kahn-Freund's rationale that

> the main object of labour law has been and … will always be to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship[2]

no longer held. To borrow from Brian Langille, the 'constituting narrative' of labour law as the law of collective relations has needed to be revisited.[3] For many scholars, the normative question was, and still is, what should and could replace this

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[1] Harry W Arthurs 'Labour law after labour' (2011) *Comparative Research in Law & Political Economy, Research Paper No 15/2011* at 18, available at *http://digitalcommons.osgoode.yorku.ca/clpe/53*, accessed on 20 October 2020.
[2] Paul Davies & Mark Freedland *Kahn-Freund's Labour and the Law* 3ed (1983) at 18.
[3] Brian Langille 'Labour law's theory of justice' in Guy Davidov & Brian Langille (eds) *The Idea of Labour Law* (2011) at 101.

narrative? Could labour law be re-constituted as human rights, constitutionalism[4] or development?[5]

The debates, even for labour law scholars from the global South, continue to be shaped by the political economy and the labour markets of the global North; yet, most of the world's workforce lives in in the global South, with a different political economy and labour-market structure to the global North.[6] In the global North, 90 per cent of the workforce is in waged employment (including non-standard employment) — that is to say that the vast majority has a contractual relationship with an entity that controls the terms and conditions of their work. Ten per cent is genuinely self-employed.[7] In contrast, in much of the global South, the structure of the labour force is the reverse. The majority is self-employed without a contractual relationship with the entity that controls their work.

The numbers matter for labour law. The International Labour Organization (ILO)'s seminal *Women and Men in the Informal Economy: A Statistical Picture*,[8] shows that 61 per cent of the global workforce — two billion people — is informally

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[4] See Ruth Dukes 'A global labour constitution?' (2014) 65(3) *Northern Ireland Legal Quarterly* 283–301; and, for a critique, see Harry Arthurs 'The constitutionalization of employment relations: Multiple models, pernicious problems' (2010) 19(4) *Social & Legal Studies* 403 at 408. Also see Ruth Dukes *The Labour Constitution:The Enduring Idea of Labour Law* (2014). Dukes shifts from constitutionalism in the nation state to a global labour constitutionalism, which she ultimately rejects as utopian.

[5] On development and labour law addressing market failures, see Simon Deakin 'The contribution of labour law to economic and human development' in Guy Davidov & Brian Langille (eds) *The Idea of Labour Law* (2011). For a critique, in the same volume, see Judy Fudge 'Labour as a "fictive commodity": Radically reconceptualising labour law' at 128–9. Also on development, and applying Amartya Sen's capability approach, see Kevin Kolben 'Labour regulation, human capacities and industrial citizenship' in Shelley Marshall (ed) *Promoting Decent Work: The Role of Labour Law* (2010); and Brian Langille 'Labour law's theory of justice' in Guy Davidov & Brian Langille (eds) *The Idea of Labour Law* (2011). For critiques of this approach, see Guy Davidov 'Notes, debates and communications: The (changing?) idea of labour law' (2007) 146(3–4) *International Labour Review* 311–320.

[6] Every year, the World Bank categorises 217 countries into low, lower-middle, upper-middle, and high-income economies, based on gross national income. Similarly, the International Monetary Fund (IMF)'s World Economic Outlook classifies 37 OECD (Organisation for Economic Co-operation and Development) countries as 'advanced economies' and all other countries as 'emerging' and 'developing'. The term 'developing world' refers to all countries that are not in the high income/advanced economy categories. It refers, therefore, to most of the world's countries and workers.

[7] Florence Bonnet, Joann Vanek & Martha Chen *Women and Men in the Informal Economy: A Statistical Brief* (2019) at 4.

[8] International Labour Organization *Women and Men in the Informal Economy: A Statistical Picture* 3ed (2018).

employed;[9] and, the majority, 64 per cent, is genuinely self-employed. In low-income countries, 72 per cent of the total workforce is informal and self-employed.[10] In middle-income countries, almost half (49 per cent) of the workforce is self-employed.

The global South is reliant on foreign investment for economic development. These foreign firms are concentrated in the global North. They invest in developing countries by procuring goods and services as part of their supply chains, and through development initiatives in select cities. The World Bank, the International Monetary Fund (IMF), and governments of developing countries regard these 'investments' by global capital as necessary to economic development. Since they are in competition with other developing countries for these investments, governments in developing countries make tax, urban planning, and other concessions to attract and keep global capital in their country. Most importantly, from a labour law perspective, competition among countries for investment incentivises governments to keep wages low and to suppress trade union activity. Therefore, for many countries in the global South, there is a seeming trade-off between economic development and labour rights that increase the cost of labour.[11]

This thesis engages with debates in labour law from the perspective of workers in the global South. Through a focus on two occupational groups typical of countries of the global South — street vendors (who are informal self-employed workers), and garment workers in global supply chains — the thesis reasserts the relevance, and legitimacy, of labour law as 'the law of collective relations' and it contributes to the evolution of the institution of collective bargaining. The research questions that inform the thesis are the following:

1. What are the *conceptual* bases for a transnational labour law, and for including informal self-employed workers within the ambit of labour

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[9] The report includes data from the labour force surveys of over 100 countries, which represents 90 per cent of the global population, excluding China.
[10] Bonnet et al op cit note 7 at 4.
[11] See Marlese von Broembsen & Shane Godfrey 'Labour law and development viewed from below: What do case studies of the clothing sectors in South Africa and Lesotho tell us?' in Shelley Marshall & Colin Fenwick (eds) *Labour Regulation and Development: Socio-Legal Perspectives* (2016) at 127–161.

law, that will most likely realise rights to collective bargaining for these two groups of workers?

2. What are the *normative* and *practical* ways in which the institution of collective bargaining must evolve to realise *de facto* rights to collective bargaining for garment workers in global supply chains, and *de jure* rights to collective bargaining for street vendors?
3. How might transnational supply-chain bargaining for garment workers and collective bargaining for street vendors be institutionalised?

The thesis explores these questions with a mix of theoretical and empirical research methods. Chapters two and three draw on institutionalism and systems theory for purposes of establishing a political economy context for the chapters that follow. Chapter four reviews labour law literature and chapters five and six discuss and analyse case studies to build theory.

This introductory chapter proceeds as follows. Parts 1.1 and 1.2 discuss garment workers in global supply chains and street vendors respectively. Each section describes the sector and the challenges it poses to labour law's institution of collective bargaining and summarises the key arguments of the thesis. Part 1.3 briefly discusses the framework that will be used to explore how these groups might institutionalise collective bargaining. The chapter concludes with the challenges that the two groups of workers pose to labour law.

## 1.1 Garment workers in global supply chains

The garment sector has been critical for industrialisation (in many countries of the global North) and many developing countries presume this still to be so.[12] Florence Palpacuer and her co-authors explain why the garment sector has been so important. First, making clothes is labour-intensive and creates many jobs. Second, garment production creates and satisfies domestic demand for clothing. Third, it acts as a springboard for other sectors through backward linkages and by generating hard currency that can finance more capital-intensive industries. Consequently, '[m]any

[12] Florence Palpacuer, Peter Gibbon & Lotte Thomsen (2005) 33 (3) 'New challenges for developing country suppliers in global clothing chains: A comparative European perspective' (2005) 33(3) *World Development* 409 at 409.

developing countries, especially low-income ones, believe that the industry can play a similar ‘‘bootstrapping’’ role for them today, and on this basis, they promote its development and its links to the global market’.[13] Chapter two discusses why European, North American and East Asian brands and retailers outsource the production of their garments to factories in developing countries and why the argument that the garment sector is still a path to industrialisation is flawed. This section focuses on the structure of production and its implications for labour law.

The literature describes the way production is organised as ‘global production networks’ or ‘global value chains.’ The ILO uses the term ‘global supply chains’. This thesis uses the terms interchangeably.[14]

At any one time, brands and retailers in the garment sector conclude agreements with suppliers in more than 40 countries.[15] These suppliers (known in the industry as tier-one suppliers) subcontract aspects of production to tier-two factories, which in turn subcontract to workshops and to homeworkers who work from their homes. The metaphor of a chain conveys the structure of production: many different entities are linked to each other through contracts.[16] Each entity contracts with the entities below it, which in turn contract with the entities below them — all the way down to homeworkers, who may be contracted by a tier-two factory, a workshop, or an intermediary. ‘Lead’ firms (which in garment supply chains are brands and/or retailers) are at the apex. The contract between the lead firm and the tier-one factory sets out what is to be produced, by when, and for how much. In an industry where

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[13] Ibid.

[14] Different terms are used by different literatures to describe what the International Labour Organization (ILO) refers to as global supply chains; these include global commodity chains, global production networks, and global production networks. The global commodity chain literature is based on Emmanuel Wallerstein’s world systems theory; the global value chain (GVC) literature draws on diverse traditions, including world systems theory (originally) and Michael Porter’s business literature. This thesis uses the ILO’s term ‘global supply chains’, except for when it refers to the literature on supply chains, in which case it uses the generic term, global value chains.

[15] Brands that have agreed to the Transparency Pledge disclose their first-tier (and sometimes second-tier) suppliers. In 2019, Marks & Spencer had suppliers in 29 countries, and H&M procured from 41 countries. The platform is now called the Open Supply Hub and is available at *https://opensupplyhub.org/*, accessed on 23 August 2023.

[16] See Jeffrey Henderson, Peter Dicken, Martin Hess, Neil Coe & Henry Wai-Chung Yeung (‘Global production networks and the analysis of economic development’ (2002) 18(4) *Review of International Political Economy* 436-464); and Neil M Coe, Peter Dicken & Martin Hess (‘Global production networks: Realizing the potential’ (2008) 8(3) *Journal of Economic Geography* 271–295), who critique the notion of chain as too linear and unrepresentative of real-life economic activity. These authors are part of the Global Network Production framework.

the barriers to entry are low (because the start-up costs are relatively low and the manufacturing specifications are relatively simple) and lead firms can easily change suppliers (since the transaction costs to switch suppliers are low), the competition between factories and countries to secure orders is intense. A study undertaken by the ILO in 2017[17] showed that 50 per cent of the suppliers interviewed (from several countries) had agreed to prices below cost in the hope that it would lead to their securing future orders. The implications for the distribution of bargaining power between the lead firm and the tier-one factory is obvious. The lead firm can dictate the terms of the contract, especially the price. Chapter two will show that the terms of the principal contract indirectly determine the structure of the chain, as well as the working terms and conditions for workers in all tiers of the chain.

In many garment-production countries, only some garment-factory workers are full-time, permanent employees.[18] Most factory workers are fixed-term contract workers, weekly workers paid by the piece, or workers contracted through an intermediary. Labour laws in garment-producing countries have been amended to respond to these realities. For example, India's Contract Labour (Regulation and Abolition) Act stipulates that labour laws apply to employees of informal, unregistered workshops that employ 20 or more people. However, small workshops that employ fewer than 10 workers — and are totally unregulated — employ almost double the number of workers that factories employ.[19] As elsewhere in the world, Indian employers restructure their relations to avoid statutory obligations to their workforce. Laws, including minimum wages, are generally not enforced in the main garment-production countries.[20]

The relations between trade unions, non-democratic governments, employer associations (who wield significant power because they create employment and are a

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[17] International Labour Organization 'Purchasing practices and working conditions in global supply chains: Global survey results' *INWORK Issue Brief No 10* (2017) at 8, available at *https://www.ilo.org/wcmsp5/groups /public/---ed_protect/---protrav/---travail/documents/publication/wcms_556336.pdf*, accessed on 12 August 2021.
[18] See e.g., Fair Wear Foundation *India: Country Study* (2019) at pages 17; 20; 24-25, 26.
[19] Jayan Jose Thomas & Chinju Johny 'Labour absorption in Indian manufacturing: The case of the garment industry' *Centre for Sustainable Employment Working Paper #15* (2018) at 5.
[20] See Matt Cowgill & Phu Huynh 'Weak minimum wage compliance in Asia's garment industry' *Asia-Pacific Garment and Footwear Sector Research Note: Issue 5* (August 2016) 1–8.

significant source of foreign exchange) and global firms are complex. Drawing on Wright's typology of trade union power, chapter two shows that traditional collective bargaining structures and sources of countervailing power are woefully inadequate to challenge the complex, multi-party constellations of power in these global supply chains. Workers' *associational power* is derived from forming worker organisations and acting as a collective. Workers' *structural power* is derived from their structural position as 'a factor of production' (as economists would say). That is to say that their labour power is essential for production, and their countervailing power lies in the threat of collectively withholding their labour power.[21] Garment workers have no structural power in relation to lead firms, for whom the transaction costs to switch suppliers (and indeed to source from a different country) are low. In the garment sector, workers' associational power is weak because states in garment-production countries are hostile to trade unions — for reasons explored in chapter two. Also, the workforce is young (in many countries workers are 18–25 years old), female, migrant, and first-time labour-market entrants.[22] Their work arrangement is often precarious, and they are new to organising.

Attempts at regulating global supply chains can be grouped into three approaches: private governance through labour codes; human rights due diligence; and supply-chain agreements.

### *1.1.1 Private governance: regulating supply chains through labour codes*

In the 1990s, labour-rights activists from North America and Europe targeted the biggest athletic clothing brands and exposed the sweat-shop conditions in which clothing for the American and European market were produced. Fearing reputational harm to their brands and consumer boycotts of brands associated with poor labour conditions, these brands developed codes of labour conduct to regulate the working conditions in the factories of their first-tier suppliers. Over time, many clothing brands and retailers joined multi-stakeholder initiatives (MSIs), pledging allegiance

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[21] Erik Olin Wright 'Working-class power, capitalist-class interests, and class compromise' (2000) 105(4) *American Journal of Sociology* 957 at 962.
[22] See, e.g., AKE Haque & Estiaque Bari *A Survey Report on the Garment Workers of Bangladesh 2020* (2021).

to the MSI's code of labour practice to safeguard their reputations.[23] Some of the MSI codes incorporate core ILO conventions and require suppliers to comply with national labour legislation.[24]

Much has been written about the failure of these 'private governance' initiatives to improve the working conditions of workers.[25] Notably, these codes of conduct leave the coercive terms of the primary contract, and the bargaining power of the brands and retailers, untouched.

### *1.1.2 Human rights due diligence*

In 2011, after a two-year global consultation process, the UN Council published the UN Guiding Principles on Business and Human Rights,[26] which states that businesses have a responsibility to address the violation of labour, human and environmental rights attributable to their business practices, and that occur in their supply chains. According to the Guiding Principles, businesses must publish a human rights policy; identify actual or potential labour, human and environmental rights violations in their supply chains; take steps to prevent future violations (including establishing complaints-and-grievance mechanisms); mitigate the effects where violations have occurred; provide a remedy; and account for their due-

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[23] Examples of garment-sector multi-stakeholder initiatives include the Social Accountability International (SAI) and Fair Labor in the US; the Ethical Trading Initiative (ETI) in the UK; and the German Partnership for Sustainable Textiles in the EU.

[24] Diana Auret & Stephanie Barrientos 'Participatory social auditing: A practical guide to developing a gender-sensitive approach' *IDS Working Paper: Vol 237* (2004) at 9.

[25] See Clean Clothes Campaign (CCC) 'Looking for a quick fix: How weak social auditing is keeping workers in sweatshops' (2005), available at *https://cleanclothes.org/file-repository/resources-publications-05-quick-fix.pdf/view*, accessed on 19 October 2021; Clean Clothes Campaign (CCC) 'Fig leaf for fashion: How social auditing protects brands and fails workers' (2019), available at *https://cleanclothes.org/file-repository/figleaf-for-fashion.pdf/view*, accessed on 19 October 2021; also see Carolijn Terwindt & Amy Armstrong 'Oversight and accountability in the social auditing industry: The role of social compliance initiatives' (2019) 158(2) *International Labour Review* 245 at 254–7; Jason Judd & Sarosh Kuruvilla 'Why apparel brands' efforts to police their supply chains aren't working' *The Conversation* (2020), available at *https://theconversation.com/why-apparel-brands-efforts-to-police-their-supply-chains-arent-working-136821*; Philip Hunter & Michael Urminsky 'Social auditing, freedom of association and the right to collective bargaining' (2003) 130 *ILO Library* 47, available at *https://www.ilo.org/public/libdoc/ilo/P/09707/09707(2003-130)47-53.pdf*, accessed on 30 May 2022; Marlese von Broembsen 'Supply chain governance: Arguments for worker-driven enforcement' *Friedrich-Ebert-Stiftung: Perspective* (July 2022), available at *https://library.fes.de/pdf-files/iez/19402.pdf*, accessed on 28 August 2023.

[26] United Nations Human Rights Office of the High Commissioner *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011).

diligence findings. The Guiding Principles cite the Universal Declaration of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work[27] (which reflect consensus positions by UN and ILO member states) as normative sources for identifying labour rights as human rights.

Its status as a declaration means that neither states nor businesses are obliged to implement the principles. Nevertheless, the effect of the Guiding Principles was seismic.[28] The Guiding Principles established a 'human rights due-diligence' framework, which is being translated into legislation in European countries. France and Germany have codified the framework in national legislation and it is the basis for a European Union (EU) Directive on Corporate Sustainability Due Diligence, which the European Union Commission, Council and Parliament have recently agreed to.[29] Legislation places statutory obligations on businesses that are registered, or who sell their goods, in the EU country concerned. However, the legislation in France and Germany share flaws. First, like the labour codes, only workers employed by first-tier suppliers are covered. Research shows that if all tiers are not regulated, the regulation incentivises suppliers to subcontract work to factories and workshops that are not regulated.[30] Second, compliance by factory owners is monitored, not by workers who are experiencing the violations, but by external social auditing companies that visit for a few days and are paid by the multinational enterprise (MNE) or the supplier.[31] This has spawned a billion-dollar auditing industry, which at worst is incompetent and falsifies findings to keep their clients,

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[27] UN General Assembly *Universal Declaration of Human* Rights (1948); International Labour Organization *ILO Declaration on Fundamental Principles and Rights at Work* (June 1988).

[28] This section on the EU Directive and the Guiding Principles has been published in Marlese Von Broembsen 'Human rights and transnational social contracts: the recognition and inclusion of homeworkers?' in Laura Allfers, Martha Chen, & Sophie Plagerson (eds) *Social Contracts and Informal Workers in the Global South* (2022) and is included in the thesis with the consent of the University of Cape Town's Doctoral Degrees Board.

[29] At the time of writing, the wording of the final text is still being negotiated. See Business and Human Rights Resource Centre 'EU: Parliament, Council & Commission reach political deal on Corporate Sustainability Due Diligence Directive' *Business and Human Rights Resource Centre Story* (14 December 2023) available *https://www.business-humanrights.org/en/latest-news/eu-csddd-political-agreement/,* accessed 5 January 2024.

[30] Genevieve LeBaron, Jane Lister & Peter Dauvergne 'Governing global supply chain sustainability through the ethical audit regime' (2017) 14(6) *Globalizations* 958 at 968.

[31] See Carolijn Terwindt & Amy Armstrong. 'Oversight and accountability in the social auditing industry: The role of social compliance initiatives' (2019 158 (2) *International Labour Review* 245-272.

and at best can only report on what is presented by factory managers and by workers fearful of losing their jobs.[32] Third, the legislation leaves the bargaining power of the retailers and brands, and the coercive contractual terms, unchallenged.

Nevertheless, the UN Guiding Principles initiated three significant shifts. First, the principles recast labour rights as human rights, and labour rights deficits as human rights violations. Historian Anthony Anghie captures the ideological implications of such a shift:

> We might understand the monumental significance of international human rights law in these terms: It enabled international law and institutions to enter the interior, to address the unconscious, and thereby to administer civilizing therapy to the body politic of the sovereign state.[33]

Human rights provide a common, emotive language that shifts the collective consciousness and facilitates the recognition of new rights that might evolve into justiciable, enforceable rights.

Second, the Guiding Principles established the principle that businesses are responsible for harms to both the environment and to workers not only caused by their direct actions, but also harm caused as a result of their business model or 'business relationships'. Arguably corporations can always be held liable for harm through tort law. Yet this principle established a moral responsibility on the part of corporations that establishes the idea in the collective conscience that corporations owe workers in their supply chain, with whom they have no direct employment or even contractual relationship, a duty of care.

Third, the language of human rights creates the potential for transnational solidarities with a broader set of actors. Collective bargaining and social dialogue are

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[32] LeBaron et al op cit note 28 at 965 and 969.
[33] Anthony Anghie *Imperialism, Sovereignty and The Making of the International Law* (2005) at 154.

premised on a closed, tripartite set of actors that participate in decision-making: trade unions, the state and employer bodies. Human rights legitimately bring other actors, including a broad range of civil society organisations, organisations of informal workers and consumer bodies, into the law-making, social contracting processes, even if informally. Although they might not have a place at the negotiating table, they shape the agenda through the media, petitions and relations with decision-makers.

### *1.1.3 Private governance: supply-chain agreements*

Blasi and Bair[34] have mapped, documented and analysed agreements concluded between global union federations, national unions, and lead firms that address the working conditions of supply-chain workers. These include framework agreements — agreements between global union federations and one brand, such as between IndustriALL and H&M — that attempt to regulate contracts between the brand and its suppliers in multiple countries, as well as agreements between several brands with trade unions and first-tier suppliers to address a particular issue — such as sexual harassment at particular factories[35] or, in the case of ACT (a partnership between IndustriALL and the ILO), low wages in one country. The question whether these agreements constitute collective bargaining agreements is explored in chapter five.

### *1.1.4 The implications of global supply chains for the institution of collective bargaining*

Global supply chains pose the following challenges to collective bargaining. First, Kahn-Freund's thesis of collective bargaining as countervailing power is challenged by the structure of employment in supply chains (that is, multiple employers and statuses of employment both inside and outside factories) and the absence of a contractual relationship between MNEs and the workers producing their goods. Second, MNEs are in different countries and continents from the workers who produce their goods, and labour courts therefore have no jurisdiction over them. This

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[34] Jeremy Blasi & Jennifer Bair 'An analysis of multiparty bargaining models for global supply chains' *Conditions of Work and Employment Series No 105* (2015).
[35] Transnational agreements have been concluded to address gender-based violence in factories in Lesotho and in India. The Indian agreement is analysed in chapter five.

raises several questions for labour law. In the absence of an employment contract (indeed the absence of any contractual link between workers and the corporations that determine supply-chain workers' terms and conditions), what is the legal basis for transnational supply-chain bargaining? How can lead firms be brought to the bargaining table? In a context where, on the one hand, governments in developing countries court MNEs to procure goods from their countries and are hostile to trade unions, and on the other hand, MNEs engage in regulatory arbitrage — if union pressure results in an increase in minimum wages, MNEs simply move their production and procure from another country where wages are lower — what are the sources of countervailing power for workers in developing countries? What are the legal mechanisms to regulate the contracts all the way down the chain to homeworkers who produce goods for global brands? In the absence of international labour inspectors and an international labour court, how could compliance be supervised and enforced? Can collective bargaining laws institutionalise transnational collective bargaining?

Most labour law scholars focus on the first question, namely the legal basis for transnational supply-chain bargaining. Chapter four's review of the labour law literature identifies three legal bases — tort, human rights, and contract law — for holding lead firms responsible for the conditions of work in their supply chains. From a collective bargaining perspective, Manoj Dias-Abey's work on contracts is the most promising. He argues that the Accord on Fire and Building Safety in Bangladesh (the Accord) should be interpreted, not as a form of 'private governance' that addresses a lack of public regulation, but rather as 'supply-chain collective bargaining' that is 'movement-led'. He argues for a 'recursive relationship' between experiments on the ground and (transnational collective bargaining) regulation and makes a case for labour law scholars to learn from social movements.[36]

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[36] Similarly, North American scholars have identified actors as sources of solidarity and countervailing power through case studies of workers in the USA. See, e.g., Kate Andrias 'Social bargaining in states and cities: Toward a more egalitarian and democratic workplace law' (2017) *Harvard Law and Policy Review Online* Labor Law Reform Symposium; also see Brishen Rogers 'Capitalist development, labor law, and the new working class' (2022) 131(6) *The Yale Law Journal* 1842; and Maria L Ontiveros 'A new course for labour unions: Identity-based organising as a response to globalization' in Joanne Conaghan, Richard Michael Fischl & Karl Klare (eds) *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (2004) at 417–428.

Chapter five both builds on Dias-Abey's pioneering contribution and complicates his account through an analysis of three case studies of collective negotiations with brands and retailers that resulted in transnational agreements in the garment sector — the Accord, the Protocol on Freedom of Association in Indonesia, and the Dindigul Agreement to eliminate gender-based violence at the factories of Eastman Exports in India.

Chapter seven analyses the case studies with a view to exploring how sectoral transnational supply-chain bargaining might be institutionalised.

## 1.2 Street vendors

Street vendors comprise both hawkers who move around and street vendors who sell from 'sidewalks, parks, alleyways and other open-air locations; around construction sites, sports stadiums and transport junctions'.[37] The thesis focuses on street vendors for several reasons.

First, the sector employs a significant percentage of the workforce in the global South. Between 11 and 24 per cent of informal urban workers, globally, are street vendors and in low-income countries, the proportion is one in four.[38] In sub-Saharan Africa, 43 per cent of informal workers are street vendors.[39] Women comprise a significant share of the sector, particularly in sub-Saharan Africa; 51 per cent of women in sub-Saharan Africa who are informally employed are vendors.[40] Street vendors create employment for themselves and for others. In Mexico City, vendors employ others to set up and dismantle their stalls and to clean the streets after informal markets shut down. In Dakar, Senegal, young men carry bags of produce for women vendors shopping in wholesale markets. In Accra, Ghana, young women are 'head-loaders', carrying goods on their heads to markets. In many countries, street vendors employ others as security guards.

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[37] Joann Vanek, Martha A Chen & Govindan Raveendran 'A guide to obtaining data on types of informal workers in official statistics' *WIEGO Statistical Brief No 8* (May 2015) at 4.
[38] Sally Roever *Informal Economy Monitoring Study Sector Report: Street Vendors* (2014), available at *http://www.wiego.org/sites/default/files/publications/files/IEMS-Sector-Full-Report-Street-Vendors.pdf,* last visited on 25 October 2021.
[39] Sally Roever & Caroline Skinner 'Street vendors and cities' (2016) 28(2) *Environment and Urbanization* 359 at 360.
[40] Ibid.

Second, informal vendors are organised in democratic trade union-like structures. In many Latin America and African countries, they have established a national federation with members throughout the country. In some countries, such as Senegal, South Africa and Malawi, they participate in tripartite structures. In 2002, vendors formed a global federation, StreetNet International, which has affiliates in 58 countries. In 2015, with the support of the research-advocacy network, Women in Informal Employment: Globalizing and Organizing (WIEGO), representatives of StreetNet from Asia, Africa and Latin America participated in the two-year General Discussion on formalising the informal economy at the 104th session of the International Labour Conference in Geneva. The outcome, *Recommendation Concerning the Transition from the Informal to the Formal Economy, 2015 (No. 204)* (hereafter Recommendation 204) is the first international instrument that implicitly recognises that informal self-employed workers have a right to freedom of association and to collective bargaining.

Third, the sector challenges labour law normatively and conceptually. Like other informal self-employed workers, street vendors are excluded from the scope of labour laws because they do not have a contractual relationship with the entity that controls their workplace — in their case, the municipal arm of the state — and they are therefore neither employees nor non-standard workers. Development policy (promoted by the World Bank and the international development organisations that funnel development funding from the global North to the global South) for the most part characterises informal self-employed workers as micro-enterprises who need skills and business training, and access to credit and markets, to grow. However, street vendors perceive themselves as part of the labour movement. Indeed, in several African countries they are affiliated to a national trade union confederation.

Located close to their customers' homes, street vendors provide access to cheap commodities and services (including tailoring, hairdressing, repairs, and letter-writing for illiterate customers). They also provide cooked food, access to fresh produce, and services for the middle class. In Accra, Ghana, for example, middle-class women frequent street vendors for weaves and other hairdressing services. In

many countries, street vendors are essential for food security.[41] During the Covid-19 pandemic, 18 African countries recognised informal food vendors as 'essential services' that were exempt from restrictions to freedom of movement during lockdowns.[42] Street vendors keep cultural traditions alive, [43] and in cities as varied as Bangkok, Mumbai and Accra, tourists patronise informal markets.[44] In low-income countries, street vendors are a source of revenue for the local authority: their fees, including daily 'taxes' to operate, licence and permit fees, and yearly/monthly sanitation taxes contribute to the fiscus.[45]

Nevertheless, as will be discussed more fully in chapter six, vendors' access to public space to trade is precarious and they face constant 'harassment, violence and arrests' by the police.[46] Their goods are confiscated without due process (even when they have permits to trade) and they are vulnerable to extortion by police or to being arrested for being illegal or 'disorderly'.[47]

Street vendors pose the following challenging questions to labour law and the institution of collective bargaining. What is the conceptual basis for including workers who are genuinely self-employed within the ambit of labour law? As street vendors rely on the state to access their workplace (public space) to trade, should they even be subjects of labour law? If there is a conceptual basis for their inclusion

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[41] Roever & Skinner op cit note 37 at 362.
[42] Pamhidzai H Bamu & Teresa Marchiori 'The recognition and protection of informal traders in COVID-19 laws: Lessons from Africa' *WIEGO Resource* (December 2020), available at *https://www.wiego.org/sites/default/files/resources/file/WIEGO_COVID-19 Laws_Lessons_Africa_Dec_2020_EN_Web%20FINAL.pdf*, accessed on 2 July 2022.
[43] Layla Eplett 'Tea Tuesday: Meet the Chai wallahs of India' (14 June 2016) *NPR news*, available at https://www.npr.org/sections/thesalt/2016/06/14/481878368/tea-tuesday-meet-the-chai-wallahs-of-india, accessed on 10 January 2023.
[44] Matt Goss 'Where to find Bangkok's best street food while you can' *New York Times* (9 April 2018), available at https://www.nytimes.com/2018/04/09/travel/bangkok-street-food-guide-ban.html, accessed on 10 January 2023.
[45] Roever & Skinner op cit note 37 at 362.
[46] See, e.g., WIEGO Blog 'Building street-vendor power in the face of repression in African cities' *WIEGO Blog* (6 July 2023), available at *https://www.wiego.org/blog/building-street-vendor-power-face-repression-african-cities?utm_source=WIEGO&utm_campaign=a763d979a8-EMAIL_CAMPAIGN_ENG+July+2023 &utm_medium=email&utm_term=0_8ef746a546-a763d979a8-330755905*, accessed on 27 August 2023.
[47] Krithika Dinesh, Pamhidzai Bamu, Roopa Madhav, Teresa Marchiori & Marlese von Broembsen 'Re-examining legal narratives on vagrancy, public spaces and colonial constructs: A commentary on the ACHPR's advisory opinion on vagrancy laws in Africa' *Law and Informality Insights No 4* (August 2021) at 1, available at *https://www.wiego.org/sites/default/files/publications/file/WIEGO_LawNewsletter_August%202021.pdf*, accessed on 27 August 2023.

in labour law's scope, how could collective bargaining with a local authority be operationalised? How would they exercise collective power if they cannot strike? Labour laws in most countries prevent informal self-employed workers, such as street vendors, from registering their organisations as trade unions, which weakens their associational power. How might labour laws at the national level realise informal self-employed workers' rights to freedom of association, which (it will be argued) the ILO standards uphold.

Two approaches to the informal sector are identifiable in labour law literature. The first approach (dominated by labour law scholars from the global North) is to identify a conceptual basis for incorporating the informal sector into the ambit of labour law. The second approach (dominated by labour law scholars from the global South) is normative. Scholars that represent the latter make normative claims that labour law should include the informal sector (self-employed informal workers), and cite cases of their inclusion in international standards,[48] occupational health and safety laws, [49] and in social protection schemes. There is a dearth of labour law literature on collective bargaining for the informal sector, besides statements that it should be possible.

Chapter four (the literature review) addresses the first research question — namely, identifying a conceptual basis for labour law to include informal self-employed workers that will realise a *de jure* right to collective bargaining. It discusses and critiques four theories of labour law that provide a conceptual basis for including self-employed informal workers within the ambit of labour law: labour law as human capability; labour law as regulation; labour law as human rights; and labour law as 'personal work relations' (PWR).

Research question two is interested in how the institution of collective bargaining will have to evolve to realise rights to collective bargaining for street

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[48] See Nicola Smit & Elmarie Fourie 'Perspectives on extending protection to atypical workers, including workers in the informal economy, in developing countries' 2009(3) *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 516; also see Paul Benjamin 'Informal work and labour rights in South Africa' (2008) *Industrial Law Journal* 1579 at 1583.

[49] See Pamhidzai Bamu-Chipunza 'Extending occupational health and safety law to informal workers: The case of street vendors in South Africa' (2018) 1 *University of Oxford Human Rights Hub Journal* 61; Richard Johnstone 'Informal sectors and new industries: The complexities of regulating health and safety in developing countries' in Judy Fudge, Shae McCrystal & Kamala Sankaran (eds) *Challenging the Legal Boundaries of Work Regulation* (2012) at 67–80.

vendors. Chapter six addresses this question. It first discusses four case studies of collective relations between organisations of street vendors and local authorities in India; San Paulo, Brazil; Liberia, Monrovia; and Zimbabwe; then discusses examples of collective bargaining laws for self-employed workers in Canada, the USA and Australia; and thereafter advances ideas for collective bargaining laws for street vendors.

Institutionalising collective bargaining is a political issue. Chapter seven analyses the case studies of the informal sector; drawing on the theory of Erik Olin Wright, hypothesises how organisations of street vendors might get local authorities to the bargaining table; and ultimately how they might institutionalise collective bargaining through collective bargaining laws.

### 1.3 Collective bargaining as an outcome of struggle

Chapter seven returns to the idea (expressed in chapter two) that institutionalised collective bargaining is the outcome of a compromise between the capitalist classes and the working classes. The chapter foregrounds the underlying assumptions of the contemporary form of collective bargaining, which is embedded in, and constituted by, industrial capitalism. The chapter undertakes two tasks. The first is to analyse the case studies to explore how street vendors might institutionalise a collective bargaining framework, and how garment workers might realise transnational supply-chain bargaining. The second is to distil the fundamental questions that these two groups of workers pose to labour law.

The chapter discusses Erik Olin Wright's theory (based on game theory) that explains strategies for reaching a 'stable positive class compromise' by identifying where and how workers can exercise countervailing power (he calls collective power 'associational power') against the owners of capital. The chapter reflects on the strategic utility of the framework for the two groups of workers given that the case studies, read with the political-economy chapters, show that the struggle for both groups of workers that are the focus of this thesis is significantly more complex than for workers in the global North. For example, for garment workers in global supply chains, the 'chain' structure of production means that the owners of capital are lead firms *and* national employers. Whereas in the heyday of labour law, the state mediated between the owners of capital and labour, the role of the state in Asian

countries is complex: not only are states mostly autocratic, but they must also pander to foreign capital, and to foreign governments. Similarly, for street vendors, the struggle is against the state, the middle classes, and two hegemonic narratives: that they are micro-enterprises (a narrative reproduced by the World Bank and the Employer Group at the ILO) or that they are 'unsanitary', a nuisance, or vagrants. This latter narrative's origin is in colonial-era laws, which are being reproduced by the contemporary state.[50]

The chapter concludes that both labour law's background rules and Wright's theory are outdated or are irrelevant for many workers in the global South. It outlines four areas that require research and theory building by labour law scholars and labour sociologists.

## 1.4 Conclusion

The thesis shows that garment workers in global supply chains *are* concluding transnational supply-chain agreements that include lead firms, and street vendors *are* engaging in collective negotiations with local authorities. Neither group requires significant practical or normative shifts on the part of the institution of collective bargaining. However, the case studies challenge labour law to recognise parties other than employers and trade unions — NGOs, the state and global union federations — as parties to collective agreements.

The greatest challenge for garment workers in global supply chains in realising rights to transnational supply-chain collective bargaining is that capital is fleet-footed and engages in regulatory arbitrage. The challenge is to build transnational structural and associational countervailing power. The greatest challenge for street vendors to realising rights to collective bargaining is for labour law to recognise informal self-employed workers as subjects of labour law. The thesis shows that the theory of labour law as 'personal work relations' can include the informal sector, and it shows how the PWR theory can be operationalised.

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[50] See Dinesh et al op cit note 44 at 5 and 7.

Both groups of workers provide labour law scholars with clues on how to re-imagine the working class, re-imagine different sources of solidarity and countervailing power, and challenge labour law scholars to re-theorise the state.

# Chapter 2

## A historical political economy perspective on the relationship between capital and organised labour

### 2.1 Introduction

This chapter provides a political economy lens for chapter five (on garment workers in global supply chains), and to some extent also for chapter six (on informal, self-employed workers). Part 2.2 of this chapter introduces a historical discussion on industrial capitalism. It recounts the three stages of industrial capitalism: laissez-faire capitalism (from mid-eighteenth century until after World War II); democratic capitalism (from the Great Depression until the 1970s); and neoliberalism and globalisation (from the1980s until the 2000s). Part 2.2 also depicts the struggle (between capital and labour) that produced labour law as the law of collective relations, discusses the nature of the trade-offs between labour and capital, and the mediating role played by the state.

Parts 2.3 and 2.4 focus on globalisation and development and analyse the implications of globalisation for the relations between capital and labour — first for developed countries of the global North, and then for developing countries of the global South. During the earlier form of globalisation (‘the first unbundling’), relations between capital and labour in developing countries replicated the relations between capital and labour in the global North — that is, workers produced goods for consumption by the domestic market, and wage increases were linked to more efficient production. However, from the 1990s, during ‘the second unbundling’, the legal and institutional form of production changed. Now, corporations offshored and outsourced production for their domestic market to developing countries. They no longer owned the factories through subsidiaries, but rather contracted with legally autonomous firms to produce their goods. They could dictate contractual terms with their suppliers by virtue of their market power.

The discussion on global supply chains in the garment industry begins with a discussion of the legal regime that incentivised multinational enterprises (MNEs) to

buy garments from suppliers located in developing countries and explains why and how governments compete for MNEs to 'invest' in procuring from their countries, and the implications for collective bargaining. Part 2.5 concludes the chapter with a discussion on the power relations in global garment supply chains, the structure of the labour force, and the terms and conditions of work for garment supply chain workers.

This chapter is important for the thesis for several reasons. First, it illustrates that capitalism (both as a mode of accumulation and as a social system) is constantly evolving, which means that the power relations between capital, labour and the state constantly change too. Kahn-Freund famously said that collective bargaining is the countervailing force against capital. This account foregrounds the necessity for labour law to conceptualise collective bargaining as an institution that must evolve to respond to the changing constellations of power. Second, the contemporary form of collective bargaining—its underlying assumptions, structure, and rules—is embedded in, and has been constituted by, industrial capitalism. This has several implications. For example, the liberal democratic framework of industrial capitalism translates into background assumptions about the nature of the state, which this thesis problematises. Third, the account shows that collective bargaining is an outcome of social struggle, which it is important to remember — especially for the discussion on supply-chain collective bargaining in chapter five. Fourth, it explains how, and why, multinational corporations — the owners of private capital — became synonymous with economic development, which is ostensibly for the common good. This is important for the thesis because it explains in part why governments in developing countries cooperate with multinational corporations in ways that deny their worker-citizens labour protections.

## 2.2 Industrial capitalism[1]

Capitalism is both an economic and a social system; it organises both social and economic relations. Its structure is therefore dynamic and mutable.[2] Its earliest form, mercantilist capitalism, derived its name from its mode of profit accumulation — that is, merchants buying commodities in the East and selling them for profit in their home countries. Mercantilist capitalists did not finance production and most of the population in Europe was therefore unaffected by the mercantile class's economic activities.[3] Production took place mainly in homes and workshops, known in England (the birthplace of industrial capitalism) as cottage industries.

The industrial revolution heralded a new form of production, and of social organisation. Unlike its predecessor, industrial capital's primary means of profit-making is through investment in the production of goods — that is, the industrialisation of the economy. The re-organisation of production into factories meant that for the first time in history, increased output and income was not contingent on increasing the workforce.[4] Instead, the model relied on knowledge, technological innovation, and efficient production methods. To make their profits, industrial capitalists rely on ongoing technological progress to improve productivity, and on paying workers less than the value generated by their labour.[5] For this to happen, labour had to be commodified.

Industrial capitalism has, over time, assumed four different social, economic and political arrangements in the advanced democracies of North America and Western Europe: (a) laissez-faire capitalism (from mid-eighteenth century until after World War II), which reified economic growth and privileged private capital over the state as the market actor responsible for economic growth; (b) Keynesian

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[1] Parts of sections 2.2 and 2.4 have been published in Marlese Von Broembsen 'Human rights and transnational social contracts: the recognition and inclusion of homeworkers?' in Laura Allfers, Martha Chen, & Sophie Plagerson (eds) *Social Contracts and Informal Workers in the Global South* (2022) and are included in the thesis with the consent of the University of Cape Town's Doctoral Degrees Board.

[2] Wolfgang Streeck *How Will Capitalism End*? (2016) at 1.

[3] In Africa, India, the Caribbean and Latin America, however, much of the population was affected by the European merchant capitalist policies and practices relating to trade and slavery. See, e.g., James M Cypher *The Process of Economic Development* 4ed (2014) ch 2.

[4] Cypher ibid at 84.

[5] James Fulcher *Capitalism: A Very Short Introduction* (2004) at 11.

economics and the welfare state (from the Great Depression until the 1970s), which entailed state regulation of private capital; (c) neoliberalism (from the1980s until the 2000s), which is a reassertion of laissez-faire capitalism under a different guise; and (d) financial capitalism (the current shift).

Since the eighteenth century, workers have countered the commodification of their labour power and the coercive bargaining power of capital through collective organisation. Collective resistance started in the United Kingdom, the birthplace of industrial revolution. Eighteenth-century crafters, the early form of outworkers, formed collective organisations to bargain for minimum wages, among other things. This was followed by guilds of journeymen in cities.[6] Throughout the early 1800s, it was difficult for workers to organise because workshops were small, and employment unstable. But by the mid-1800s, factories were larger, and unions were strong. They embarked on industrial action (strikes, riots, and breaking machines), which was violently suppressed by the state's military.[7] In the 1900s, trade unions were 'strong and revolutionary';[8] as a result, capital was forced to make concessions to labour to ensure that the factory model of production (with outworkers) survived. These concessions, a 'political taming', took the form of 'democratic power-sharing and social reform'.[9]

The first half of the twentieth century was marked by two world wars, which fundamentally reshaped the relations between capital and labour in two ways. First, the owners of (private) capital lost a big share of their wealth because they financed the wars.[10] Their loss significantly reduced rising inequality, which reduced the social instability that inequality produces. Second, the fact that the wars were financed by private capital gave rise to the notion that private capital is a 'public utility',[11] a notion that would serve capital in the future.[12] Third, it ushered in an era

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[6] Ibid at 20.
[7] Ibid at 39–40.
[8] Streeck op cit note 2 at 4.
[9] Ibid at 4. Also see Hugh Collins, Gillian Lester & Virginia Mantouvalou ('Introduction: Does labour law need philosophical foundations?' in Hugh Collins, Gillian Lester & Virginia Mantouvalou (eds) *Philosophical Foundations of Labour Law* (2018) at 2) for a reflection on labour law as 'the product of historical and pragmatic political compromises'.
[10] Streeck op cit note 2 at 4.
[11] Ibid at 15.
[12] At the time, Veblen countered this idea that the 'captains of industry' were motivated by the greater good.

in which the state assumed a central role in society and the economy — that is, the welfare state was born.

### *2.2.1 Democratic capitalism*

After the Great Depression, Keynesian economics (which gave a prominent role to the state) replaced neoclassical economics as the economic orthodoxy in Western Europe. This ushered in a period where private capital was constrained by social, legal and political institutions — the outcome of a class compromise to ensure societal stability. Wolfgang Streeck describes this period as 'democratic capitalism':

> Democratic capitalism was fully established only after the Second World War and then only in the 'Western' parts of the world, North America and Western Europe. There it functioned extraordinarily well for the next two decades — so well, in fact, that this period of uninterrupted economic growth still dominates our ideas and expectations of what modern capitalism is or could and should be.[13]

Democratic capitalism functioned well in the West (and some post-colonial countries)[14] because of the trade-off between capital, on the one hand, and labour on the other. The working classes exchanged their labour and their rights to property for a secure livelihood, for social protection (social insurance and public goods, such as healthcare), and for a continuously improving standard of living.[15] Capital relied on the working classes not only for their labour, but also for their purchasing power as consumers. Wages were an outcome of collective bargaining, to be sure, but they

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[13] Streeck op cit note 2 at 73.
[14] Jason Hickel 'A short history of neoliberalism (and how we can fix it)*' New Left Project* (2012), available at *https://www.academia.edu/38364529/A_Short_History_of_Neoliberalism_And_How_We_Can_Change_It_* (accessed 28 August 2023).
[15] Alain Supiot, María Emilia Casas, Jean de Munck, Peter Hanau, Anders L Johansson, Pamela Meadows, Enzo Mingione, Robert Salais & Paul van der Heijden *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (2001) at 1 and 25; Simon Deakin 'The many futures of the contract of employment' in Joanne Conaghan, Richard Michael Fischl & Karl Klare (eds) *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (2004) at 178; Bob Hepple 'Factors influencing the making and transformation of labour law in Europe' in Guy Davidov & Brian Langille (eds) *The Idea of Labour Law* (2011) at 37.

also took into account the cost of reproduction (for workers to afford a family that could replace their labour) and the need to create demand for mass-produced consumables.

Three institutions are characteristic of democratic capitalism in Europe and in Anglophone Western countries: a welfare state that guarantees social security to its citizens; full employment;[16] and the right of workers to freedom of association and collective bargaining.[17] Both the jurisprudence and the legislation of the 1900s mention different forms of employment; these included hiring workers as independent contractors, casual workers, servants, labourers, and workmen. However, as sub-contracted workers were absorbed by factories after World War II, or 'likened to employees',[18] they were distilled into two categories: those dependent on wage employment ('employees') and those who were self-employed ('independent contractors').[19]

The key labour law institutions — the employment contract, collective bargaining and social insurance — emerged during this period. Simon Deakin[20] argues that the employment contract played three distinct functions. First, it classified a worker into the category of employee or independent contractor (the former being entitled to labour rights and the latter not). Second, it regulated the relationship between employer and employee. Third, it redistributed risk and reward since the state (as an 'implicit party' to the employment contract) used it as a mechanism to collect income tax as well as social insurance contributions, which it redistributed through welfare spending.[21] Although not an explicit term in the employment contract, workers agreed to their subordination to management.[22] Giving up their individual 'economic independence'[23] and agreeing to their

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[16] In economic terms, full employment means that all those who are willing and able to work at the prevailing rate of wages are employed.
[17] Deakin op cit note 15 at 178.
[18] Supiot et al op cit note 15 at 14.
[19] Deakin op cit note 15 at 179 and 184–5.
[20] Ibid at 178–9.
[21] See also Katherine Stone & Harry Arthurs 'The transformation of employment regimes: A worldwide challenge' in Katherine Stone & Harry Arthurs (eds) *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (2013) at 2.
[22] Ibid. For further discussion see Hugh Collins 'Is the contract of employment illiberal?' in Hugh Collins, Gillian Lester & Virginia Mantouvalou (eds) *Philosophical Foundations of Labour Law* (2018).
[23] Ibid.

subordination was counterbalanced, however, by labour law institutionalising collective bargaining. Dennis Davis describes labour law as 'provid[ing] a framework within which workers can build a countervailing power to that of management by providing a legislative framework that supports organising, collective bargaining and industrial action'. [24]

For more than two decades, Western countries experienced continuous economic growth, which 'resulted in deeply rooted popular perceptions of continuous economic progress as a right of democratic citizenship — perceptions that translated into political expectations'.[25] It also fed the emerging perception after World War II that private capital is a public utility. However, growth began to slow after the oil crisis in the 1970s and, with the collapse of the gold standard,[26] states were beset by stagflation (a combination of high inflation and high unemployment yielding a stagnant economy). The Keynesian economic toolkit was unable to deliver full employment, which led to a loss of confidence in the state, rather than in the capitalist system itself. This set the stage, in the 1980s, for Thatcher and Reagan to embrace neoliberalism, a combination of neoclassical economics and libertarianism. Economics provided the analytical tools; the philosophical rationale was provided by the libertarian, Von Hayek. [27]

### *2.2.2 Neoliberal capitalism and globalisation*

Neoliberalism is animated by the idea that the market is the most efficient institution to distribute society's resources, and that market actors should not be constrained by state interference — i.e., a resurgence of the laissez-faire ideals that Polanyi and Hale countered in the 1940s. Neo-liberalism's primary institutions include privatisation (including of social goods, such as education); de-regulation (including

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[24] Dennis Davis 'Death of a labour lawyer?' in Joanne Conaghan, Richard Michael Fischl & Karl Klare Labour (eds) *Law in an Era of Globalization: Transformative Practices and Possibilities* (2004) at 160.
[25] Streek op cit note 2 at 10.
[26] David Kennedy 'The "rule of law, political choices and development common sense' in David Trubek & Alvaro Santos (eds) *The New Law and Economic Development: A Critical Appraisal* (2006) at 110.
[27] Ha-Joon Chang 'Breaking the mould: An institutionalist political economy alternative to the neo-liberal theory of the market and the state' (2002) 26(5) *Cambridge Journal of Economics* 539–59. Also see Guy Standing *Global Labour Flexibility: Seeking Distributive Justice* (1999) at 540.

product and capital markets); a flexible labour regime; and a reduced public sphere.[28] These institutions undermined the very institutions produced by democratic capitalism (the social compact between the state, labour and corporations)—public goods (including education; health; and social security); regulated labour markets (through a hybrid of state regulation and collective bargaining) and a large democratic, public sphere. Neoliberalism has brought irreversible consequences for democracy, for labour, and for the institution of collective bargaining.[29]

These shifts in the political economy heralded a new form of production that involved the vertical disintegration of multinational firms' supply chains and an international division of labour. According to Guy Standing,[30] the doctrine of labour flexibility is comprised of the following four aspects:

(i) "*Production or organizational flexibility*" describes corporations' practice of keeping the functions that are profitable (such as research and development, branding, and marketing) and outsourcing or subcontracting the less profitable aspects, such as production.[31]

(ii) "*Wage system flexibility"* targets the wage costs of production and firms pursue strategies to reduce their wage costs (strategies have focused on ways in which to re-structure their relationships with workers to avoid the responsibilities that come with an employment contract).

(iii) "*Labour cost flexibility"* targets the non-wage component of labour, including social protection (such as unemployment insurance), compensation for injuries at work, sick leave, and supervision costs. Firms find ways to transfer these costs to other firms and/or to their workers.

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[28] See John Braithwaite (*Regulatory Capitalism: How It Works; Ideas for Making It Work Better* (2008) at 5) for a discussion on the reduction of the public sphere.
[29] See Bob Hepple (op cit note 15 at 38–41) for a discussion on how this played out in different countries.
[30] Guy Standing *Global Labour Flexibility: Seeking Distributive Justice* (1999).
[31] See Gary Gereffi, John Humphrey & Timothy Sturgeon ('The governance of global value chains' (2005) 12(1) *Review of International Political Economy* 78–104) who show that domestic outsourcing came first, followed by offshoring to developing countries.

(iv) *"Numerical flexibility*" enables firms to hire when market demand is high and not hire when demand is low. Firms carry the costs of employment for permanent, full-time employees even when there are no orders, but casual or part-time workers and homeworkers/outworkers absorb these costs when there are no orders.

In a 1990 article, Hugh Collins[32] argued that the UK government's adoption of the labour market flexibility doctrine was the biggest contributing factor to the vertical disintegration of firms and the offshoring and outsourcing of work. Indeed, globalisation and the labour flexibility doctrine has profoundly re-shaped the nature of work in advanced countries and the relations between organised capital and labour.

Richard Baldwin[33] argues that globalisation has occurred in two distinct phases, which he calls the 'first unbundling' and the 'second unbundling'.[34] He argues that the drivers for each phase were different, resulting in different relations of production and different possibilities for development. By implication, each phase also had different implications for the nature and conditions of work. The 'first unbundling' took place between 1698 (with the invention of the steam engine, which reduced the cost of trans-Atlantic transport) and the mid-1980s.[35] It manifested as cross-border trade and investment. From the 1900s (the era of import substitution), it was characterised by corporations establishing assembly plants in different countries through subsidiaries. The subsidiary sourced and assembled components and employed the workers in its factories. The entire production process took place in spatially proximate factories because it required face-to-face supervision.[36] Generally, the whole chain — each stage of production — took place within the

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[32] Hugh Collins 'Independent contractors and the challenge of vertical disintegration to employment protection laws' (1990) 10 *Oxford Journal of Legal Studies* 353 at 361.
[33] Richard Baldwin 'Trade and industrialisation after globalisation's 2nd unbundling: How building and joining a supply chain are different and why it matters' *National Bureau of Economic Research Working Paper* (December 2011), available at *http://www.nber.org/papers/w17716*, accessed on 2 April 2018.
[34] Thomas Piketty (*Capital in the Twenty-First Century* (2014) at 28) calls these the first and second globalisations.
[35] Baldwin op cit note 32 at 2.
[36] Richard E Baldwin 'Global supply chains: why they emerged, why they matter, and where they are going' *CTEI Working Papers* (2012), available at *https://repository.graduateinstitute.ch/record/287415?_ga=2.248702343.1867928143.1691680498-1709383900.1691579660*, accessed on 20 January 2019.

same group of companies, which economists describe as a vertically integrated chain.[37]

The 'second unbundling' started in the mid-to-late 1980s and is characterised by a 'vertical disintegration' of production. Corporations shed direct ownership of less profitable functions (such as production), while keeping the more profitable functions (such as innovation, product design, branding and marketing). For example, Toyota (considered a leader) outsourced production, assembly and even some design functions, contracting with one first-tier supplier to produce the car seats, another to produce the engine, and a third to produce the gearbox.[38] Each of these first-tier suppliers sub-contracts the production of component parts to smaller suppliers and assumes responsibility for assembling the constituent parts into the final product, being the car seat, gearbox and engine. The sub-contractors are located in a different country and continent to the first-tier supplier.[39] Toyota has a contractual relationship with its first-tier suppliers and no employment relationship with any workers in any factories that are owned by first-, second- or third-tier suppliers.

As multinational corporations have shed ownership of production and are not physically present in the country, they are no longer able to exercise *direct* face-to-face control over the firms that produce the products that they sell. Nevertheless, they need to retain some control over production to ensure continuous, high-quality supply.[40] The legal mechanism they deploy to exercise control over supply is their contract with the first-tier supplier. Collins argues that managerial control has not disappeared with the restructuring of supply chains but appears instead in a different form — as coercive terms in commercial contracts.

In many sectors, MNEs are networked to their suppliers and can track the real-time progression of their products. Indeed, Baldwin attributes the vertical disintegration of global production networks — the second unbundling — to

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[37] This is not to suggest that vertical integration has disappeared; it is describing a trend.
[38] Timothy Sturgeon, Johannes van Biesebroeck & Gary Gereffi 'Value chains, networks and clusters: reframing the global automotive industry' (2008) *Journal of Economic Geography* 304 at pages 304-5.
[39] Ibid.
[40] Ibid.

developments in information and communication technology (ICT), without which corporations would not be able to co-ordinate their production processes from a distance. ICT made it *possible* to offshore and outsource production, he argues, and low wages made it *profitable* to do so.[41]

During the first unbundling, factories in emerging economies made goods for the domestic market. The wage negotiations therefore mirrored their country of origin: workers were both their employees and their consumers. In the context of the second unbundling, however, not only is the employment relationship (between multinational enterprise and domestic factory worker) severed, but so too is the retailer/consumer relationship since goods are not necessarily produced for domestic consumption.[42]

The implications for organised labour in advanced industrialised countries are several. First, the nature of work has shifted fundamentally. Permanent, full-time work is no longer the norm; for a significant percentage of labour market entrants, non-standard work is the new normal. Second, and as a result, fewer people are unionised, and unions' coercive power is eroded since brands and retailers can outsource their production to suppliers in developing countries that have a surplus of labour, lower minimum wages, and weaker trade unions. Third, the production costs and risks that were previously borne by enterprises are effectively passed onto smaller enterprises in developing countries, and to their workers.[43] Fourth, capital is mobile and not constrained by national boundaries, and has therefore exited the social contract that underlies labour law.[44] Finally, taxpayers (individual and corporate) avoid paying tax, which undermines the state's capacity to provide public goods, which ultimately undermines democracy.[45] Fudge notes:

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[41] Baldwin op cit note 36 at 4.
[42] Anne Trebilcock & Adelle Blackett 'Conceptualizing transnational labour law' in Adelle Blackett & Anne Trebilcock (eds) *Research Handbook on Transnational Labour Law* (2015) at 1.
[43] Judy Fudge 'Blurring legal boundaries: Regulating for decent work' in Judy Fudge, Shae McCrystal & Kamala Sankaran (eds) *Challenging the Legal Boundaries of Work Regulation* (2012) at 2.
[44] Trebilcock & Blackett op cit note 42 at 13.
[45] Harry Arthurs 'The constitutionalization of employment relations: multiple models pernicious problems' (2010) 19 *Social & Legal Studies* at 404.

> [T]he new economy has accelerated the breakdown of the traditional firm, which was the basis upon which unions were organized in developed non-socialist countries after World War II. This transformation in political ideology and economic reality has had a profound impact on the traditional supports for labor rights. Laws that protected and promoted trade unions have been undermined as the economy and the structure of enterprises have changed or have been refashioned to promote competition via individual contracting.[46]

The focus of this chapter now shifts to developing countries and considers the implications of the re-structuring of global production from the perspective of states and workers from developing countries. The next section discusses the implications for developing countries of corporations restructuring their production into what different disciplines have called global commodity chains, global value chains, or global production networks.[47] To fully understand the implications, however, one needs some understanding of the history of development, and the relationship between capitalism and development. The account starts in the late 1940s when the newly formed global financial institutions, in particular the World Bank and the International Monetary Fund (IMF), turned their attention from the post-war reconstruction of Europe to developing under-developed countries.

## 2.3 Capitalism, development and global value chains

Gustavo Esteva identifies American President Harry Truman's inaugural speech as the moment that 'development' as a capitalist agenda was born.[48] Truman said the following:

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[46] Judy Fudge, 'The new discourse of labor rights: from social to fundamental rights' (2007) 29(1) *Comparative Labor Law & Policy Journal* 29 at 31.
[47] The details are discussed in chapter one, note 14.
[48] Gustavo Esteva 'Development' in Wolfgang Sachs (ed) *The Development Dictionary: A Guide to Knowledge as Power* 3ed (1993) at 1.

> We must embark on a bold new programme for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas. The old imperialism — exploitation for foreign aid — has no place in our plans. What we envisage is a program of development based on the concepts of democratic fair-dealing.[49]

According to Esteva, this was the first time that 'under-developed' was used in relation to the 'Third World'. Biologists began to use the term 'development' as a synonym for evolution in the eighteenth century, which resulted in the term becoming associated with the natural evolutionary process.[50] When social theorists began to use the biological term 'development' to explain political and social transformation, they naturalised the process, erasing the contestations that underlie any political and social transformation.[51] Truman's specific contribution, argues Esteva, is that development became synonymous with capitalism.[52]

From the 1940s to the 1970s, 'modernisation theory' dominated development economics. The term 'modernisation' reflects its premise, namely that 'underdeveloped' countries needed to 'modernise' and emulate the scientific advancement and industrial progress of North America, the United Kingdom and Europe. In the post-war period, when labour law was constituted, Keynesian economics, with its perspective on the role of the state and its assumption of full employment, shaped the institutions of labour law. Keynesian economics also shaped development theory during this period. According to (Keynesian) development orthodoxy, the state should drive development. But development economists disagreed on exactly what the state should do. Some advocated for a 'big bang' where the state stimulates several sectors simultaneously for the economy to

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[49] Ibid.
[50] Ibid.
[51] Ibid at 6.
[52] See Antony Anghie ('Colonialism and the birth of international institutions: Sovereignty, economy, and the mandate system of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics* 513–634) for a treatise on the 'development' of the colonies after World War I.

'take off'.[53] Others, such as Albert Hirschman, argued that the state should target particular sectors for industrialisation. Growth in these sectors would stimulate backward linkages (new enterprises that would supply these sectors) as well as 'upstream' industries. For example, as Cypher explains, if the state stimulates the electrical power sector by oversupplying electrical power at a lower cost, it will stimulate industries that rely on electrical power.[54] Rostow[55] developed a model that comprised five stages of industrialisation. The final stage was characterised by a capitalist production process, full employment, and mass consumerism. In short, while development economists disagreed on whether industrialisation should be capital or labour intensive, and whether development could be achieved by a 'big push' or by targeting particular sectors, the process of development was understood as universal, and to some extent formulaic, and the goal was to emulate the industrialised countries of the North.

Structuralist development economists challenged modernisation theory's thesis that if the state instituted the right industrial, monetary and trade policies, it would result in economic growth, which would absorb informal labour. They also challenged Ricardo's theory of comparative advantage, namely that if all nations traded in those products in which they enjoyed comparative advantage, it would lead to a levelling of income levels among countries.[56] Structuralism studies a social system as a whole and is concerned with power relations inherent within all social systems and their distributive implications:

> The principal characteristic of structuralism is that it takes as its object of investigation a "system" that is, the reciprocal relations among parts of a whole, rather than the study of different parts in isolation. In a more specific sense this concept is used by those theories that hold that there are a set of social or economic structures that are

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[53] See Cypher op cit note 3 for a synopsis of these debates. Also see Kennedy op cit note 26.
[54] Cypher op cit note 3 at 173. Hirschman advocated for capital-intensive rather than labour-intensive industrialisation. Nevertheless, it was assumed by these Keynesian economists that full employment was possible and that ultimately all residual labour would be absorbed by capitalist production.
[55] Cypher op cit note 3 at 195.
[56] Ibid at 201.

> unobservable but which generate observable social and economic phenomena.[57]

The best-known structuralist development economist is Raul Prebisch, an Argentinian. Prebisch began to question the universality of orthodox economic prescriptions when he saw at first-hand how power relations among trading partners impacted trade.[58] Argentina's primary export was beef and its primary trading partner was Britain. When British demand for Argentina's beef dropped, the new superpower, the United States of America (USA), was not interested in importing Argentinian beef since it also produced and exported beef. Argentina's beef industry suffered badly as a result. The fact that Argentina enjoyed a comparative advantage over the USA proved futile in the face of the USA's power to manipulate the rules of the game.

In 1950, Prebisch was appointed to lead the United Nations Economic Commission for Latin America, where he joined Hans Singer, a German Keynesian economist, who had been appointed to the United Nations' new Economic Development Department. Together they embarked on extensive data collection and analysis. Their empirical analysis showed that developed countries ('the centre') dominated manufacturing, and undeveloped countries ('the periphery') produced the primary products (agriculture and minerals) for export to the centre. Their data showed that ultimately all the benefits of international trade accrue to the centre.

The Prebisch-Singer hypothesis — that international trade would increase inequality between nations — was premised on understanding trade relations as 'antagonistic and detrimental rather than complementary and harmonious'.[59] The argument is that the economic, institutional and labour market structures in the advanced 'centre' countries and in developing 'periphery' countries are fundamentally different. The centre countries enjoy two common characteristics. First, manufacturing is controlled by oligopolistic corporations that enjoy significant control over setting the prices for their manufactured goods. Thus, when

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[57] Gabriel Palma in Cypher op cit note 3 at 198.
[58] Ibid at 199.
[59] Ibid at 206.

corporations in centre countries export their goods to other countries, *they decide* on the price for their goods. Second, the social contract in these countries stipulates that a portion of the rents produced by more efficient production (even if the increased efficiency is due to technical innovation) goes to labour in the form of increased wages. Capital and labour in the exporting country share the profits generated by more efficient production.[60]

The economic, institutional, and labour market structure in peripheral countries, however, is dramatically different. Peripheral countries produce primary products (agriculture and mining) and face significant competition both domestically and internationally. Instead of domestic suppliers setting their export prices, prices are negotiated under competitive conditions. If suppliers improve their productivity, including through technological innovation, the distributional effect is different from the distribution between labour and capital in 'centre' countries. Instead of keeping the price per unit as is and distributing the profit between corporation and workers, the supplier drops the price for the commodity in order to become more competitive. In the absence of a social contract and strong trade unions, there is no institutional pressure to increase wages.[61] As this trend is exacerbated over time, the trade relations between centre and peripheral countries become increasingly unequal.[62] These critiques were further refined by Paul Krugman, who won a Nobel prize in Economics in 2008 for his trade theory.[63] Immanual Wallerstein, the father of world systems theory, applied the Prebisch-Singh thesis to global value chains.[64]

World systems theory (WST) uses supply chains as a lens through which to understand the global division of labour. WST traces the geographical journey of the production of commodities to illustrate a 'spatial sorting' that has high-wage developed countries keeping the 'core-like', skills-intensive production processes (such as designing, branding, marketing, retailing and 'lending for consumption')[65]

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[60] Caroline Moser 'Informal sector or petty commodity production: Dualism or dependence in urban development' (1978) 6 *World Development* 1041 at 1042.
[61] Cypher op cit note 3 at 206.
[62] Ibid at 207.
[63] See Paul Krugman 'Increasing returns, monopolistic competition, and international trade'(1979) 9(4) *Journal of international Economics* 469.
[64] See Immanual Wallerstein *World Systems Analysis: An Introduction* (2004).
[65] Peter Gibbon & Stefano Ponte *Trading Down: Africa, Value Chains and the Global Economy* (2005) at 12.

and low-wage, developing countries undertaking the 'periphery-like', labour-intensive processes (such as harvesting, mining raw materials and production).[66] WST refers to countries that are characterised by predominantly core-like processes as core countries and countries that are characterised by predominantly periphery-like processes as peripheral countries. WST has also expanded Prebisch's core/periphery analytic to include a third category — the semi-periphery. Semi-peripheral countries are those that dominate the 'core' production processes in relation to some countries, but in relation to other countries undertake the 'peripheral' production processes.[67] WST argues that these states — core, periphery, and semi-periphery — are relational and dynamic. As products are commoditised (partly by improvements in technology and transport), core processes might become peripheral over time.[68] This has been the case with the garment and textile industry.[69] For garment production, the core countries are in Europe, North America and Japan; the semi-peripheral countries are in East Asia (Singapore, Taiwan and South Korea); and the peripheral countries are in Asia, Latin America, and Africa.

Global value chain scholars have developed taxonomies for understanding how and why power is distributed differently in different types of supply chain, and how corporations deploy different strategies to extract rent from factories and workers in developing countries. Gary Gereffi[70] distinguished between two different types of chain — buyer- and producer-driven chains. 'Producer-driven' chains are characteristic of 'capital-and-technology-intensive industries like automobiles, computers, aircraft, and electrical machinery'.[71] 'Buyer-driven chains' are typically labour-intensive, consumer-goods industries, such as those making garments, appliances, toys, and furniture. [72] The 'lead' firm — the firm with the power — is a buyer and typically is a large retailer or a brand-names merchandiser. The lead firms

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[66] Baldwin op cit note 36 at 16.
[67] Wallerstein op cit note 64 at 17.
[68] See ibid at 23 for a detailed discussion of the variables.
[69] Baldwin op cit note 36 at 18.
[70] Gary Gereffi 'The organization of buyer-driven global commodity chains: How US retailers shape overseas production networks' in Gereffi & Miguel (eds) *Commodity Chains and Global Capitalism* (1994) 95 at 122.
[71] Ibid at 97.
[72] Ibid; also see Peter Gibbon & Stefano Ponte 'Global value chains: from governance to governmentality?' (2008) 37(3) *Economy and Society* 365 at 366.

decide who makes what products, by when, and for how much.[73] 'Captive chains' describes chains where the product specifications are relatively simple and easily codified, which means the transaction costs for a buyer to switch to another supplier are very low. Since the barriers to market entry are low, competition among suppliers is fierce, their bargaining power is therefore weak, and they are easily 'captive' to the buyers' contractual demands.[74] Most garment workers are employed in 'fast fashion', which is a captive chain.

Nevertheless, for developing countries, this offshoring and outsourcing of production produced new possibilities for industrial strategy and for job creation.[75] Indeed, 'the clothing industry has played a critical part in the industrialisation process of a wide range of countries, over a period covering two centuries'.[76] Consequently, '[m]any developing countries, especially low-income ones, believe that the [garment] industry can play a similar ''bootstrapping'' role for them today, and on this basis, they promote its development and its links to the global market'.[77]

## 2.4 Global supply chains in the garment sector: an analysis

Many countries, particularly in Asia, were able to produce for global garment value chains as a result of the five-year (1999–2004) Multi-Fibre Agreement (MFA) signed by the USA and the European Union (EU). The USA and the EU used a quota system to limit the quantity of garments the USA's main trading partners in the European Union could export to the USA, and *vice versa*. The objective was to keep jobs in the apparel sector in the USA and in Europe. Its unintended effect, however, was to disperse apparel production to low-wage countries, mainly in Asia. American and European brands sourced from their traditional partners, who were bound by the MFA, and once the threshold was reached, they sourced from other countries that

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[73] John Humphrey & Hubert Schmitz 'How does insertion in global value chains affect upgrading in industrial clusters?' (2002) 36(9) *Regional Studies* 1017 at 1027.
[74] Gereffi et al op cit note 31 at 86.
[75] Baldwin op cit note 33 at 18.
[76] Florence Palpacuer, Peter Gibbon & Lotte Thomsen 'New challenges for developing country suppliers in global clothing chains: A comparative European perspective' (2005) 33(3) *World Development* at 409.
[77] Ibid.

were not bound by the MFA.[78] Indeed, trade rules facilitated the outsourcing of discrete processes to different countries. For example, the WTO Harmonised Tariff Schedule 9802.00.80 allows firms in core countries 'to ship components to low-wage locations for assembly and then ship the final product back … with duty to be paid only on the value-added, effectively reducing tariffs'.[79]

When the MFA ended, it was replaced by the World Trade Organization's Agreement on Textiles and Clothing (ATC). The ATC provided for a ten-year phasing-out of quotas on textiles and apparel, and facilitated the taking-on by peripheral countries of more complex functions than apparel assembly, including 'interpreting designs, sourcing inputs (notably fabric) and coordinating logistics'.[80] Initially, Gereffi and Miguel argued that as suppliers in developing countries were able to move from assembling garments, often in export processing zones to 'full package production', it enabled garment supply chains 'to move rapidly from captive to more complex relational value chains over the span of just a few decades'.[81] For example, Tawainese Nien Hsing (the world's largest jeans producer and sixth-largest denim producer) has factories in Taiwan, Mexico, Nicaragua and Lesotho. Korean Yupoong (the largest cap manufacturer in the world) exports to 60 countries and has factories in the Dominican Republic, Vietnam, and Bangladesh, while the Hong Kong group, Yue Yuen industrial (the biggest branded athletic and casual footwear supplier with 17 per cent of the world market) has several factories in China.[82] These East Asian countries have become semi-peripheral countries in apparel production and their suppliers enjoy more symmetrical power relations with buyers from core countries. Nonetheless, the relationship between buyers (from the EU, USA, and East Asia) and suppliers in the periphery remains a captive one. Indeed, the brands

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[78] See Richard Appelbaum, P. Richard, Edma Bonacich & Katie Quan 'Assessing the impact of the phasing-out of the agreement on textiles and clothing on apparel exports on the least developed and developing countries' (2005) *UC Santa Barbara: Global and International Studies*, available at *https://escholarship.org/uc/item/6z33940z*.

[79] Brad Christenson & Richard Appelbaum 'Global and local subcontracting: space, ethnicity, and the organization of apparel production' (1995) 23(8) *World Development* 1363 at 1366.

[80] Mark Anner 'Squeezing workers' rights in global supply chains: purchasing practices in the Bangladesh garment export sector in comparative perspective' (2020) 27(2) *Review of International Political Economy* 320 at 323.

[81] Gereffi et al op cit note 31 at 91.

[82] Richard P Appelbaum, Edna Bonacich & Katie Quan 'The end of apparel quotas: a faster race to the bottom?' (2005) *UC Santa Barbara: Global Studies* at 7, available at *https://escholarship.org/content/qt0q40t681/qt0q40t681.pdf*, accessed on 4 August 2024.

and retailers from core and semi-peripheral (buying) countries enjoy significantly more bargaining power than their suppliers in the periphery, and this has distributional consequences for the labour force.

Mark Anner[83] notes that the past 20 years has seen increased 'power asymmetries' between buyers from core countries, and suppliers from peripheral countries. Several institutional enablers are at play. First, financialisation and its emphasis on yielding a return on shareholders' investments (both for public mutual funds and private equity investors) means that 'CEOs and managers in lead firms are under constant pressure to grow share values or risk being replaced'.[84] Institutional investors pressure CEOs and senior managers in two key ways. The remuneration of CEOs and senior managers includes a share-incentive component, in terms of which the company facilitates the acquisition of its shares by its management. This has the effect of aligning management's interests with the interests of shareholders. This carrot is supplemented by a stick. Through 'new performance indicators such as the Economic Value Added (EVA) designed by the consulting firm Stern & Stewart',[85] the corporation's performance is tracked by institutional shareholders.[86] The combined effect of carrot and stick is to shift production risks that were historically borne by shareholders to the corporation itself. CEOs and senior managers in turn shift the risk from the corporation to their employees and their suppliers. They do so in what Anner terms 'a price squeeze' and a 'sourcing squeeze'. Put differently, they continuously pressure their suppliers to drop their prices, and they change their procurement strategies.[87] Florence Palpaceur's interview with a sourcing manager at a major UK clothing retailer captures this power dynamic: price reductions are achieved simply by using market power to 'squeeze' suppliers:

> UK retailers mentioned adopting systematic price-reduction policies with suppliers. 'The cut didn't come out

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[83] Anner op cit note 80 at 321 and 324.
[84] Ibid at 324.
[85] Florence Palpacuer 'Bringing the social context back in: governance and wealth distribution in global commodity chains' (2008) 37(3) *Economy and Society* 393 at 395.
[86] See ibid for a detailed discussion on financialisation strategies deployed by institutional investors and firms.
[87] See Peter Gibbon ('At the cutting edge? Financialisation and UK clothing retailers' global sourcing patterns and practices' (2002) 6(3) *Competition & Change* 289 at 308) for an early account of how this played out in the apparel sector.

> of our margin, it came out of squeezing our supply base,' stated a sourcing manager at a major UK retail chain.[88]

A second reason for increased lead-firm bargaining power is attributable to a shift in the structure of the industry at both ends of the chain. Brands and retailers have consolidated through mergers and acquisitions that were made possible by a declining political commitment to enforce competition law.[89] At the same time, China and Vietnam joined the WTO, which led to a significant increase in competition among suppliers.[90] These two shifts have resulted in 'an oligopolistic market structure at the top of the chain and a highly competitive structure at the bottom'.[91] As a result, multinational buyers wield considerable market power. They also wield social and political power, both in relation to their own governments, as well as with governments in supplier countries. Christenson and Appelbaum note that large firms are much more likely to send their production offshore to developing countries than are small firms because they have the *market* power to make demands of suppliers and the *social* power to manipulate government officials in the supplier country:

> In developing nations which have underdeveloped legal infrastructures, connections with government officials are crucial in avoiding problems in dealing with customs, internal transport, licensing, and quota (Ng, 1993; Klopp, 1993; Birnbaum, 1993). Cultivating these relationships comes much easier for large firms than for small firms. According to one executive in Hong Kong: 'If you are a large and famous company, they (relationships) can be built fairly quickly. You can make a few trips to China, have some large fancy banquet for all the officials, and give them gifts. A couple of these banquets and you can

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[88] Palpaceur op cit note 85 at 400.
[89] Anner op cit note 80 at 322.
[90] Ibid at 323.
[91] William Milberg 'Pricing and profits under globalized competition: A post Keynesian perspective on US economic hegemony' (2006) *Schwartz Center for Economic Policy Analysis, New School for Social Research, Working Paper Series* at 13.

> begin to work. If you are a small firm, however, it is more difficult. You have to have personal connections. You may know someone who can introduce you to a particular official. You can then begin to build a relationship with him. Then he can see what he can do to use his connections to try to get quota or access capacity. This takes a lot of time and effort (Cheng, 1993).[92]

Retailers increase their profits by reducing the cost of their garments (the 'price squeeze') and by managing their inventory more efficiently ('the sourcing squeeze'). Buyers continually coerce their suppliers to reduce their prices.[93] At the same time, buyers try to reduce the time that clothing spends on their shelves. They do this in three ways: first, by pressuring suppliers 'to hold stocks on their behalf and to provide inventory-management services';[94] second, by reducing the time between placing the order and delivery by the supplier, since 'the shorter the period from product design to product sale, the better firms are able to judge consumer trends, which reduces the likelihood of unsold inventory and costly markdowns'.[95] Third, they vary the volume of their orders according to real-time market consumer intelligence. Suppliers typically respond in three ways. First, according to the ILO,[96] they fail to comply with statutory minimum wages. Indeed, 50.7 per cent of male employees and 74.0 per cent of female employees do not receive the statutory minimum wage, particularly if employed in the Philippines, India, and Pakistan.

Second, they coerce workers into extending their working hours without overtime pay[97] and they increase each worker's hourly production targets, which

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[92] Christenson & Appelbaum op cit note 78 at 1366.
[93] See Anner op cit note 80 at 323.
[94] Palpacuer op cit note 85 at 399. Also see Mark Anner, Jennifer Bair & Jeremy Blasi 'Toward joint liability in global supply chains: Addressing the root causes of labor violations in international subcontracting networks' (2013) 35(1) *Comparative Labor Law & Policy Journal* 1 at 8.
[95] Anner op cit note 80 at 321.
[96] International Labour Organization 'Asia-Pacific Garment and Footwear Sector Research Note' (August 2016, issue 5) at 1.
[97] Rajini Vaidyanathan 'Indian factory workers supplying major brands allege routine exploitation' *BBC News* 17 November 2020, available at *https://www.bbc.com/news/world-asia-54960346*, accessed on 26 December 2020.

results in occupational health and safety problems, and severe psychological stress.[98] They often employ migrants, including inter-state migrants whose migrancy, caste and class status renders their work precarious and who are thus less likely to unionise.[99] Third, they restructure their employment relations to maintain a flexible workforce and to transfer wage as well as non-wage costs to workers. Fenwick and co-authors[100] provide a typology of non-standard work that explains suppliers' flexibilisation strategies. Suppliers (a) adjust the *time period* of work from permanent hours to task-based work, for which they can pay by the piece, or from full-time to part-time work; (b) change the *place of work* so that the work does not take place on their premises, but is outsourced either directly to homeworkers, or to informal small or micro-enterprises;[101] and (c) contract with workers through an intermediary.

This section has outlined the degree to which the lead firms, which are located in developed countries, determine the terms and conditions of work for workers in global garment supply chains. The concluding part of this chapter identifies the challenges of bargaining with these lead firms.

## 2.5 What are the implications for supply-chain collective bargaining?

This chapter has shown that, in order for workers to change their conditions of work, they need to be able to bargain collectively, both with their employers and with lead firms — that is, the brands and retailers that purchase the garments that they make. This is so because although these lead firms might not be their legal employers, economically speaking, they are the real employers.

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[98] Fair Wear Foundation 'India country study 2019' (2019) at 5, available at *https://api.fairwear.org/wp-content/uploads/2019/06/CS-INDIA-2019.pdf*, accessed on 26 December 2020.
[99] Ibid at 4.
[100] Colin Fenwick, John Howe, Shelley D Marshall & Ingrid Landau 'Labour and labour-related laws in micro and small enterprises: innovative regulatory approaches' (2007) *SEED Working Paper No 81, University of Melbourne Legal Studies Research Paper No 322* at 2. Also see International Labour Organization *Non-Standard Employment Around the World: Understanding Challenges, Shaping Prospects* (2016) at 8, available at *https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_534326.pdf*, accessed on 26 December 2020, also available at *http://ssrn.com/abstract=1123305*, accessed on 26 December 2020.
[101] Ibid.

The neoliberal hegemony and the labour flexibility doctrine provided an initial impetus for lead firms to outsource and send production offshore to developing countries (with low wages, weakly enforced labour laws and poorly developed institutions of collective bargaining), while demand from developing countries competing with one another for foreign investment has meant that brands and retailers are able to exercise their considerable political and market power to decide unilaterally on contractual terms with their suppliers. Chapter one alluded to attempts to regulate lead firms through private regulation (labour codes) and through public law based on a human rights framework. These initiatives have as yet failed to redistribute power or to improve working conditions for supply chain workers.[102]

The question is whether collective bargaining that includes lead firms is possible, both conceptually and practically. In relation to lead firms, supply chain workers do not enjoy any structural power. If they withhold their labour, lead firms can easily change suppliers. They may enjoy associational power if they are unionised, but since they do not have a contractual relationship with the lead firm, even if they are unionised, the lead firm is not under any pressure to come to the bargaining table. Therefore, a first hurdle would be to identify sources of countervailing power (other than traditional forms of structural and associational power) that would pressure lead firms to bargain with workers. A second hurdle would be to determine how to enforce a transnational collective agreement in the absence of a global labour court.

The literature review, in chapter four, is relevant in this regard where the work of Manoj Dias Abey is discussed. Dias Abey has argued that agreements concluded with lead firms — in the case of the garment sector, the Bangladesh Accord — are forms of 'movement-led supply chain collective bargaining'. Instead of constructing a top-down framework, he deploys a case-study method to reflect on how labour law

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[102] Although see Business and Human Rights Resource Centre ('The German Supply Chain Act 1 year on: Civil society networks see initial positive impacts' *Business and Human Rights Resource Centre Article (* 27 December 2023), available at https://www.business-humanrights.org/en/latest-news/cso-press-release-german-supply-chain-act-one-year/, accessed on 6 February 2024) that expresses some optimism in respect of the German supply chain law.

might approach transnational supply chain collective bargaining. Chapters five and six expand on his analysis.

The political economy lens provided in this chapter allows for a robust analysis in chapters five and seven of three collective agreements in the garment sector with a view to contributing to the nascent debate.

## Chapter 3

## The political economy of the informal sector

*More than 60 per cent of the world's employed population earn their livelihoods in the informal economy. Informality exists in all countries regardless of the level of socio-economic development, although it is more prevalent in developing countries. The 2 billion women and men who make their living in the informal economy are deprived of decent working conditions.*[1]

*Viewed through the prism of informality we can better see how the legal rules that constitute, and re-constitute, the world of work might be ordered and chosen, how they are intended to function in the larger picture of the economy as a whole.*[2]

### 3.1 Introduction

In most regions of the developing world, modern industrial jobs have never been the norm.[3] Indeed, the International Labour Organization (ILO) estimates that 61 per cent of the global workforce, excluding China, is in informal employment.[4] Martha Chen captures the range of economic activities that comprise informal employment:

> Street vendors in Mexico City; push-cart vendors in New York city; rickshaw pullers in Calcutta; jitney drivers in Manila; garbage collectors in Bogotá; and roadside barbers in Durban …. Other informal workers are engaged in small shops and workshops that repair bicycles and motorcycles; recycle scrap metal; make furniture and metal parts; tan

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[1] International Labour Organization *Women and Men in the Informal Economy: A Statistical Picture* 3ed (2018), available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_626831.pdf at page v, accessed on 3 November 2018.
[2] Kerry Rittich 'Historicising labour law in development: labour market formalisation through the lens of British colonial administration' in Diamond Ashiagbor (ed) *Re-Imagining Labour Law for Development: Informal Work in the Global North and South* (2019) at 24.
[3] Joann Vanek, Martha Alter Chen, Françoise Carré, James Heintz & Ralf Hussmanns 'Statistics on the informal economy: definitions, regional estimates & challenges' (April 2014) *WIEGO Working Paper (Statistics) No 2* at 3, available at *http://wiego.org/informal-economy/statistical-picture*, accessed on 7 December 2020.
[4] ILO op cit note 1 at 13.

> leather and stitch shoes; weave, dye, and print cloth; polish diamonds and other gems; make and embroider garments; sort and sell cloth, paper, and metal waste; and more. The least visible informal workers, the majority of them women, work from their homes. Home-based workers … include garment workers in Toronto; embroiderers on the island of Madeira; shoemakers in Madrid; and assemblers of electronic parts in Leeds. Other categories of work that tend to be informal in both developed and developing countries include casual workers in restaurants and hotels; subcontracted janitors and security guards; day labourers in construction and agriculture; piece-rate workers in sweatshops; and temporary office helpers or off-site data processors.[5]

These statistics and this narrative disrupt the idea that informal work is a recent phenomenon, and affirm that non-standard work (the term used by the ILO and labour law scholars to describe employment that is temporary, part-time/on-call, a multi-party employment relationship, or disguised employment/dependent self-employment)[6] describes the dominant forms of informal work globally. Informal work is growing in response to both 'informalisation from above' through outsourcing and sub-contracting, and 'informalisation from below' through poor, under- or unemployed people engaging in self-employed livelihood strategies.[7]

Of the global workforce, a significant 44 per cent — almost half — is informal and self-employed.[8] The vast majority are one-person, own-account

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[5] Martha Alter Chen 'The informal economy: definitions, theories and challenges' (2012) *WIEGO Working Paper* No 1 at 1, available at *http://www.wiego.org/sites/wiego.org/files/publications/files/Chen_WIEGO_WP1.pdf,* accessed on 3 December 2018.

[6] International Labour Organization Non-Standard Employment around the World: Understanding Challenges, Shaping Prospects (2016) at 8.

[7] The terms are borrowed from Jan Theron 'Informalization from above, informalization from below: The options for organization' (2010) 11 (2&3) *African Studies Quarterly* 87–105.

[8] Women in Informal Employment: Globalizing and Organizing 'Counting the world's informal workers: a global snapshot' (2019), available at *https://www.wiego.org/sites/default/files/resources/files/WIEGO-Global-Statistics-Snapshot-Pamphlet-English-2019.pdf*, accessed on 30 July 2023.

workers such as street vendors, taxi drivers, home-based workers, fishermen and smallholder-agricultural workers. This thesis uses 'informal sector' and 'informal self-employed workers' interchangeably. [9] Street vendors (both hawkers who move around and those vending from stalls and tables outside of markets) are the most visible informal workers because they operate in public spaces such as streets, pavements, public transportation hubs and informal markets, and they are ubiquitous in both developed and developing economies. Indeed, street vendors comprise anywhere from 12 to 24 per cent of total urban informal employment in the cities of Africa, Asia and Latin American.[10] In sub-Saharan Africa, where 89 per cent of the workforce is in informal employment, [11] almost one in two people (43 per cent) of the 89 per cent is a street vendor.[12]

This thesis argues that in the global South, street vendors and other informal self-employed workers constitute the working class, and yet, they are not recognised as workers; their collective organisations — unions, associations, and cooperatives — are not recognised as trade unions; and they are marginal in labour law scholarship. Street vendors need property rights in the form of access to public space to trade, infrastructure (such as storage space, running water and ablution facilities), occupational health and safety, and social protection (such as health care, pensions and social security, including maternity leave and disability insurance). They want to be able to bargain collectively with the entity that controls their terms and conditions of work — the municipal arm of the state.

For labour law scholars, it is hard to imagine that street vendors could be the subjects of labour law. This is so for three reasons. First, they do not have a contractual relationship with an entity that controls their conditions of work. Second, their claims are similar to those of micro-enterprises, and therefore, or so the

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[9] The term 'informal sector' refers to several groups: people who employ others in their informal, unregistered businesses (about three per cent of the informal sector); people who are paid employees in informal enterprises; one-person own-account workers; unpaid family workers; and members of informal producers' cooperatives.

[10] Sally Roever Informal Economy Monitoring Study Sector Report: Street Vendors (2014) at 1, available at https://www.wiego.org/sites/default/files/publications/files/IEMS-Sector-Full-Report-Street-Vendors.pdf, accessed on 5 August 2023.

[11] WIEGO op cit note 8.

[12] Sally Roever & Caroline Skinner 'Street vendors and cities' (2016) 28(2) *Environment and Urbanization* 359 at 360.

argument goes, they should engage with the state as micro-enterprises. Third, even if they self-identify as workers, they should rely on human rights law, or advocate for progressive zoning and other by-laws rather than direct their claims on the state through labour law.[13] These views reflect doubts as to whether labour law can enlarge its scope conceptually to include such workers. They also reflect the ubiquitous perspective that informal livelihoods are the subject of development rather than of labour law. This is not surprising, since micro-enterprise development is indeed a preoccupation of development orthodoxy.

This chapter provides a lens on the political economy of street vending, so as to provide context for the case studies discussed in chapter six, which explores the normative and practical shifts required of the institution of collective bargaining for informal self-employed workers such as street vendors to be able to bargain collectively; the political economy of the informal economy is also relevant for chapter seven, which explores the implications for labour law. Part 3.2 provides a historical overview of debates on the informal economy through the lens of development discourse and policy, and shows how (at different historical moments) own-account workers have variously been viewed as labour and as micro-enterprises. Part 3.3 focuses on the International Labour Conference as a global rule-making forum that has enabled a network of organisations of workers in informal employment to contest the development discourse that own-account workers are micro-enterprises, and to assert their identify as labour. It discusses their strategies to influence ILO *Recommendation No 204 concerning the Transition from the Informal to the Formal Economy*, which recognises self-employed workers' right to freedom of association and collective bargaining. Part 3.4 focuses on the workplace of street vendors, namely urban public space. It shows that streets are sites of class struggle in many cities of the global South. Part 3.5 concludes with a reflection on the implications for collective action and for collective bargaining.

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[13] These views were expressed at the Labour Law Research Network Conference held in Warsaw, Poland 25–27 June 2023.

## 3.2 A historical overview of debates on the informal economy

Fifty years ago, there was no term to describe the economic activities described by Chen in the introduction. Both orthodox neoclassical and heterodox Marxist economists simply distinguished between the 'traditional economy' (a euphemism for a peasant, subsistence micro-economy) that produced non-waged employment, and the 'modern' capitalist economy that produced waged employment.[14] The term 'informal sector' was used for the first time in 1971 by British anthropologist Keith Hart to describe self-employed Ghanaians' economic activities. The Ghanaians he studied were either formally employed (defined as permanent, regular employment for fixed remuneration),[15] but earning so little that they were under-employed, or they had no access to wage-employment and made ends meet through 'self-employment'.[16]

Hart's seminal paper (based on five years spent in Ghana) challenged the prevailing theory that people who were either under- or unemployed constituted a passive 'reserve army of labour' waiting to be employed by capitalist enterprises. He saw the informal sector as an intrinsic part of the 'urban economy',[17] which comprised both formal and informal enterprises. And he noted multiple linkages between the formal and the informal: informal retailers bought their goods from formal businesses (known in the economics literature as 'backward linkages'); consumers used their wages earned working for formal enterprises to purchase goods from informal enterprises; and some informal enterprises sold their goods and services to the formal sector.[18] He noted that the informal sector played an important function in providing the city with 'essential services' that were otherwise unaffordable for poorer consumers.[19]

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[14] Caroline ON Moser 'Informal sector or petty commodity production: Dualism or dependence in urban development?' (1978) 6 *World Development* 1041 at 1042.
[15] Keith Hart 'Informal income opportunities and urban employment in Ghana' (1973) 11(1) *Journal of Modern African Studies* 61 at 68.
[16] Ibid.
[17] Ibid at 86.
[18] Ibid at 85
[19] Ibid at 68

Hart found that individuals often engaged in more than one activity, and often engaged in both formal and informal employment.[20] For example, a watchman for a formal enterprise (earning less than from informal activities, but providing reliable, stable income)[21] would at the same time operate an informal gin bar, informal restaurant, hairdressing business or repair radios. At other times, informal activities acted as a temporary 'buffer' between formal jobs.[22] Thus he showed that maintaining a bright line between the formal and informal sectors is both empirically and conceptually 'absurd':

> The difficulty of placing many individuals unequivocally in either formal or informal sectors (owing to the widespread incidence and multiple income sources) … makes it empirically and theoretically absurd to maintain the notion of a significant status transition from unemployment or under-employment to full-time employment through the mere acquisition of a job in the organised labour force.[23]

After Hart's 'discovery', the ILO commissioned three country missions on the informal sector. Hart co-authored one of these reports. According to Caroline Moser, three insights from these missions shaped the ILO's position on the informal sector. First, the informal sector provides a solution to the problem of unemployment, which, by the early 1970s, it was clear that industrialisation was not going to solve. Second, the informal sector is productive and has growth capacity (which could be improved through procurement linkages between the formal and informal sectors). Third, compared to the formal sector, it suffers from structural deficits, including a lack of access to markets, and 'discrimination' and 'lack of support' on the part of the state.[24]

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[20] Ibid at 69 and 78.
[21] Ibid at 73.
[22] Ibid at 81.
[23] Ibid at 83.
[24] Moser op cit note 14 at 1045.

Meanwhile, the informal sector had become a subject for the World Bank and the IMF and for development economists. As noted in chapter two, until the 1970s, 'modernisation theory' dominated development economics.

### *3.2.1 Development theory and the informal economy: the 1970s*

Nobel Prize winner Arthur Lewis was an adherent of the modernisation theory of development that was discussed in the previous chapter. Writing about the informal ('traditional') sector, he argued that it constituted a comparative advantage for developing countries because absorbing it into formal production would be cheap relative to labour in industrialised countries.[25] He therefore advocated for labour-intensive industrialisation.[26] Thus, like the Marxist economists, modernisation theorists saw informal self-employed workers as 'a reserve army of labour' for the formal sector. The widely held assumption among modernisation economists was that economic growth, driven by the state, would lead to employment, and that the traditional sector would disappear.[27]

Development economists from the structural and institutionalist schools challenged what was then development orthodoxy. Just as Prebisch and Singer had problematised trade relations between the centre and the periphery as not being neutral and not benefiting all countries, the structuralists problematised Hart's idea that the linkages between the formal sector (the core) and the informal sector (the periphery) are benign.[28] Drawing on studies on the informal sector in Calcutta, Ghana and Dakar, Moser argued that the relationship between the informal and formal sectors in the colonies is 'a relationship of exploitation'.[29] The informal sector, she argued, 'performs important functions within the capitalist mode of

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[25] See W Arthur Lewis 'Economic development with unlimited supplies of labour' (May 1954) 22 *The Manchester School* 139.
[26] Ibid. Also see J Fei & G Ranis *Development of the Labour Surplus Economy* (1964); and John R Harris & Michael P Todaro 'Migration, unemployment and development: a two-sector analysis' (1970) 60 *American Economic Review* 126–44.
[27] Moser op cit note 14 at 1042 and 1046. Also see Colin Williams & Mark Lansky 'Informal employment in developed and developing economies: Perspectives and policy responses' (2013) 152(3–4) *International Labour Review* 355 at 362.
[28] See Moser op cit 14. Also see Manuel Castells & Alejandro Portes 'World underneath: The origins, dynamics, and effects of the informal economy' in Alejandro Portes, Manuel Castells & Lauren A Benton (eds) *The Informal Economy: Studies in Advanced and Less Developed Countries* (1989).
[29] Moser op cit note 14 at 1058.

production'.[30] First, since the informal sector provides goods and services to low income populations at lower prices than what they could be imported or produced for by the formal sector, it depresses wages in the formal sector. Not only was it not profitable for formal (neocolonial) enterprises to provide goods and services to low-income populations, but it also meant that if goods and services were available at lower prices than in the formal sector, the formal sector could pay workers lower wages to meet their consumption needs.[31] Second, there were structural limitations to informal sector growth because informal enterprises were denied access to markets, raw materials and capital. Weeks[32] explained these structural limitations by analysing the informal and formal sectors' respective relations with the state. Formal enterprises were recognised by the state as legitimate market actors, which contributed to economic growth and therefore enjoyed access to benefits (such as subsidies), resources (such as infrastructure) and favourable regulations. Despite the informal sector's socio-economic contribution — producing consumer goods for low-income groups that were otherwise unaffordable; producing 'indigenous goods' such as traditional craft; and often being more productive (if productivity is measured as the ratio between capital and labour, and the output produced) than their formal sector counterparts[33] — the state did not regard the informal sector as legitimate or productive. This view still prevails.

Leys, an institutionalist development economist, critiqued the ILO reports for presuming a socio-democratic framework and a state that represents the interests of the whole population, when in reality, in the ex-colonies, the middle class enjoyed access to state power that poor people did not have, and foreign capital and the elite often colluded.[34] He was also critical of the ILO for ignoring the distributive implications of legal institutions, in particular property law, which preserved the

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[30] Ibid.
[31] Ibid at 1058 and 1061. Also see Kate Meagher 'Unlocking the informal economy: A literature review on linkages between formal and informal economies in developing countries' (April 2013) *WIEGO Working Paper No 27* at 3.
[32] Moser op cit note 14 at 1054.
[33] Ibid at 1055.
[34] Colin Leys 'Interpreting African underdevelopment: Reflections on the ILO Report on Employment, Incomes and Equality in Kenya' (1973) 72 *African Affairs* 419 in Moser op cit note 14 at 1046.

status quo. This thesis argues that labour law scholarship perpetuates these blind spots.

### *3.2.2 Neo-liberal development and the informal economy (1980s–2000)*

The mid-1980s was characterised by a loss of faith in the state as the driver of development.[35] The laissez-faire, neoclassical economics of the 1940s was revived, except that this time it was exported to developing countries.[36] Development orthodoxy now focused on macroeconomic reform with the objective of creating markets 'free' of state interference, based on the conviction that perfectly competitive markets are best at allocating scarce resources, and that foreign direct investment — capital — would drive industrialisation and innovation. Labour economist James Heintz describes this framework as follows:

> The … policy framework stress[ed] macroeconomic stability, freer markets, a smaller role for the public sector and uninhibited international flows of capital and goods, but not extending the same privilege to labour.[37]

For more than a decade, the World Bank offered developing countries loans that were conditional on their implementing its 'structural adjustment' paradigm: a macroeconomic reform package that included trade liberalisation, de-regulation, privatisation, and a reduction of subsidies and social expenditure.[38] By the 1990s, it was clear, even to World Bank insiders, that structural adjustment had not only failed to realise economic growth, but the dismantling of public institutions through the reduction of social spending (including on health and education) had resulted in

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[35] David Kennedy 'The "rule of law", political choices, and development common sense' in David M Trubek & Alvaro Santos (eds) *The New Law and Economic Development* (2006) at 129-131; also see Bob Hepple 'Factors influencing the making and transformation of labour law in Europe' in Guy Davidov & Brian Langille (eds) *The Idea of Labour Law* (2011) at 38.
[36] Kennedy op cit note 35 at 129.
[37] James Heintz 'Globalization, economic policy and employment: Poverty and gender implications' (2006) *ILO Employment Strategy Papers No 3* at 69.
[38] See (Chantal Thomas 'Law and neoclassical economic development in theory and practice: Toward an institutionalist critique of institutionalism' (2011) 96 *Cornell Law Review* at 993) for a discussion on the reason for each of these components of structural adjustment.

greater poverty, which was felt disproportionately by women.[39] In the mid 1990s, two key modifications were made to structural adjustment. First, it was recognised that some public spending (notably on primary education, primary health care and residual safety nets) contributed to economic development.[40] Second, and more significantly, this moment marked a shift in the development discourse to a focus on institutions, and specifically law. World Bank loans, as well as bilateral aid and trade and investment treaties, now required governments to undertake institutional reform as part of 'good governance' and the 'rule of law'.[41] 'Good governance' refers to a set of 'good institutions' that includes democracy, an independent judiciary, corporate governance, and financial institutions.[42] The list of good institutions sometimes also includes good public finance systems, social welfare systems, and labour rights.[43]

The international development community's explicit incorporation of law and legal institutions into the development paradigm naturally influenced the discourse on the informal sector. Informality was no longer defined in purely economic terms — as residual labour — but as 'income generating activities that are unregulated by the state'.[44] The informal economy was defined in legal terms: as extra-legal, as existing outside of the law. Formalisation of the informal therefore meant bringing the informal within the scope of the law. At this key moment, Peruvian economist Hernando de Soto published his first book, *The Other Path: The Invisible Revolution in the Third World*,[45] which depicted informal workers as

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[39] See Joseph Stiglitz *Globalisation and Its Discontents* (2002); also see Ha-Joon Chang 'Institutions and economic development: theory, policy and history' (2011) 7(4) *Journal of Institutional Economics* 473 at 483.

[40] As Amartya Sen points out in *Development as Freedom* (1999), the social is incorporated into the development agenda, not on its own terms because the state has a responsibility to ensure citizens are healthy or educated, but on instrumentalist grounds.

[41] See Chang op cit note 39 at 474. Chang (at 474) adds that 'in addition to loan/aid conditionalities and international rules, developing countries have been increasingly subject to more informal pressures to adopt these Global Standard Institutions (GSIs). Not only the World Bank and the IMF, but also the OECD (Organization for Economic Cooperation and Development), the G7, the World Economic Forum, and many other think-tanks and policy forums that are dominated by the rich countries have promoted the view that developing countries should adopt GSIs'.

[42] Ha-Joon Chang *Kicking Away the Ladder: Development Strategy in Historical Perspective* (2007) at 69.

[43] Ibid at 70.

[44] Meagher op cit note 31 at 2.

[45] Hernando de Soto *The Other Path: The Invisible Revolution in the Third World* (trans June Abbott) (1989).

entrepreneurs who had failed to formalise their businesses (that is, register and pay tax) because the time and effort required to comply with legislation made it more cost effective to remain informal. In the words of Frank Upham:

> The new development model contends that sustainable growth is impossible without the existence of the rule of law: a set of uniformly enforced, established legal regimes that clearly lays out the rules of the game [46] … such reforms are essential to establishing stability and norms that encourage investment and sustainable economic growth in the developing world.[47]

De Soto's work provided the impetus for the World Bank's deregulation programmes to reduce 'red tape', which meant 'leaving regulation to ordinary market rules, to the private law of property and contract'.[48] As noted by labour law scholars, Trebilcock and Blackett, under the guise of the rule of law, transnational financial organisations have pressured developing countries into deregulating their product and labour markets for multinational enterprises, ostensibly because '[d]eregulation of the labour market would … help to restore competitiveness in the short run by reducing wage costs, while contributing over the longer term to productivity improvements';[49] and in the name of free trade, they have constructed domestic trade, investment, and intellectual property legal regimes that favour (global) capital over domestic labour.[50]

It is important to note that the World Bank's institutional design is based on new institutional economics (NIE), which differs fundamentally from the 'old' political economy institutionalism[51] in two important ways. First, NIE does not challenge the neoclassical view of the market as natural. Instead, NIE has provided

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[46] Frank Upham 'Mythmaking in the rule of law orthodoxy' (2002) *Carnegie Working Paper Rule of Law Series No 30* at 1.
[47] Ibid at 7.
[48] Hepple op cit note 35 at 33.
[49] Adelle Blackett & Anne Trebilcock 'Conceptualizing transnational labour law' (2017) in Blackett & Trebilcock (eds) *Research Handbook on Transnational Labour Law* (2015) at 5.
[50] Zoe Adams & Simon Deakin 'Structural adjustment, economic governance and social policy in a regional context: The case of the Eurozone crisis' in Blackett & Trebilcock (eds) op cit note 49.
[51] See Thomas op cit note 38 at 968.

neoclassical economics with an analytical toolkit for understanding why markets fail, and how market failure might be addressed through institutional reform. By contrast, old political economy institutionalists contest the idea that the market is natural. They argue that there is no such thing as a 'free' market that exists apart from the state. Indeed, they argue that markets are constituted by a range of institutions, mostly notably by law (including private law), which is enforced by the state. Second, NIE maintains the individualist analytic of neoclassical economics, whereas old political economy institutionalism is concerned with groups — with how particular interest groups or classes create institutions that distribute, reproduce or reinforce power of one group over another.

The takeaways from this discussion on development and the informal sector are as follows. Until the 1970s, informal livelihood activities were recognised by neither orthodox modernisation theory nor heterodox Marxist theory, other than as a 'reserve army of labour' waiting to be absorbed by capitalist development. From the early 1980s, when it was clear that the unemployed would not be absorbed by industrialisation, they were recast as 'entrepreneurs' prevented from formalising owing to *institutional barriers* (laws and regulations) or a *lack of institutions* (including a Western individualised private property law system). This methodological individualism that is characteristic of neoclassical economics reduces structural inequalities between interest groups and classes to individual choices. When, in the 1990s, the weaknesses of the neoclassical economics model became widely acknowledged[52] and explanations of 'market failure' could no longer adequately explain why real people did not behave in accordance with their models, NIE came to the rescue. It showed that institutions can either obstruct rational self-enlightened choices (in this case, informal entrepreneurs' decisions not to register their business) or incentivise decisions (for example, the institution of private property can motivate decisions to formalise) — or so the theory went.

Structuralists and "old" institutionalists see individuals and countries as part of classes, population groups and systems. Both schools bring power into the analysis. In the context of this discussion, structuralists showed that the institutions

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[52] See Joseph Stiglitz op cit note 39.

of the free-trade regime (including GATT and the WTO) legitimised, reinforced and reproduced the inequality in trading relations between industrialised Western countries (the core) and developing countries (the periphery). These same arguments were applied to explain relations between the formal and the informal economy. Structuralists argued that capitalist development relied on the informal sector to suppress wages in the formal sector because it provides cheaper goods and services. They also showed that non-recognition of the informal sector by the state perpetuated their structural exclusion from markets. These critiques of development orthodoxy unfortunately had little meaningful influence on development theory or practice.

In the meantime, the beginnings of another discourse were emerging within the ILO. Scholars writing on an emerging transnational labour law note the multiple roles that the ILO plays: it creates new institutional norms; it plays a regulatory role (albeit weak) in relation to member states; but most importantly, it creates dialogue. It is because of this last role that 'the ILO holds significant potential to foster global, counter-hegemonic transformation'.[53] The next section explores the significance of this critical role in relation to the informal sector.

### 3.3 The International Labour Conference: a forum to contest the neoliberal frame

Writing about transnational labour law, Trebilcock and Blackett state that the 'ILO itself [should be seen] as both a contributor to the construction of dialogic spaces, and a space for concertation and experimentation'.[54] This is so because the ILO has a tripartite structure, which is reflected in its tripartite governance structure, but also in its standard-setting processes. Unique among the United Nations institutions, not only member states, but also organised business and labour from member states participate in negotiating Conventions — that is, trade unions engage in making international law. Every year, the three constituencies hold an International Labour Conference (ILC), lasting up to two weeks, on a theme related to work. The tripartite governing body of the ILO decides whether the ILC will be a 'general discussion'

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[53] Blackett & Trebilcock op cit note 49 at 18.
[54] Ibid at 9.

that results in a set of 'conclusions' (reflecting the consensus reached between the three constituencies and which may form the basis for future negotiations) or a 'standard-setting discussion' (with the aim of negotiating a convention and/or a 'recommendation'). A convention is binding when ratified by a member state, whereas a recommendation is non-binding and usually contains practical measures for translating a convention into national law. As a secretariat, the ILO provides research, facilitates pre-conference meetings, and drafts the text that forms the basis for negotiation. Women in Informal Employment: Globalizing and Organizing (WIEGO), a global network, has used the space created by the ILO, and the ILC in particular, to bring workers in informal employment into both general and standard-setting discussions.

Since it was founded in 1996, WIEGO's mission has been to make workers in informal employment *visible* in statistics, most especially in labour force surveys; for their organisations to have *voice* at national and global rule-making processes about work; and for their work to be recognised as legitimate and productive and which should enjoy labour rights and protections.[55] WIEGO has aimed to influence global debates on informal work, and the ILC has been a key forum, including for WIEGO to challenge the development narrative that self-employed informal workers are entrepreneurs.[56] WIEGO has succeeded in securing the participation of informal worker organisations in the Worker Group — a significant win both politically and conceptually. Like the global union federations (GUFs), WIEGO enjoys observer status at the ILC. Some of its members are registered as trade unions and are included in national trade union centres. Those included in the national trade union delegation to the ILC have full speaking rights. Until informal workers' global federations—StreetNet, the International Domestic Worker Federation and HomeNet International—gained their own observer status in 2023, they and some of their members participated as part of the WIEGO delegation and could speak only if invited to do so by the Worker representative.

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[55] See Women in Informal Employment: Globalizing and Organizing website *www.wiego.org*.
[56] See Florence Palpacuer 'Bringing the social context back in: governance and wealth distribution in Global Commodity Chains' (2008) 37(3) *Economy and Society* 393 at 404 on WIEGO's contribution.

The ILO's 2002 International Labour Conference was a pivotal moment. It adopted a *Resolution Concerning Decent Work and the Informal Economy*, which recognises informal workers as labour rather than as owners of micro-enterprises and it states that workers in informal employment have a right to decent work. The ILO's 'four pillars' of its decent work agenda are: the opportunity to work; rights (in particular, the right to freedom of association and the right to organise); social protection (in particular, protection against all forms of loss of income, including health, unemployment, and disability insurance); and voice, or effective representation.[57]

In 2014, the Employer Group called for a general discussion on 'formalising' the informal sector. The Employer Group argued that the informal sector enjoyed an unfair competitive advantage, since it was exempt from regulatory and tax compliance. Employers wanted micro-enterprises to 'formalise' by being brought into the ambit of corporate law. Thirty-two representatives of informal worker organisations from around the globe participated in the Worker Group negotiations.[58] They argued that the vast majority of people in the informal sector earned below the minimum tax threshold and advocated for formalisation to be defined as legal and social protection for workers. The Worker Group triumphed and *Recommendation Concerning the Transition from the Informal to the Formal Economy, 2015 (No.204)* (Recommendation 204) recognises public space as a workplace, and the rights of informal own-account/self-employed workers to social protection and to freedom of association and collective bargaining.[59]

Addressed to member states, Chapter III of Recommendation 204 (on legal and policy frameworks) includes three significant provisions. First, makes clear that the 'integrated policy framework' should encompass 'all levels of government'.[60]

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[57] See International Labour Organization 'Decent work and the informal economy' (2002) *International Labour Conference, 90th Session*, available at https://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/rep-vi.pdf, accessed on 3 January 2019.
[58] See Women in Informal Employment: Globalizing and Organizing 'International Labour Conference 2015: Securing R204 at the ILC 2015' (undated), available at *https://www.wiego.org/content/international-labour-conference-2015*.
[59] Ibid.
[60] *Recommendation concerning the Transition from the Informal to the Formal Economy, 2015 (No.204)* at para 9.

This is significant because it is the first ILO instrument that applies not only to national government, but also to local government, the importance of which is discussed in part 3.4. Second, it states that this policy framework must include 'respect for and promotion of the fundamental principles and rights at work',[61] which suggests that the fundamental conventions also apply to self-employed workers. Indeed, the annex includes the list of 'fundamental conventions' that all member states of the ILO are required to translate into national law, irrespective whether they have ratified these Conventions. Among these conventions are the Freedom of Association and the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); and Collective Bargaining Convention, 1981 (no. 154). Third, Recommendation 204 states that member states should provide statutory protection of these rights. Paragraph eleven envisages a statutory framework that realises rights to freedom of association (and associated organisational rights) and to collective bargaining for all informal economy workers, including self-employed workers. This protection of enabling rights is reiterated in chapter V on 'rights and social protection', which states that decent work 'for those in the informal economy' requires member states to adopt 'measures' that realise 'freedom of association and the right to effective bargaining'.[62]

The recognition in Recommendation 204 that public space is a workplace was critical for informal self-employed workers. The entity that controls who can use public space, for what purpose, and the conditions for access and use, is the municipal arm of the state — the local government. The next section discusses the politics of urban public space and the role that the local authority typically plays in distributing rights among the different classes. Chapter six discusses how a right to collective bargaining with local authorities has begun to be realised by street vendors and their organisations.

### 3.4 Public space as workplace and a site of class struggle

Urban scholar Saskia Sassen theorises cities as important sites to understand the strategies and trajectories of global capitalism:

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[61] Ibid at para 11(d).
[62] Ibid at para 16 (a).

> The analysis is not about cities *per se*, it is about novel types of imperial geographies. Global firms and markets do not want to operate only in a few cities of the Global North. They want to operate in multiple cities worldwide. This generates what I described earlier … as a systemic demand for a growing number of global cities.[63]

According to Sassen, some cities in the global South — usually capital cities — are earmarked for capitalist insertion and expansion. Vanessa Watson argues that globally, but increasingly also in Africa, capitalist 'territorial insertions into cities'[64] takes two forms. First, satellite cities, financed and managed by global property investors, are constructed contiguous to the existing city. Poor people who live and work on the edges of the city are evicted from their homes and workplaces and are relocated to make space for the newly constructed satellite city.[65] These global developers make demands on the state for 'world class' infrastructure and for decision-making that bypasses the usual urban-planning processes.[66] Second, many governments are undertaking urban-renewal plans that cater to, and expand, the middle- and upper-income market.[67] These plans are often financed by the World Bank and begin with campaigns to clean up the public space. For example, in 2017, Thailand's Bangkok Metropolitan Administration launched a 'return the pavement to the public' campaign, which was translated into banning hawking, revoking street vendors' trading permits, and forcibly removing and arresting resistant vendors from 21 districts in the city.[68] It is estimated that only 10 000 vendors out of approximately 240 000 street vendors did not have their permits revoked and consequently are now trading legally.[69] The administration was apparently motivated

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[63] Saskia Sassen 'Global inter-city networks and commodity chains: any intersections?' (2010) 10(1) *Global Networks* 150 at 159.
[64] Ibid at 160.
[65] Vanessa Watson 'African urban fantasies: dreams or nightmares?' (2013) 26(1) *Environment & Urbanization* 215 at 216.
[66] Ibid.
[67] Ibid at 217.
[68] Adam Bemma 'Thai street food sellers battle Bangkok's clearance campaign' (21 October 2018), available at *https://www.aljazeera.com/features/2018/10/21/thai-street-food-sellers-battle-bangkoks-clearance-campaign*, accessed on 27 March 2022.
[69] Narumol Nirathron & Gisèle Yasmeen 'Street vending management in Bangkok: the need to adapt to a changing environment' (2019) 4(1) *The Journal of Public Space* 15 at 21.

by a desire to 'maintain order and hygiene' as '[m]any in the administration view[ed] street food as an eyesore in its effort to modernize the megacity'.[70]

Similarly, in October 2021 in Ghana, President Akufo-Addo launched the World-Bank-funded campaign, 'Let's make Accra work again'. It gained huge public support as middle- and upper-class residents bought into the idea of Accra becoming 'the cleanest city in Africa'. The campaign is managed by the Greater Accra Regional Coordinating Council (GARCC), which is comprised of 29 local authorities from the Greater Accra Region. All 29 assemblies gazetted sanitation by-laws to implement the initiative.[71] In February 2022, thousands of street vendors were forcibly removed from their trading sites because of their 'unsanitary activities' in public spaces. Similar scenarios have played out across major African cities, including in Kampala, Uganda;[72] Dar-Es-Salaam, Tanzania; and Dakar, Senegal.[73]

On one level, the evictions are puzzling since informal vending is a significant job creator, particularly in Africa. Moreover, the Covid-19 pandemic underscored the importance of informal food vendors for food security. As mentioned in chapter one, at least 18 African countries recognised informal food vendors as 'essential services' that were exempt from restrictions to freedom of movement during lockdowns.[74] Informal vendors also contribute to city coffers: in cities as varied as Bangkok, Mumbai and Accra, tourists patronise informal markets,

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[70] Bema op cit note 68.
[71] Delali Adogla-Bessa 'Tema won't be left out of Operation Clean Your Frontage initiative – Henry Quartey' (1 February 2022) CNR Citi Newsroom, available at *https://citinewsroom.com/2022/02/tema-wont-be-left-out-of-operation-clean-your-frontage-initiative-henry-quartey/*, accessed on 4 July 2022.
[72] See Pius Gumisiriza 'Street vending in Kampala: From corruption to crisis' (2021) 20(1) *African Studies Quarterly* 81.
[73] Similarly, in South Africa, the Johannesburg city council engaged in 'Operation Clean Sweep' and forcibly evicted over 2000 street vendors (who were trading lawfully with a permit) and confiscated their goods. The street vendors went to court. Finding for the street vendors, Acting Chief Justice Moseneke notes that 'the City contended that if the applicants were allowed to return to their trading stalls, the inner city would be 'chaotic, uncontrolled and illegal trading with its concomitant crime and grime [will] be permitted to return to the streets of Johannesburg'. See *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* [2014] ZACC 8 at para 32.
[74] Pamhidzai Bamu & Teresa Marchiori 'The Recognition and Protection of Informal Traders in COVID-19 Laws: Lessons from Africa' (2020), available at https://www.wiego.org/sites/default/files/resources/file/WIEGO_COVID-19%20Laws_Lessons_Africa_Dec_2020_EN_Web%20FINAL.pdf, accessed on 2 July 2022.

and vendors pay daily and monthly tolls and fees that in low-income countries constitute significantly to the city fiscus.[75]

On another level, it is not surprising. Despite their socio-economic contributions, street vendors have always struggled for recognition as workers, as citizens, and as residents of cities. Indeed, 'the propertied, privileged, and powerful [have *always* sought] to establish …[the] rules governing the use of urban space that is compatible with their city vision'.[76] In colonial times, the colonial masters enacted health, sanitation, nuisance, and vagrancy laws to regulate who should be allowed to use public space, and on what terms. The colonial spirit lives on.[77] For example, in Dakar, Senegal, Law 50/1967 regulates the use of public space. A recent report submitted by the Ministry of Interior and the Commission for Legislation, Justice, General Administration, and Internal Regulation to Parliament, reveals a desire to keep the 'undesirables' off the streets, and describes a proposed Bill's policy rationale as 'the need to regulate the disorderly occupation of public space by itinerant traders, porters, street acrobats (cireurs), and car guards (gardiens de voitures)' because 'such activities are "frequently of such a nature to bring serious threat to [the country's] prestige" and are … "dangerously incompatible" with its economic aspirations as a "hospitable country and touristic attraction"'.[78]

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[75] See Michael Rogan 'Informal workers and taxes: What "tax justice" looks like from below' *WIEGO Blog* (2018), available at *https://www.wiego.org/blog/informal-workers-and-taxes-what-tax-justice-looks-below*, accessed on 3 May 2023. Also see Michael Rogan 'Tax justice and the informal Economy: A review of the debarenttes' *WIEGO Working Paper No 41* (September 2019) available at https://www.wiego.org/sites/default/files/publications/file/Rogan_Taxation_Debates_WIEGO_WorkingPaperNo41_2020_0.pdf, accessed 5 February 2024.

[76] Murray in Thomas Coggin & Marius Pieterse 'Rights and the City: An Exploration of the Interaction Between Socio-economic Rights and the City' (2012) 23 *Urban Forum* 257 at 257. This is the case all over the world. See Ryan Thomas Devlin 'Winning a right to the sidewalks: Street vendors in New York' (November 2021) *WIEGO Organising Brief No 11* at 2 and 5, available at *https://www.wiego.org/sites/default/files/publications/file/WIEGO_Organizing_Brief_%20No-11%20Winning%20a%20Right%20to%20the%20Sidewalks%20for%20web_0.pdf,* accessed on 3 May) for a discussion on the 'politically connected real estate lobby' in New York that succeeded in keeping a cap on the number of permits issued to food vendors for almost 40 years: 'Business and real estate interests portrayed vendors as disorderly and out of step with plans for urban regeneration.'

[77] See Pamhidzai H Bamu, 'Street vendors and legal advocacy: Reflections from Ghana, India, Peru, South Africa and Thailand' (2019*) WIEGO Resource Document No. 14*, available at *https://www.wiego.org/sites/default/files/publications/file/Bamhu-WIEGO-Resource_Document-14-Street-Vendors-Law-Five-Countries-2019.pdf*, accessed on 2 July 2022; also see Caroline Skinner & Pilar Balbuena 'Where are the inclusive cities? Street vendors globally face increasing hostility' (7 May 2019) *WIEGO Blog*, available at *https://www.wiego.org/blog/where-are-inclusive-cities-street-vendors-globally-face-increasing-hostility,* accessed on 2 July 2022.

[78] Krithika Dinesh, Pamhidzai Bamu, Roopa Madhav, Teresa Marchiori & Marlese von Broembsen 'Re-examining legal narratives on vagrancy, public spaces and colonial constructs: A commentary on

Nuisance, vagrancy, traffic, health and sanitation laws and regulations are still routinely used by officials to harass vendors, confiscate their goods and arrest them for contravening a regulation.[79] A recent opinion by the African Union Court, in response to a petition by the Pan African Lawyers Association (PALU) for the court to instruct member states to amend or strike down vagrancy laws, articulated the class implications of these petty offences laws as follows:

> [T]he Court notes that vagrancy laws, effectively punish the poor and underprivileged, including but not limited to the homeless, the disabled, the gender-nonconforming, sex workers, hawkers, street vendors, and individuals who otherwise use public spaces to earn a living. Notably, however, individuals under such difficult circumstances are already challenged in enjoying their other rights including more specifically their socio-economic rights. Vagrancy laws, therefore, serve to exacerbate their situation by further depriving them of their right to be treated equally before the law.[80]

Although this discussion has focused on major cities in the global South, these dynamics between middle-class residents, local authorities and street vendors are characteristic of workplace/public space battles in secondary cities and towns too. These same class struggles also play out in neighbourhoods in cities of the global North.[81] The workplace of street vendors — public space in many cities of the global

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the ACHPR's Advisory Opinion on vagrancy laws in Africa' *Law and Informality Insights No 4* (August 2021) at 7, available at *https://www.wiego.org/sites/default/files/publications/file/WIEGO_LawNewsletter_August%202021.pdf*, accessed on 2 July 2022.

[79] Ibid.

[80] African Court on Human and Peoples' Rights Advisory Opinion No 001/2018 on the compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and other human rights instruments applicable in Africa, requested by Pan African Lawyers Union (PALU) (4 December 2020) at para 70 available *at https://www.african-court.org/cpmt/storage/app/uploads/public/5fd/0c6/49b/5fd0c649b6658574074462.pdf,* accessed on 6 August 2021.

[81] See for example, Ryan Thomas Devlin & Sarah Orleans Reed 'In a New York neighborhood, it's the rich pushing out street vendors, not the majority'(6 August 2019) *WIEGO Blog*, available at *https://www.wiego.org/blog/new-york-neighborhood-its-rich-pushing-out-street-vendors-not-majority*, accessed on 10 January 2023.

South and North— is indeed a ubiquitous site of class struggle. As will be argued in the chapters that follow, labour law is intrinsically about creating a framework for containing and enabling productive collective negotiations between the owners of property and the working class.

## 3.5 Conclusion

Canadian labour law scholar Kerry Rittich argues that 'like development itself, formalisation is both an ideology and a project'.[82] This chapter has shown that the formalisation project — part of the development agenda since the 1990s — is about bringing 'extra-legal' economic activities, 'income generating activities that are unregulated by the state',[83] within the scope of law. The question is, which body of laws? This is at the heart of the ideological battle. Indeed, this battle continues unabated — the Employers Group has insisted on another general discussion in 2025 on formalising the informal sector. The question is whether informal self-employed workers are independent contractors/enterprises who should be subject to laws that pertain to enterprises (formalised as enterprises) or whether they are workers who should be incorporated into labour laws (formalised as labour). This thesis contends the latter.

Which body of law to apply matters — to these workers, and to the discipline of labour law. It matters to workers because if defined as micro-enterprises, then they would be precluded from registering their organisations as trade unions; competition laws would preclude them from negotiating collectively; and they would be excluded from participating in social dialogue and tripartite structures at the national level — the neoliberal frame (which reduces structural, class inequalities to the outcome of individual choices) will have triumphed. This chapter has presented structuralist and political-economy institutionalist perspectives on the informal sector to contextualise this battle within capitalism (the core-periphery analysis showing why it serves a capitalist society to maintain the informal economy), and to

[82] Rittich op cit note 2 at 27.
[83] Meagher op cit note 31 at 2.

foreground the implications for street vendors' terms and conditions of work of power relations among different classes in society and their relations with the state.

Chapter four of this thesis explains that labour lawyers have argued for the informal sector to be formalised through human rights law. Both chapters four and six discuss the opportunities and the threats to workers of articulating their claims to the state on the basis of their human rights. Normatively, the arguments for their incorporation into labour law are compelling. The workplace of many of these workers — public space — is a site of class struggle, which is the DNA of labour law. Politically, incorporation of workers into labour law matters too. Labour law's crisis is attributed, in part, to the disappearance of labour as a political class. The fact that labour law excludes 44 per cent of the world's workers makes it a pressing issue; labour law needs to take seriously the challenge of recognising the informal sector as labour. The next chapter, which is a review of the labour law literature, explores the conceptual basis for the inclusion of the informal sector into labour law. It argues that the most compelling paradigm for its inclusion is the theory presented by Freedland and Kountouris of labour law as personal work relations. It will also be argued that this theory effectively excludes the tiny percentage of informal workers who are enterprises that should be formalised through laws pertaining to enterprises.

# Chapter 4

## Re-imagining labour law: A review of the literature

### 4.1 Introduction

The shifts in the global political economy described in chapter two represent significant challenges to labour law. In 1998, the European Commission established an expert group under the chairmanship of Alain Supiot to advise it on how labour law should evolve in response to the changing nature of work in Europe.[1] Originally written in French, the Supiot Report, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe*,[2] became a touchstone for much subsequent scholarship. A year later, in 1999, Guy Standing published *Global Labour Flexibility: Seeking Distributive Justice,*[3] in which he created a taxonomy of the different dimensions of labour-market flexibility, with the accompanying redistribution of costs and risks to a rapidly 'informalising' European workforce. Although the theoretical implications of these important works[4] resonated beyond Europe, the analyses focused primarily on the implications of emerging forms of non-standard employment in Europe.

On the other side of the Atlantic, in 1994, upon the invitation of Karl Klare, 70 progressive labour law scholars from around the world gathered in Massachusetts, United States of America. They formed INTELL (The International Network on Transformative Employment and Labour Law), a transnational network

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[1] Mark R Freedland & Nicola Kountouris *The Legal Construction of Personal Work Relations* Oxford Monographs on Labour Law (2011) at 24.

[2] European Commission, Directorate-General for Employment, Social Affairs and Inclusion *Transformations du travail et devenir du droit du travail en Europe: Rapport Final* (1999). This was published originally in French and finally in English in 2001 — see Alain Supiot, María Emilia Casas, Jean de Munck, Peter Hanau, Anders L Johansson, Pamela Meadows, Enzo Mingione, Robert Salais & Paul van der Heijden *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (2001).

[3] Guy Standing *Global Labour Flexibility: Seeking Distributive Justice* (1999).

[4] This is not to suggest that these scholars represent the only or most important voices that shaped the early debates. See for example, J Clark & Lord Wedderburn 'Otto Kahn-Freund and British Labour Law' in Lord Wedderburn, R Lewis & J Clark (eds) *Labour Law and Industrial Relations: Building on Kahn-Freund* (1983); also see Bob Hepple 'Restructuring Employment Rights' (1986) 15 *Industrial Law Journal* 69.

that engaged in the project of re-inventing labour law.[5] Critical legal scholars who were part of this network expressed scepticism that the 'transformative project' of re-imagining labour law to counteract the effects of globalisation — the rise of global value chains, the international division of labour, the commodification of labour, and regulatory arbitrage by capital — could possibly hold capital to account. Dennis Davis's argument that 'law in general and labour law in particular have little to offer in acting as an effective countervailing mechanism against the power of capital in a globalised world' led him to conclude that any claims that labour law has transformative potential are 'unsustainable'.[6] Alan Hyde agreed.[7] Harry Arthurs argued that labour law is increasingly 'politically irrelevant and intellectually ossified'.[8] He argued that rather than privileging the employment relationship, labour law must transcend work relations as the only site of struggle and reconstitute itself as 'the law of economic subordination and resistance'.[9] Other relations of subordination such as landlord/tenant and consumer/retailer might provide greater traction for mobilising against capital. Similarly, Karl Klare argued that labour law's goal is to democratise the economy, and the participation of workers (in distributive decisions in the workplace, and the economy as a whole) should not be privileged above the participation of 'consumers, spouses and local residents'.[10] In essence, like Arthurs, he argued for a displacement of employment as the central organising identity to constitute a countervailing force against capital.

This thesis contributes to the ongoing 'crisis' within the discipline of labour law (in particular in relation to the question of its relevance as the law of collective

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[5] See a recounting of INTELL's history in the Introduction to Joanne Conaghan, Richard Michael Fischl & Karl Klare (eds) *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (2004) at pages xiii-iv.
[6] Dennis Davis 'Death of a labour lawyer?' in Conaghan et al op cit note 5 at 160.
[7] Alan Hyde 'The idea of the idea of labour law: A parable' in Guy Davidov & Brian Langille (eds) *The Idea of Labour Law* (2011).
[8] Harry Arthurs 'Labour law after labour' in Davidov & Langille (eds) op cit note 7 at 18; but Deakin in 'The contribution of labour law to economic and human development' in the same volume argues that labour law started off from such a low base in the USA that the claim of ossification may be accurate for the USA and Canada but is not for Europe or even South America; however, writing about English and European labour law, Freedland & Kountouris in *The Legal Construction of Personal Work Relations* op cit note 1 at 5 refer to an 'existential crisis for labour or employment law'.
[9] See Harry Arthurs 'Labor law as the law of economic subordination and resistance: A thought experiment' (2013) 34(3) *Comparative Labor Law and Policy Journal* 585 at 601.
[10] Karl Klare 'The horizons of transformative labor and employment law' in Conaghan et al op cit note 5 at 17.

relations) by challenging the discipline to lift its gaze from a preoccupation with work in the industrialised countries of the global North to see, understand, and incorporate workers in the developing world. Indeed, most of the world's workers live in the developing world.[11] Asia (the factory of the world) and Africa (the continent with the fastest-growing population, which is rapidly urbanising) present both challenges and opportunities for labour law.

This chapter focuses on the first research question posed in chapter one: is there a *conceptual* basis (a) for a transnational labour law for supply-chain workers; and (b) for incorporating self-employed workers into the ambit of labour law; that could realise *de facto* rights to collective bargaining for supply-chain workers and *de jure* rights to collective bargaining for street vendors? The chapter engages critically with the labour law literature that helps answer these questions.

Part 4.2 discusses the literature that addresses the conceptual basis for labour law to include informal self-employed workers in its scope. It discusses and critiques three schools of thought (the capability approach, the regulatory approach, and human rights) that theoretically provide a conceptual basis for informal self-employed workers to be included in the ambit of labour law. It will be argued that each of these approaches decentres labour law as the law of collective relations — that is, none of these schools privilege rights to freedom of association and collective bargaining over other employment rights. Next, the discussion engages with Freedland and Kontouris's theory of labour law as 'personal work relations' (PWR). The section concludes with a discussion on why the PWR theory is preferable as the conceptual basis for informal self-employed workers to be recognised as subjects of labour law.

Part 4.3 engages with the legal/conceptual basis for transnational supply-chain bargaining. It grapples with whether and how labour law might regulate

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[11] The World Bank categorises 217 countries into low, lower-middle, upper-middle and high-income economies, based on gross national income every year (see World Bank 'How does the World Bank classify countries?' (undated) *https://datahelpdesk.worldbank.org/knowledgebase/articles/378834-how-does-the-world-bank-classify-countries*). Similarly, the International Monetary Fund (IMF)'s World Economic Outlook classifies 37 OECD (Organization for Economic Cooperation and Development) countries as 'advanced economies' and all other countries as 'emerging' and 'developing'. The term 'developing world' refers to all countries that are not in the high income/advanced economy categories. It refers, therefore, to most of the world's countries and workers.

industrial relations in global supply chains, given that (a) there is *no contractual relationship* between multinational corporations and the workers that make their goods, and (b) multinational enterprises (MNEs) are in different countries and continents to the workers that produce their goods, and labour courts have *no jurisdiction* over them. This part addresses two questions. First, in the absence of an employment contract (indeed, the absence of any contractual nexus between workers and the corporations that determine supply-chain workers' terms and conditions of work), what might be the legal basis for a transnational labour law? Second, if transnational collective bargaining is possible, what are the sources of countervailing power for workers in developing countries in a context where: on the one hand, their governments court MNEs to procure goods from their countries and are hostile to trade unions; and on the other hand, MNEs engage in regulatory arbitrage — that is, if union pressure results in an increase in minimum wages, they simply move their production and procure from another country where wages are lower.

## 4.2 Theories of labour law that could include the informal sector

Deakin, Marshall and Pinto note that the employment contract is not only a legal, but also 'a social mechanism of inclusion and exclusion'.[12] The legal implications are that workers who have an employment contract are entitled to labour rights, including the right to social protection and to bargain collectively, and that all other workers are classified as independent contractors who fall outside the protection of labour law.[13] The social implications are that workers who do not qualify as employees are not only denied 'membership of that magic circle'[14] but are invisible to the state. This has significant socio-economic and political implications.

Early debates, particularly between Simon Deakin and Mark Freedland, centred on whether the employment contract could be expanded (to include non-standard work) by defining subordination to include economic dependency, or

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[12] Simon Deakin, Shelley D Marshall & Sanjay Pinto 'Labour laws, informality, and development: Comparing India and China' in Diamond Ashiagbor (ed) *Re-Imagining Labour Law for Development: Informal Work in the Global North and South* (2019).
[13] This is necessarily stylised. Many jurisdictions have a third category, such as 'worker' in the UK, 'para-subordinate' in Italy, and 'independent contractor' in other countries.
[14] Sandra Fredman & Judy Fudge 'The legal construction of personal work relations and gender' (2013) 17(1) *Jerusalem Review of Legal Studies* 112 at 115.

whether labour law should jettison the employment contract and transcend its binary conception of work. This chapter discusses the literature that transcends, rather than expands, the employment contract for labour law to include the informal sector. It discusses four approaches: the capability approach, the regulatory approach, the human rights approach, and labour law as personal work relations.

### *4.2.1 The capability approach*

Brian Langille, the most renowned advocate of the capability approach, argues for a 'worker-centred approach' to reflect the reality of work in the twenty-first century: 'if we could cast off from our land of contracts, we would be in a position to account for the diversified forms of productive activity that permeate our modern economy'.[15] Langille sees labour law's focus on unequal bargaining power (that is, its relational perspective) as its conceptual limitation to incorporating all workers. [16] Drawing on Amartya Sen and Martha Nussbaum's capability approach to development and social justice, Langille argues for a human-centred approach to labour law. For Langille, labour law's constituting narrative should be to realise individual workers' freedom to live lives that they value.

This section gives a brief explanation of the capability theory, followed by Langille's explanation of its relevance for labour law. Sen's idea of development as freedom —the freedom to live the life one chooses and to participate in the social, political, and economic life of their community'[17]—challenges heterodox theories of economic development. As a theory of justice, Sen's capability approach challenges the idea that equality of opportunity will lead to such freedom. He argues that people enjoy different capabilities that enable them (or not) to 'convert' these opportunities into freedoms to enable them to live lives that they value.[18] In sum, a person's 'internal capabilities' (comprised of skills, abilities and opportunities) are often only

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[15] Brian Langille 'Human freedom: A way out of labour law's fly bottle' in Hugh Collins (ed) *Philosophical Foundations of Labour Law* (2018) at 90.
[16] Ibid and at 101.
[17] Amartya Sen *Development as Freedom* (1999) in Marlese von Broembsen 'A new constituting narrative for labour law: A critique of development and making a case for Fraser's conception of justice' (June 2013), available at *https://www.upf.edu/documents/3298481/3410076/2013-LLRNConf_VonBroembsen.pdf/90e2f7f9-7a00-4caf-8cf7-0082345e2dc6*, accessed on 26 January 2020.
[18] Amartya Sen *The Idea of Justice* (2009) in von Broembsen op cit note 17 at 7.

converted into functionings if the right 'external conversion factors' are present.[19] Langille argues that labour law is a conversion factor. By providing 'substantive and procedural protections … labour law provides the necessary external legal structure (or "conversion factors")' for workers to realise two types of freedom: first, the human freedom of work that is dignified and allows them to live a good life; and second, a 'process freedom' — a place to exercise representative democratic decision-making through the institutions of freedom of association and collective bargaining.[20] I have previously critiqued the capability approach as a basis for labour law, [21] arguing that Sen's focus is on the individual rather than the collective and that he imagines that structural change is possible through individual agency rather than requiring collective action.[22] Sen wrote:

> This freedom-centred understanding of economics and of the process of development is very much an agent orientated view. With adequate social opportunities, individuals can effectively shape their own destiny and help each other.[23]

I argued further that the capability approach lacks a political economy analysis and under-theorises power. As a liberal, Sen depoliticises distributional struggles. In a chapter in *The Capability Approach to Labour Law* (which Langille edited), Langille[24] responds to my critique and similar critiques voiced by Judy Fudge.[25] First, he argues that Sen's approach has been wrongly categorised as only individualistic.[26] Second, he argues that unlike the capability approach, labour law's lens is trained on 'one site … one problem', namely the terms and conditions of work, which are expressed in the contract of employment. Indeed, the fundamental

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[19] Langille op cit note 15 at 93.
[20] Ibid.
[21] See von Broembsen op cit note 17.
[22] See also Judy Fudge, 'Labour as a "fictive commodity": Radically reconceptualising labour law' in Davidov & Langille (eds) op cit note 7 at 128–9.
[23] Sen in Von Broembsen op cit note 17 at 11.
[24] Brian Langille 'What is labour law? Implications of the capability approach' in Brian Langille (ed) *The Capability Approach to Labour Law* (2019) at 131–2.
[25] Judy Fudge 'The new discourse of labour rights: From social to fundamental rights?' (2007) 29(1) *Comparative Labor Law and Policy Journal* 29–66.
[26] Langille op cit note 24 at 135.

problem with the labour law, he argues, is that the 'standard account of itself … makes it impossible to see the informal sector (no contract, no employer or employee) as part of labour law's world at all'.[27] Sen's capability approach enlarges labour law's limited 'normative vision and empirical scope' to include informal workers. He suggests two legal mechanisms for including informal workers: articulating labour rights as human rights, and constitutionalising labour rights.[28] Unlike most other labour law scholars who champion labour rights as human rights, Langille maintains that freedom of association and collective bargaining should remain central to labour law.

Guy Davidov concedes that a capability theory of labour law provides a normative rationale for labour law. It can, he argues, be deployed both legally and politically to realise labour rights. Legally, it can be used to justify a purposive interpretation of labour law when judges weigh up competing interests, or when the constitutionality of labour laws is challenged. It can be deployed politically to oppose the doctrine of labour-market flexibility.[29] However, he questions the theory's relevance for determining wages or for the institution of collective bargaining because it fails to speak to the 'conflict of interest and imbalance of power between employers and employees'.[30] Supriya Routh challenges Davidov, and reasserts Langille's argument, namely that the capability approach addresses 'the empirical reality' of many different forms of work 'without assuming a now outdated institutional of industrial employment'.[31] Both Langille and Routh respond to critiques by asserting that the capability theory addresses labour law's increasingly irrelevant industrial employment paradigm, and that it recognises workers who are denied recognition by labour law. In sum, the capability approach makes it possible for workers who are excluded from labour law to become subjects of labour law; but its proponents have not offered substantive counter-arguments to the critiques that the capability approach is focused on the individual and that it fails

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[27] Ibid.
[28] Ibid at 134.
[29] Guy Davidov 'The capability approach and labour law: Identifying the areas of fit' in Langille *(*ed) op cit note 24 at 45.
[30] Ibid.
[31] Supriya Routh 'The need to become fashionable' in Brian Langille (ed) *The Capability Approach to Labour Law* (2019).

to theorise power relations, which renders it unsuitable for the realisation of rights to freedom of association and collective bargaining.

### *4.2.2 The regulatory approach*

Instead of focusing on the worker, Simon Deakin and Shelley Marshall focus on labour-market laws and the functions that they perform.[32] The authors identify five functions: economic co-ordination, risk management, democratisation (presumably though social dialogue), empowerment, and 'redressing specific vulnerabilities in a region or country'. Their solution is pragmatic: disaggregate labour law's functions, identify different institutions to perform some or all these different functions, and legislate accordingly.

Judy Fudge operationalises Deakin and Marshall's regulatory theory. With a focus on informal workers, she disaggregates labour rights into individual rights and proposes street vendors and their organisations identify the 'functional equivalent' of an employer in respect of each right.[33] Referencing Deakin and Marshall, she argues that 'different labour rights could be exercised against different entities, including the state, and through different regulatory mechanisms'.[34] She envisages that these 'regulatory mechanisms' should include laws that provide default contractual terms and procedural rules for the collective bargaining relationship, as well as 'platforms or techniques', including 'licensing'.[35] She argues that the 'entities' would internalise norms created by regulation, which would strengthen informal workers' 'regulatory power'.

The appeal of the regulatory approach lies in its pragmatism, its potential to be operationalised, and its inclusion of workers without a notional employer. It eliminates the messiness of working out how traditional collective bargaining laws could be extended to workers without an employment relationship, and it is

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[32] See Shelley Marshall 'Revitalizing labour market regulation for the economic South: New forms and tools' in Shelley Marshall & Colin Fenwick (eds) *Labour Regulation and Development: Socio-Legal Perspectives* (2016) 288 at 292–3.
[33] Judy Fudge 'Revising Labour Law for Work' in Martha Chen & Francoise Carre (eds) *The Informal Economy Revisited* (2020) 105 at 107.
[34] Ibid at 106.
[35] Ibid. Having worked with street vendor organisations for nearly a decade, the author disagrees that 'licensing' is a platform for realising labour rights. Most often, it is a mechanism for the state to exercise state power.

analytically satisfying. Nevertheless, I have three concerns. First, like the capability theory, the proposal is abstracted from power relations. Chapter two of this thesis showed that public space (the workplace for many self-employed informal workers) is controlled by the municipal arm of the state and that it is a site of class struggle. Legislation that 'redresses vulnerabilities' or 'empowers' workers is invariably the product of long, hard, political struggle. National legislation has been achieved in only one country — India[36] — and it took more than 20 years. Second, if different regulations apply to different occupational groups, the effect will be to fragment the labour movement and to dilute the political and social power of the working class. Third, if, as Fudge suggests, traditional collective bargaining laws could apply to self-employed workers such as street vendors, conceptual challenges remain. For example, if street vendors are not in a 'work relationship', how would collective bargaining for vendors be realised? Who would be the bargaining counterparty? If the counterparty is a wholesaler, would competition laws not apply? If street vendors are to bargain with the state, what are the sources of countervailing power for street vendors in the absence of a right to strike?

### *4.2.3 Labour rights as human rights*

The literature on labour rights as human rights falls into three categories. The first category makes a case for labour rights to be re-envisaged as human rights in response to the crises faced by labour law — that is, a case to 're-norm' labour law.[37] The goal of these scholars is to establish normative legitimacy for labour rights as human rights in much the same way as scholars have argued that labour rights contribute to economic and social development, or for a capability approach to labour law. A discussion of this body of literature falls outside the scope of this chapter. The second category of literature in this area responds to the international division of labour and the rise of global value chains described in chapter two. These authors see human rights as the basis for a transnational labour law. This category is discussed in part 4.3.1. of this chapter. The third group of scholars is responding to

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[36] See Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act 7 of 2014.
[37] See Eric Tucker 'Renorming labour law: Can we escape labour law's recurring regulatory dilemmas? (2010) 39(2) *ILJ* 99–138. Also see Hugh Collins 'Theories of rights as justifications for labour law' in Davidov & Langille (eds) op cit note 7 at 137–155.

the empirical fact that non-standard workers are excluded from labour law. Their contention is that human and constitutional rights may prove more durable legal pathways for the realisation of labour rights for non-standard and informal workers than labour law. The most prolific of this latter group is Philip Alston,[38] who makes a case for labour rights to be construed as human rights to remedy labour law's binary construct — protecting insiders (employees) at the expense of (informal, non-standard, non-unionised) outsiders.[39] Therefore, the argument is that everyone who works has a right to claim labour rights by virtue of their being human.

Several labour law scholars argue that human rights is incompatible with labour law because the focus of human rights is on the individual and on holding *public* power accountable primarily through *litigation*, whereas labour law's focus is on collective relations, mobilising and organising for collective *negotiations* with the owners of capital (that is, *private* power).[40] Mundlak[41] describes how human rights litigation has undermined trade union strategies in Israel.[42] Stefan van Eck warns that labour rights as human rights would mean that labour issues would become the purview of ordinary courts. This, he argues, would mean that judges who have no

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[38] Philip Alston '"Core labour standards" and the transformation of the international labour rights regime' (2004) 15(3) *European Journal of International Law* 457–521; Philip Alston 'Facing up to the complexities of the ILO's core labour standards agenda' (2005) 16(3) *European Journal of International Law* 467–480; Philip Alston *Labour Rights as Human Rights* (2005). Also see Philip Alston & James Heenan 'Shrinking the International Labor Code: An unintended consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?' (2004) 36 *NYU Journal of International Law and Policy* 101. Other authors include Mathias Risse 'A right to work? A right to leisure? Labor rights as human rights' (2009) 1(3) *Law and Ethics of Human Rights Journal* 1 (developing a broader theory of human rights that encompasses labour rights, particularly with respect to the right to work and the right to leisure); also see Christopher McCrudden & Anne Davies 'A perspective on trade and labor rights' (2000) 3 *Journal of International Economic Law* 43 at 43.

[39] See Ruth Dukes ('Insiders, outsiders and conflicts of interest' in Ashiagbor (ed) op cit note 12) for a discussion on the insider/outsider implications of labour law.

[40] Brian Langille 'Core labour rights: The true story (response to Alston)' (2005) 16 *European Journal of International Law* 409–429; Guy Mundlak 'Human rights and labor rights: Why don't the two tracks meet?' (2012) 34(1) *Comparative Labor Law & Policy Journal* 217–246; Francis Maupain 'Revitalization not retreat: The real potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights' (2005) 16(3) *European Journal of International Law* 439–465.

[41] Mundlak op cit note 40 at 228.

[42] Another disagreement concerns the procedural/substantive nature of labour versus human rights. Langille (op cit note 40 at 134–35) argues that regulation is composed of both procedural and substantive components. Some components of labour regulation provide rights to workers that guarantee processes, such as freedom of association and collective bargaining, while other components might prescribe substantive standards that employers must meet, such as specified levels of health and safety and wages. He accuses Alston of conflating these two concepts. Fudge (op cit note 25 at 56–7) challenges Langille's distinction between labour rights and labour standards and believes that the distinction rehashes an outdated separation between civil and political (or negative) rights on the one hand, and social (or positive rights) on the other.

specialised knowledge of industrial relations would shape labour law jurisprudence. They would be likely, for example, to deploy the common-law concept of lawfulness rather than the labour law concept of fairness. [43] This would undermine specialised labour courts and tribunals such as the Commission for Conciliation, Mediation and Arbitration (CCMA), and ultimately may lead to their being 'abolished'.[44]

In a thoughtful contribution, Fudge[45] identified both the cost and opportunity of couching labour rights as human rights. The cost, she argued, may be that, by relying on the judiciary to realise labour rights (as human rights), the normative basis for the 'legitimacy' of labour's claims will change.[46] The basis for recognising labour rights will become labour's claim to being human, which is politically much weaker than making claims through democratic, representative participation in workplace decision-making. The opportunity she identified is discussed in section 4.3.1.

For labour law scholars from developing countries where labour law excludes most of the workforce, understanding labour rights as human rights presents a politically legitimate means for the working poor to claim labour rights. Writing about the 92 per cent of the workforce that is excluded from labour laws in India, Kamala Sankaran[47] makes a powerful argument for labour lawyers in developing countries to embrace labour rights as human rights.

Human rights thus represent a pathway for workers excluded from the ambit of labour law — workers who do not have a contractual relationship with the entity that controls their access to property for livelihood purposes, and which controls their terms and conditions of work — to be recognised as workers. It presents a more direct response to the exclusion of much of the global workforce from labour law

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[43] Stefan van Eck 'Constitutionalisation of South African labour law' in Colin Fenwick & Tonia Novitz (eds) *Human Rights at Work: Perspectives on Law and Regulation* (2010) at 260.
[44] Ibid at 290.
[45] See Fudge op cit note 25.
[46] See also Supriya Routh ('Do human rights work for informal workers?' in Ashiagbor op cit note 12) on the role of human rights in legitimising workers and their claims for labour rights; Also see Ramapriya Gopalakrishnan 'Enforcing labour rights norms through human rights: The approach of the Supreme Court in India' in Fenwick & Novitz (eds) op cit note 43.
[47] Kamala Sankaran 'Protecting the worker in the informal economy: The role of labour law' in Guy Davidov & Brian Langille (eds) *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (2006) 205 at 205.

than the capability approach. Yet the same critiques can be levelled, as discussed in part 4.2.5.

### *4.2.4 Labour law as personal work relations*

In the words of Simon Deakin, Freedland and Kountouris's book, *The Legal Construction of Personal Work Relations*, provides 'a new cognitive map for labour law'.[48] Adopting an institutional approach,[49] these authors propose replacing 'employment' with 'personal work', and 'contract' with 'work relations'[50] — that is, the concept of personal work relations (PWR) plays the employment contract's classification function, determining who is covered by labour law. The adjective 'personal' is necessary, the authors claim, as '*all work'* is too 'loose' and 'open-ended'.[51] The work must be performed *personally* for another person or entity, but the relationship between the two parties is not necessarily one of subordination or dependency.

Imagine the worker like a spider at the centre of their web — an unfortunate metaphor, but helpful in visualising Freedland and Kountouris's theory. The worker has a web of relationships, each strand with a different party and each of these relationships impacting on their work. Consider Tozama Maka, a street vendor in Cape Town, South Africa. Tozama has a permit, issued by the municipality of Cape Town, to set up her stall outside the main Cape Town train station. A statute stipulates the terms and conditions for her work. Every day she sets up a table with her wares — packets of potato chips/crisps, sweets and single cigarettes. She buys these goods (involving a contractual relationship) from a wholesaler. She has social relations with other vendors, some of whom are her competitors, while others are members of the association to which she belongs.

According to Freedland and Kontouris's theory, labour law can only recognise the relations that have a legal basis. Tozama's social relations must

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[48] Simon Deakin 'What exactly is happening to the contract of employment? Reflections on Mark Freedland and Nicola Kountouris' *Legal Construction of Personal Work Relations*' (2013) 7(1) *Jerusalem Review of Legal Studies* 135 at 135.
[49] Sandra Fredman & Judy Fudge 'The legal construction of personal work relations and gender' (2013) 7(1) *Jerusalem Review of Legal Studies* 112 at 114.
[50] Freedland & Kountouris op cit note 1 at 31.
[51] Ibid at 21.

therefore be disregarded, even if they impact how much she sells or how much she charges, because they do not have a legal basis. These relations are excluded from her 'work nexus' or 'personal work relations': 'the personal work nexus, indeed the personal work relation itself is made up of the totality, or bundle of these legal connections'.[52] The legal relations are not necessarily of a contractual nature. Indeed, the authors state that the contractual relationship might not be the most significant relationship affecting the terms and conditions of work. They cite the *Harrods* case as an example of where a non-contractual relationship was most significant. In this case, an employee of Shaeffer Pens, a franchise that sold pens inside the Harrods store, successfully brought a case of discrimination against Harrods, in its capacity as Shaeffer's principal.[53]

Fredman and Fudge describe the socio-legal implications of de-centering the employment contract as follows: '[Freedland and Kountouris] have detached the legal analysis of personal work arrangements from its anchor of the contract of employment and they have reclaimed the empirical and legal ambiguity of personal work relations'.[54] The implication of the PWR institution for labour law is that it shifts labour law's focus from determining whether an employment relationship exists to the worker herself.[55] It follows therefore that the legal questions become, is this worker entitled to rights? If so, from whom? Since the worker enjoys plural legal relations with plural parties, the realisation of labour rights may be distributed among several parties and may indeed include the state.[56]

Although she departs from the broader concept of 'work', Rochelle le Roux's intervention[57] shows how this distribution of obligations might work in practice. She argues that de-centering employer/employee relations to focus on the activity of work allows labour law to conceive of labour rights as a bundle of rights with potentially different duty bearers. Citing the example of a voluntary worker, who is usually excluded from labour law rights and protections, she illustrates her theory: some rights, such as the volunteer's occupational-health-and-safety rights, might be

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[52] Ibid at 320.
[53] Ibid at 321.
[54] Fredman & Fudge op cit note 49 at 114.
[55] Ibid at 118–9.
[56] Ibid at 118.
[57] Rochelle le Roux 'The new unfair labour practice' (2012) *Acta Juridica* 41 at 56.

realised through employment-law regimes[58] — that is, the duty to realise the health-and-safety right falls to the beneficiary of the volunteer's services, whereas the rights of a volunteer as worker to social protection (primarily the duty of the state) might be provided in a variety of ways, ranging from universal state provisioning, private insurance, or a combination of the two.

Fredman and Fudge argue that the PWR theory would probably include the informal sector, but they fail to explain the basis for their view. They add that the PWR concept is narrower than work, 'since it must be a relationship, and not simply an activity'.[59] In a subsequent contribution, Fudge[60] categorises work as: (a) a 'work relationship', if 'an entity that exercises economic power or labour process control' is identifiable;[61] and (b) a 'work activity' in the absence of such an entity. She includes street vendors in this latter category. As discussed in the previous section, she draws on Deakin and Marshall's regulatory theory to argue for a regulatory solution that includes street vendors in the ambit of labour law.

My contention is that the PWR theory can, and should, apply to informal self-employed workers such as street vendors. Local authorities control street vendors' access to property (public space) for purposes of generating a livelihood. There is clearly a relationship between local authorities and street vendors. The challenge is to identify the *legal* relationship. For vendors with a permit, the legal relationship is defined by the permit to trade, and by the statute in terms of which the licence is granted. It is a moot point whether the permit distributes property rights.[62] Most vendors, however, cannot obtain a licence or permit, and trade illegally. What then, from a PWR perspective, is their legal relation with the state? Arguably, street vendors could address the state as citizen-worker and assert a rights-based legal relation. Indeed, street vendors in India did just this. They litigated on the basis of

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[58] Ibid at 52.
[59] Fredman & Fudge op cit note 49 at 115.
[60] Judy Fudge 'Revising labour law for work' in Martha Chen & Françoise Carré (eds) *The Informal Economy Revisited* (2020) 105–110.
[61] Ibid at 106.
[62] The Indian Street Vendors' (Protection of Livelihood and Regulation of Street Vending) Act 7 of 2014 includes a clause stating that permits are not to be construed as granting property rights, which suggests that at common law the permits may indeed grant property rights.

their constitutional rights to life and to trade in order to establish a right to trade on pavements.

In *Olga Tellis v Bombay Municipal Corporation*,[63] the Supreme Court stated *obiter* that the constitutional right to life should be interpreted to include a right to trade and to earn a living. The court recognised that if the state does not create employment, it cannot deny citizens the right to create their own livelihood, upon which their very existence depends.[64] In 1989, in *Sodan Singh v New Delhi Municipal Corporation*[65] the court upheld the constitutional right to trade on pavements and sidewalks[66] and directed the local authority to 'frame a scheme' in terms of the Delhi Municipal Corporation Act, 1957 to realise the right of hawkers and vendors to trade basic commodities. In a second *Sodan Singh* case,[67] the New Delhi Municipal Corporation (NDMC) argued for the removal of 33 sites from the allocation process because trading would hinder pedestrians, add to congestion, and destroy the character of a suburb. The court rejected the NDMC's arguments and, recognising street vendors' contribution to the economy and to consumers, upheld the vendors' claims.[68]

Deriving *locus standi* through claims of citizenship, street vendors realised the right to access public space (in this case, pavements) to trade. The court held that, since the right to life is meaningless unless people can make a living, nested in the right to life is a right to trade. Realising the right to trade involves the local authority providing vendors with regulated access to pavements for livelihood purposes. The court played a supervisory role over a period of nine years to ensure that the local authority provided vendors with access to public space to trade, and it intervened when the local authority tried to reduce the number of designated sites for trading, or to reduce the hours of trading. Street vendors used these legal victories to

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[63] *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545.
[64] Ibid at 548–50.
[65] *Sodan Singh v New Delhi Municipal Corporation* (1989) 4 SCC 155.
[66] This is subject to three caveats. First, the right can only be exercised if it does not interfere with the freedom of other citizens to use the space. Second, it does not translate into a right to a particular spot. Third, in terms of art 19(6) of the [Indian] Constitution, the state may restrict the right if the restrictions are reasonable.
[67] *Sodan Singh v New Delhi Municipal Corporation* (1992) 2 SCC 458.
[68] Ibid at para 168.

pressure the national government for enabling legislation for vendors — a sixteen-year struggle.

Similarly, waste pickers in Argentina and Colombia have relied on the right to equality and the right to work, and constitutional courts have ruled, based on the right to equality, that the state has a duty to give waste pickers access to waste.[69] In Johannesburg South Africa, over 2000 street vendors who were forcibly removed from their trading sites took the City of Johannesburg to court. In *South African Informal Traders Forum and Others v City of Johannesburg and Others* the Constitutional Court of South Africa held *obiter* that '[t]he ability of people to earn money and support themselves and their families is an important component of the right to human dignity'.[70]

In the absence of justiciable human or constitutional rights at the national level, workers could arguably address the state on the basis of rights (such as the right to work, the right to equality, and the state's duty to not discriminate) enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR)[71]to which 169 states are signatories; the Covenant on the Elimination of Discrimination Against Women (CEDAW);[72] the Convention on the Rights of the Child; and regional instruments, including the African Charter on Human and People's Rights.[73]

Article 6 of the ICESCR enshrines the right to work as a fundamental human right as follows:

> The States Parties to the present Covenant recognize that the right to work includes the right of everyone to have the

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[69] See Aminta Ossom 'Defending waste pickers' livelihoods: Lessons from litigation in Latin America' (2023) *WIEGO Law and Informality Insights No 7*, available at *https://www.wiego.org/resources/law-informality-insights-march-2023*, accessed 12 August 2023.
[70] *South African National Traders Retail Association v City of Johannesburg and Others* [2014] ZACC 8 at para 31.
[71] United Nations General Assembly *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 3 (1966). Adopted: 16/12/1966; EIF: 03/01/1976.
[72] United Nations General Assembly *Covenant on the Elimination of All Forms of Discrimination Against Women* (1979). Adopted 34/180/1979;
[73] For a full list and the applicable articles see Colm O' Cinneide 'The Right to Work in International Law' Work' in Virginia Mantouvalou (ed) *The Right to Work*: *Legal and Philosophical Perspectives* (2015)
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> opportunity to gain his living by work which he freely chooses or accepts and will take appropriate steps for safeguarding this right. [74]

In 2006, the UN Economic and Social Council (the Council), which oversees the implementation of the ICESCR, published General Comment No 18, which outlines how the Council interprets the provisions on the right to work.[75] The General Comment states that:

> The right to work is essential for realising other human rights and forms an inseparable and inherent part of human dignity…
> The right to work is an individual right that belongs to each person and is at the same time a collective right which encompasses all forms of work whether independent work or dependent wage and paid work.

The Council made explicit that work includes 'all forms of work' including 'independent' work i.e., 'genuine' self-employment. Under the duty 'to protect', the Council states that the state must 'reduce to the fullest extent possible the number of workers outside the formal economy'. Implicit in this obligation, therefore, is the duty to formalise, or put differently, to bring the informal economy with the ambit of the law.[76]

In 2018, the International Commission of Jurists (ICJ) submitted a shadow report to the UN Council on South Africa's obligations to comply with ICESCR and in particular to realise the right to work. The ICJ argued that in the absence of jobs, the right to work should be interpreted to mean that governments must create an

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[74] *Ibid*. at 104.
[75] *Ibid*. at 102.
[76] The only international instrument that defines formalisation is Recommendation 204, which was discussed in chapter two. It describes formalisation as extending legal and social protection to self-employed workers; recognising public space as a workplace; and extending the right to collective bargaining to self-employed workers.

enabling regulatory framework for workers (like street vendors) that create their own jobs.[77] The UN Council's observations are consistent with these arguments.

Although there has been little litigation on the right to work,[78] it presents informal workers with an opportunity. Indeed, in South Africa, the International Commission of Jurists (ICJ) intervened as *amicus curiae* in *Ryckloff-Belegging v Occupiers of ERF 791 of the Farm Randjesfontein*[79]on behalf of waste pickers who were threatened with eviction from their place of work. The ICJ relied on the right to work enshrined in the ICSECR to argue that the court should not authorise their eviction if it meant that they would be denied access to work.

The facts of the case are pertinent to the discussion. Waste pickers lived and sorted recyclables on private land owned by Ryckloff-Beleggings. In terms of South Africa's Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIEA)[80] all evictions must be authorized by a court. Where such eviction would result in homelessness, the municipality has a statutory duty to provide temporary accommodation to persons evicted from land in its jurisdictional area. In this case, the waste pickers (who were members of the African Reclaimers Association) argued that for them to continue their livelihood activities, such accommodation must (a) be close to households 'yielding high-value waste'; (b) be close to recycling depots to which they sell recyclable waste; and (c) would not interfere with established networks of waste-pickers.[81]

In its heads of arguments, the ICJ argued that articles 39(1)[82] and 233[83] of the Constitution of South Africa and the jurisprudence of the Constitutional Court require courts to take into account both 'binding and non-binding international law'

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[77] See International Commission of Jurists 'ICJ submission to the Committee on Economic, Social and Cultural Rights in advance of the examination of South Africa's initial periodic report' (31 August 2018), available at *https://www.icj.org/wp-content/uploads/2018/08/SouthAfrica-ICJSubmissionCESCR-Advocacy-Non-legal-submission-2018-ENG.pdf*, accessed on 4 January 2024.
[78] James W. Nickel 'Giving up on the Human Right to Work' in Virginia Mantouvalou (ed) *The Right to Work*: *Legal and Philosophical Perspectives* (2015).
[79] *Ryckloff-Beleggings (EDMS) Beperk v Occupiers of ERF 791 of the Farm Randjesfontein and Others* (2019/18156) [2022] ZAGPJHC 735 (5 June 2022).
[80] Act 19 of 1988.
[81] Rycloff-Beleggings op cit note 79 at para 22.
[82] Article 31(1) states that when a court or tribunal interprets the Bill of Rights, it must 'promote' dignity, equality, and freedom as cornerstones of a democratic society, and 'must consider international law'.
[83] Section 233 states that 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over an alternative interpretation that is inconsistent with international law.

when interpreting the state's duties.[84] It argued that articles 6-8 of the ICESCR set out member states' obligations in relation both to the right to work and to rights at work[85] and it argued that UN General Comment No. 23 explicitly states that the right to work applies to the informal sector[86] and 'include(s) a right to not be 'unfairly deprived' of existing employment'.[87] Thus, since waste pickers were creating their own employment, argued the ICJ, eviction from their workplace by the local authority would undermine their 'access to work'.[88]

Although the High Court did not refer to South Africa's international law obligations to realise the right to work, it cited South African jurisprudence on the PIEA that 'government must have regard to the relationship between the location of residents and their places of employment'[89] and ordered the City of Johannesburg to identify land that 'will allow [the 78 waste pickers] to continue to earn a living'.[90] The case thus recognizes that local authorities have a legal obligation (in terms of PIEA) to protect the livelihoods of informal self-employed workers.

If the legal relationship between street vendors and the municipal arm of the state is rights-based, what is to be gained from framing labour law as personal work relations as opposed to understanding labour law as human rights? This question is addressed in the section below.

### *4.2.5 A comparison of the four theories*

The research question that this section addresses is the following: is there a conceptual basis for including self-employed workers in the ambit of labour law that could realise for them an effective right to collective bargaining? In relation to the available theories, there are two aspects to the question. First, does the theory provide a conceptual basis for including informal self-employed workers as subjects

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[84] International Commission of Jurists 'Amicus curiae's written submissions' available at *https://icj2.wpenginepowered.com/wpcontent/uploads/2021/03/4.2_Amicus_Curiae_Heads_of_Argument_Ryckloff.pdf,* accessed 3 January 2024.
Par 2.1. For a discussion on the South African government's obligations in terms of the ICESCR see paras 10-19.
[85] Rycloff-Beleggings op cit note 79 at para 34.
[86] Ibid at para 35.
[87] Ibid at para 33.
[88] Ibid at para 2.3.
[89] Ibid at para 44.
[90] Ibid at para 47.

of labour law? Second, can it realise the right to collective bargaining for this new category of workers? To answer these questions, it is necessary to analyse the background assumptions upon which the two core institutions of labour law rest.

Labour law is founded on property relations, encapsulated by Robert Hale's image of the propertyless man exchanging his labour power for access to property to generate a livelihood to eat.[91] The two institutions foundational to the architecture of labour law — the employment contract and collective bargaining — are superimposed on these property relations. As outlined in chapter two, the employment contract performs three functions. First, it encapsulates the terms of the exchange of labour power for access to property to generate a livelihood. Second, it acts as a mechanism of redistribution because it places obligations on the property owner/employer to collect and make social security contributions, and to transfer the contributions to the state for redistribution. Third, it classifies people into those entitled to a suite of labour regulations and rights, and those who are able to access property for livelihood purposes independently.[92] The capability, human rights, and PWR theories each propose a different mechanism to replace the employment contract's classification function. In the capability and human rights approaches, the basis for inclusion in labour law is being human and working. The PWR theory is narrower and the criteria for inclusion stricter: the person must *personally* undertake the work, and the person must have a legal relationship with the entity to which they address the obligation to realise labour rights. The regulatory approach does not address the classification issue directly but assumes an all-inclusive position. To assess whether the approaches facilitate redistribution and democratic participation, it is necessary to consider each approach's position on collective bargaining.

Labour law's institution of collective bargaining is premised on the assumption that the interests of the property owner and the person exchanging their labour power for an income are fundamentally divergent; at a fundamental level, the workplace/work relation is a site of struggle — not at an individual level, but

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[91] Robert Hale 'Coercion and distribution in a supposedly non-coercive state' (1923) 38(3) *Political Science Quarterly* 470–494; also see Wolfgang Streeck *How Will Capitalism End?* (2016) at 2.
[92] Simon Deakin 'The many futures of the contract of employment' in Joanne Conaghan, Richard Michael Fischl & Karl Klare (eds) *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (2004) 179 at 184-5.

structurally, it is a class struggle — hence Kahn-Freund's truism that collective bargaining is a source of countervailing power to the power of capital. In many systems, the state regulates the framework within which collective relations occur. This regulatory framework may include imposing obligations on the property owner to bargain in good faith, and protecting pressure tactics that redistribute power before and during negotiations (namely, the right to strike or secondary boycotts) and trade union organising rights, including obligations on the property owner to allow trade unions onto premises to organise workers and to deduct union dues from workers' salaries to pay to unions.

The objective of the PWR theory is to replace the classification function of the employment contract/relation. It is preferable to the other theories because it does not displace labour law as the law of collective relations with a different philosophical basis. All it does is dismantle the institution that imagines only one significant relationship — the employment relationship — as determining workers' terms and conditions of work. In so doing, it broadens the scope of labour law to include a range of workers who are otherwise excluded. Collective bargaining remains the cornerstone of labour law.

By contrast, the capability and human rights approaches purport to replace not only the classification function of the employment contract/relation, but to re-theorise labour law; in the process, collective relations are displaced as the *raison-d'être* of labour law. With the capability approach, collective relations are replaced by individual freedom and labour law's relational aspect is rejected in terms. Addressing asymmetrical power is therefore not central to the theory. Labour laws, including collective 'process rights' are viewed instrumentally. The theory assumes the pre-existence of labour laws as 'conversion factors' that allow workers to access dignified work and live a good life. Since it rejects a relational perspective, it is unclear how 'process rights' for informal workers would be realised and to what end. I therefore agree with Collins, Lester and Mantouvalou that 'it is unclear where

[Langille's proposal] leads' since it does 'not appear to provide a conceptual apparatus' to translate the ideas into a labour law that can be operationalised.[93]

Similarly, the human rights approach re-theorises labour rights as human rights. In other words, it does not centre a relationship and asymmetrical power relations as its constituting narrative. Instead, it places an individual — not a relationship, not a class — at the centre and makes claims for the individual, including a claim to be able to bargain as a collective on the basis of being human. Although the right to collective bargaining is enshrined in human rights instruments, it is not privileged over other human/labour rights. Moreover, a justiciable right assumes a corresponding duty bearer — yet, the labour law literature on labour rights as human rights has not progressed beyond recognising self-employed informal workers as subjects of labour law. It has yet to do the work of identifying the corresponding duty bearer in relation to the right to collective bargaining and the nature of the duty.

The regulatory theory is different in that it does not articulate an alternative narrative to labour law as collective relations. However, if the different functions of labour law are disaggregated, the parts no longer add up to the whole. Disaggregation invites cherry picking, which all but guarantees that economic co-ordination and risk management will be privileged over democratisation and empowerment. Indeed, 'empowerment' has no inherent meaning, and within development theory, it is a contested concept. In 2025, the International Labour Conference will once again have a general discussion on formalising the informal economy. In this context, 'empowerment' would be a dangerous concept. For the Employer Group, 'empowerment' would be articulated as formalising informal micro-enterprises — that is, as registration and taxation, not as democratic participation in the workplace, as Deakin and Marshall intend.

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[93] Hugh Collins, Gillian Lester & Virginia Mantouvalou 'Introduction: Does labour law need philosophical foundations?' in Hugh Collins, Gillian Lester & Virginia Mantouvalou (eds) *Philosophical Foundations of Labour Law* (2018) 1 at 18.

## 4.3 Labour law literature on global supply chains

This section reviews the literature that addresses the legal basis for holding lead firms responsible for the terms and conditions of the workers in their supply chains, in the absence of a contractual relationship with these workers. From the literature, three legal bases for liability are identifiable: human rights, tort and contract law. Under contract law, the literature engages with three types of contract: trade agreements between countries; [94] global framework agreements between global union federations and brands; and 'multi-party agreements', which are agreements between national and global supply-chain actors. The section discusses Manoj Dias-Abey's article, which makes a case for thinking about 'multi-party agreements' as 'supply-chain collective bargaining agreements'. Finally, it discusses the labour law literature that engages with the possibility of transnational supply-chain bargaining.

### *4.3.1 Human rights as a basis for regulating supply chains*

According to Virginia Mantouvalou, the literature on labour rights as human rights can be divided into three approaches, which she calls positivistic, instrumentalist, and normative.[95] The positivistic approach typically analyses treaties and conventions to determine which labour rights are human rights. If a labour right is found in a treaty or convention, then it is a human right, even if it is not 'sufficiently supported in law'.[96] Conversely, if it is not located in an existing instrument, it is not a human right. The normative approach takes a diametrically opposite approach. It advances moral or political reasons for advocating that a labour right should be regarded as a human right and then makes a normative claim that it is a human right. Most of the labour law literature, argues Mantouvalou, falls into the second category, namely instrumentalism.[97] Instrumentalists, she argues, 'present [… workers']

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[94] See David Cheong & Franz Christian Ebert 'Labour law and trade policy: What implications for economic and human development?' in Marshall & Fenwick op cit note 32 at 82–126; also see Lance Compa 'From Chile to Vietnam: International labour law and workers' rights in international trade' in Gráinne de Búrca, Claire Kilpatrick & Joanne Scott (eds) *Critical Legal Perspectives on Global Governance: Liber Amicorum David M Trubek* (2014) at 143–162.

[95] Virginia Mantouvalou 'Are labour rights human rights?' (2012) 3(2) *European Labour Law Journal* 151 at 151.

[96] Ibid at 152.

[97] Ibid at151.

claims as human rights' if it is strategic or tactical to do so.[98] They train their analysis on two sites — jurisprudence and written instruments on the one hand, and 'activities of non-governmental organisations' on the other. Thus, if they conclude that jurisprudence or other instruments advance labour rights, then they advance the argument that the right concerned is a human right. Similarly, if workers internalise their labour rights as human rights and it proves tactical to advocate for their labour rights as human rights, labour law scholars support articulating labour rights as human rights.[99] The driver is therefore inherently pragmatic and is based on empirical data. Some of these positions are reflected in labour law scholarship on the private regulation of labour standards through corporate codes of conduct.[100]

In this instrumentalist spirit, much has been written about trade unions using human rights at the *national* level, both in litigation and as a basis for statutes to hold businesses to account for labour-rights deficits in their business dealings, including their supply chains. In Italy, trade unions have relied on individual human rights – for example, the right not to be discriminated against, to 'restore collective rights'.[101] Transnationally, the trade union movement and NGOs are experimenting with using human rights to hold lead firms responsible for workers in their supply chains, but the recent labour law literature on human rights and supply chains is largely descriptive with little theorising of what this means for labour law.[102]

In a prescient contribution in 2007, Judy Fudge[103] foresaw the political possibility that human rights could be deployed as a source of countervailing power

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[98] See Robert Knox ('Strategy and tactics' (2012) 21 *The Finnish Yearbook of International Law* 193–229) for an explanation of the difference between strategy and tactics.
[99] Mantouvalou op cit 74 at 106 cites Lance Compa 'Solidarity and human rights' (2009) 18(1) *New Labour Forum* 38–45 as an example.
[100] See Harry Arthurs 'Private ordering and workers' rights in the global economy: Corporate codes of conduct as a regime of labour market regulation' in Conaghan et al (eds) op cit note 8 at 471–488; Lance 'Trade unions, NGOs and corporate codes of conduct' (2004) 14(1–2) *Development in Practice* 210–215; also see Roopa Madav 'Corporate codes of conduct in the garment sector in Bangalore' in Judy Fudge, Shae McCrystal & Kamala Sankaran (eds) *Challenging the Boundaries of Regulation* (2012) 267–284.
[101] Orsola Razzolini 'Self-employed workers and collective action: A necessary response to increasing income inequality' (2021) 42 *Comparative Labor Law and Policy Journal* 293 at 321.
[102] One example is Marlese von Broembsen 'Constitutionalizing labour rights: Informal homeworkers in global value chains' (2018) 34(3) *International Journal of Comparative Labour Law and Industrial Relations* 257–280.
[103] Judy Fudge 'The new discourse of labour rights: From social to fundamental rights' (2007) 29(1) *Comparative Labor Law Policy Journal* 29 at 29.

against capital. Indeed, the trade union movement has invoked the normative legitimacy of the UN Declaration of Business and Human Rights as the basis for transnational supply chain regulation. At the 105th session of the International Labour Conference and within the OECD, the International Trade Union Confederation (ITUC) argued that businesses have a responsibility to address the ubiquitous human rights violations in their supply chains. The ITUC made the case, successfully, for the incorporation of the UN Guiding Principles on Business and Human Rights (the Guiding Principles) into the ILO's Tripartite Declaration of Principles concerning MNEs and Social Policy (the 'MNE Declaration') and ultimately into mandatory due diligence laws in the European Union.[104] In March 2018, France passed its Duty of Vigilance law, which makes it mandatory for corporations to do a due diligence investigation of their supply chains to identify, prevent, and mitigate the violation of workers' labour rights. Similar legislation has been passed by the German Parliament. A European Union Directive, which will oblige member states to pass legislation making it mandatory for firms domiciled or selling in their countries to undertake regular human rights and environmental due diligence in their supply chains, is currently being negotiated by the EU Commission, Parliament, and Council.

In response to pressure from labour right organisations in Brussels, European trade unions, and from networks in the global South, both the EU Commission's draft Directive on Corporate Sustainability and the EU Parliament's draft report cover all workers in all tiers of the chain, but the corporations' procurement practices remain largely unaddressed. The terms of the Directive are a product of consensus, and organised business has lobbied powerfully. Labour lawyers for the trade union movement have registered their concern that if the final Directive reflects the terms of the draft Directive, it is unlikely to remedy the violations of supply-chain workers' labour rights.[105]

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[104] See Von Broembsen op cit note 102 at 260.
[105] See Jeffrey Vogt, Ruwan Subasinghe & Paapa Danquah 'A missed opportunity to improve workers' rights in global supply chains' *Opinio Iuris* 18 March 2022, available at *http://opiniojuris.org/2022/03/18/a-missed-opportunity-to-improve-workers-rights-in-global-supply-chains/*, accessed on 10 August 2023.

### *4.3.2 Tort as a legal basis for transnational liability*

Alan Hyde[106] argues that MNEs can be held liable for labour-rights violations in tort — in particular, using the doctrine of vicarious liability.[107] Thus, if a party purchases a product or a service, they are vicariously liable should the product be made, or the service rendered, by someone whose human rights are violated. Hyde argues that the rationale behind the early nineteenth-century common-law 'right to control' test to establish an employer's liability for a servant's tort was to identify 'the party who can control the situation, prevent future harms, and compensate victims'.[108]

In the context of the global value chain, the lead firm — usually the brand or retailer — has both the power to structure the conditions of employment throughout the chain, and the means to compensate the 'victim' of the labour-rights violation, and could therefore be held jointly liable for suppliers' workers' labour-rights violations.[109] In support of his argument, Hyde refers to several American statutes that attribute liability for labour-rights violations to parties that have no employment relationship with the workers whose rights are violated. For example, he cites the 'hot goods' provision in the Fair Labour Standards Act[110] that enables the Department of Labour to prevent items produced by workers in state A (who are paid less than the minimum wage or are not paid for overtime work) being sent to state B.[111] A second example is a Californian statute that was enacted in 2003 and which is referred to as a 'brother's keeper law'. It states that if parties to contracts related to construction, janitorial services, security guards, agricultural products or garments knew or reasonably should have known that the amount they are paying is too little for the contractor to comply with labour obligations, then they are jointly liable for the labour-rights violations.[112] In *Zeng v Liberty Apparel Co*[113], a 2003 US Court of Appeal case, the court held that the factory owner and the buyer, who had

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[106] Alan Hyde 'Legal responsibility for labour conditions' in Fudge et al (eds) op cit note 79 at 93.
[107] Also see Brishen Rogers 'Toward Third-Party Liability for Wage Theft' (2010) 31 *Berkeley Journal of Employment & Labor Law* 1
[108] Ibid at 94.
[109] Ibid.
[110] Act 29 of 1938
[111] Ibid at 95.
[112] Ibid.
[113] Zheng v. Liberty Apparel Co., No. 09-4890 (2d Cir. 2010)

delivered 'partly finished goods for finishing' were jointly liable for labour-rights violations.[114]

Hyde recognises that in the absence of a global labour court, this would be difficult to translate into transnational legislation because enforcement would be impossible. As will be shown below, his arguments for enforcement through global framework agreements and corporations' (private) codes of conduct[115] are possibly anachronistic in light of 'experiments' by NGOs and trade unions to coerce MNEs into taking some responsibility for the workers in their supply chains.

### *4.3.3 Contracts as a basis for MNE liability*[116]

Several private-law scholars have written about contract as the legal mechanism for linking each part of the chain.[117] Global value chains, they argue, are constituted by law — in particular by contract law. Contracts — between lead firms and suppliers, between suppliers and sub-contractors, and between employers and workers — determine the distribution of risks and costs throughout the chain.

In the 1990s, non-governmental organisations (NGOs) from developed countries launched campaigns against Nike and other athletic clothing brands to address the sweatshop conditions in factories that produced their garments. Consumer pressure on these brands led to Nike and its competitors developing codes of labour conduct, which they incorporated as contractual terms in their agreements with suppliers. Many lead firms joined multi-stakeholder initiatives (MSIs) comprised of lead firms, NGOs and trade unions. These MSIs developed their similar codes. Labour law scholars have framed these agreements as forms of

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[114] Ibid at 96.
[115] Ibid at 98.
[116] This section has been published in Marlese von Broembsen 'Human rights and transnational social contracts: the recognition and inclusion of homeworkers?' in Laura Allfers, Martha Chen, & Sophie Plagerson (eds) *Social Contracts and Informal Workers in the Global South* (2022). Inclusion of the publication in this thesis has been approved by the Doctoral Degrees Board of the University of Cape Town.
[117] See Klaas Hendrik Eller & Jaakko Salminen 'Reimagining contract in a world of global value chains' (2020) 16(1) *European Review of Contract Law* 1–2; also see Klaas Hendrik Eller 'Is "global value chain" a legal concept? Situating contract law in discourses around global production' (2020) 16(1) *European Review of Contract Law* 3–24; Fabrizio Cafaggi & Paola Iamiceli 'Regulating contracting in global value chains. Institutional alternatives and their implications for transnational contract law' (2020) 16(1) *European Review of Contract Law* 44–73.

'private regulation'.[118] It is incontrovertible that 'private regulation' has failed to improve supply-chain workers' conditions of work.[119] Indeed, because this is so, in 2016, the ILO governing body called for a General Discussion on decent work in global supply chains in the 105th session of the International Labour Conference.

Global union federations (GUFs) and transnational NGOs have pressured MNEs to conclude agreements that attribute to them some responsibility for the workers making their goods.[120] These transnational agreements take two forms: global framework agreements (GFAs) and 'enforceable brand agreements'. A GFA is an agreement concluded between a GUF and a single MNE and applies to all the countries and suppliers from which the MNE purchases. As the name suggests, GFAs establish a negotiating framework. The framework includes working conditions and lists core ILO standards that must be adhered to, such as freedom of association and collective bargaining, workplace equality, health-and-safety standards, access to information and training, and environmental protection.[121] In the garment sector, IndustriALL has signed GFAs with H&M and with Inditex. Scholars agree that GFAs are not enforceable unless national trade unions are co-signatories, and the terms are included in agreements between the lead firm and its suppliers.[122] Labour law scholars have written about GFAs, but not from the perspective of the effect of GFAs on collective bargaining.[123]

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[118] See Harry Arthurs 'Private ordering and workers' rights in the global economy: Corporate codes of conduct as a regime of labour market regulation' in Conaghan et al (eds) op cit note 5 at 471–488; Lance Compa 'Trade unions, NGOs and corporate codes of conduct' (2004) 14(1–2) *Development in Practice* 210–215; Roopa Madav 'Corporate codes of conduct in the garment sector in Bangalore' in Fudge et al (eds) op cit note 79 at 267–284; Beryl ter Haar & Maarten Keune 'One step forward or more window-dressing? A legal analysis of recent CSR initiatives in the garment industry in Bangladesh' (2014) 30 *International Journal of Comparative Labor Law and Industrial Relations* 5–26.

[119] Clean Clothes Campaign 'Fig leaf for fashion: How social auditing protects brands and fails workers', available at *https://cleanclothes.org/file-repository/figleaf-for-fashion.pdf/view*, accessed on 12 August 2023.

[120] Governments conclude trade agreements, which increasingly include labour clauses, but these contracts fall outside the ambit of this thesis, since on no account can they be construed as collective agreements. They have also not been successful mechanisms for improving labour rights in developing countries.

[121] Marion Hellmann 'Social partnership at the global level: Building and wood workers' international experiences with international framework agreements' in Verena Schmidt (ed) *Trade Union Responses to Globalization: A Review by the Global Union Research Network* (2007).

[122] André Sobczak 'Legal dimensions of international framework agreements in the field of corporate social responsibility' (2007) 62(3) *Relations Industrielles/Industrial Relations* 466–491.

[123] See, e.g., Felix Hadwiger *Contracting International Employee Participation: Global Framework Agreements* (2018).

'Enforceable brand agreements' is the name given by labour-rights organisations to agreements between MNEs, GUFs and trade union affiliates of the GUFs. In an article titled 'Labour law from below: What social movements can teach us about regulating supply chain capitalism?', labour law scholar Manoj Dias-Abey challenges the categorisation of these agreements as 'private regulation'. [124] Instead, he refers to these agreements as 'nascent forms of supply chain collective bargaining'.[125] One such agreement is the Bangladesh Accord on Fire and Building Safety (the Accord), an agreement signed by over 200 brands in te garment sector, two GUFs, and the Bangladeshi affiliates of IndustriALL (the GUF to which national clothing and textile unions belong). The Accord was concluded after the infamous Rana Plaza tragedy that killed over 1 100 workers. Dias-Abey describes the Accord as 'movement-led' collective bargaining, because without the European Clean Clothes Campaign and the North American Workers' Rights Consortium, the Accord would not have happened. After the Rana Plaza fires, these 'social movements' identified the brands that purchased from the factory, protested outside their stores, and embarked on a public media campaign to make the public aware that: workers had complained that the factory was unsafe; the factory had been assessed as compliant with the MNE's codes; and most garment factories in Bangladesh are unsafe. MNEs agreed to engage in collective negotiations because they feared consumers boycotting their brands if they refused. Dias-Abey describes the organisations as 'alternative mobilisations, which forge solidarities between the various groups adversely impacted by capitalism …[as] some of the most exciting vectors of labour struggle in the contemporary era'.[126]

Dias-Abey recognises that MNEs' decisions to offshore their production was motivated, in part, by wanting to avoid statutory obligations to bargain with unions. The Accord represents an experiment in response to the re-organisation of production into global supply chains. He argues that regulation is critical, but that it must learn from successful experiments. Indeed, he argues for 'a recursive

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[124] Manoj Dias-Abey 'Using law to support social movement-led collective bargaining structures in supply chains' (2019) 32(2) *Australian Journal of Labour Law* at 3 in SSRN version, available at *https://ssrn.com/abstract=3400564*. See, e.g., Ter Haar & Keune (op cit note 118 at 5), who write about the Bangladesh Accord as an example of private regulation.
[125] Manoj Dias-Abey op cit note 124 at 1.
[126] Ibid at 3.

relationship' between legislation and 'experiments' on the ground[127] — hence his interest in the Accord.

The Accord's objective is to improve the structural safety of 1 600 supplier factories in Bangladesh that employ 2.5 million workers. Its principal terms are discussed in chapter five. Dias-Abey argues that the Accord can be characterised as a collective bargaining agreement because it was negotiated collectively, is legally binding, and has a 'robust dispute resolution process'.[128] His article concludes with broad proposals for transnational collective bargaining laws that would compel lead firms to bargain. He includes a proposal for something akin to sectoral bargaining, and legislation that imposes a statutory duty of care 'on a lead firm for the conduct of its subsidiaries and contractors in circumstances where it exercises significant control'.[129] Like Hyde, he published his proposals before the recent legislative developments in Europe that supersede these theoretical notions.

Dias-Abey's contribution is important because it addresses the issue of how workers might exercise countervailing power against capital in supply chains, given twin problems — 'the absence of fully fledged labour relations legislation' in their countries,[130] and labour law's inability to regulate transnational relations. Drawing on Erik Wright's typology of the sources of trade union power, Dias-Abey argues that 'social movements' like the Clean Clothes Campaign and the Workers' Rights Consortium represent 'new forms of associational power' for supply-chain workers to coerce the owners of capital to the bargaining table. The next chapter elaborates upon these ideas.

## 4.4 Conclusion

The chapter has analysed and compared four theories of labour law that transcend labour law's binary architecture and could therefore include informal self-employed workers in the scope of labour law. It has established that three of the theories could incorporate the informal sector and could, at least in theory, be operationalised; these

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[127] Ibid at 5.
[128] Ibid at 16.
[129] Ibid at 20.
[130] Ibid at 17.

workable theories are human rights, the regulatory theory, and PWR. However, it is questionable whether, when operationalised, the first two theories are recognisably labour law. This argument will be enlarged upon in the discussion of two case studies from India and Brazil in the next chapter.

In sum, human rights enable informal workers to make claims for recognition as workers, which the chapter has shown is the legal basis for informal self-employed workers to be incorporated into labour law as personal work relations. However, neither human rights, nor the regulatory theory promote democratic participation in the workplace, which labour law scholars have always argued is important for democratic participation in the wider polity.

This chapter's key contribution to the labour law literature on the informal sector is its argument for why it matters for self-employed informal workers to realise their labour rights as subjects of labour law, rather than by means of human rights law or other regulatory experiments. It also shows how the PWR theory can be operationalised. Chapter six discusses three case studies in order to explore the normative and practical shifts necessary to realise *de jure* rights to collective bargaining for informal self-employed workers. Incorporating the informal sector into the scope of labour law also has significant implications for labour law as a discipline. These implications are the subject of chapter seven.

The chapter has also discussed the literature that identifies the legal bases for transnational labour law for supply-chain workers — namely, tort, human rights and contract law. Similar critiques to those made above can be levelled against human rights law and tort law — neither privileges collective rights over other rights. Therefore, particularly given a powerful business lobby that is active in the legislative processes in Europe, neither avenue seems a realistic possibility for realising *de facto* rights to supply-chain collective bargaining for workers in garment supply chains. Dias-Abey has shown that contract law holds most promise for realising collective bargaining rights; and he makes a powerful case for transnational collective bargaining laws to take lessons from experiments on the ground.

The next chapter builds on Dias-Abey's pioneering contribution. Also deploying a case-study method, the chapter discusses three supply collective agreements in the garment sector — the Accord, the Indonesian Protocol on

Freedom of Association, and the Dinidgul Agreement on gender-based violence. Drawing on empirical work by scholars from other disciplines, the chapter complicates Dias-Abey's account, and explores the normative and conceptual shifts necessary for the institution of collective bargaining to facilitate the realisation of *de facto* rights to collective bargaining for workers in garment supply chains.

# Chapter 5

## Global supply chains and collective bargaining

### 5.1 Introduction

One reason that workers in garment supply chains do not enjoy freedom of association and collective bargaining in practice is that lead firms determine the terms and conditions of their work; and, in the absence of a contractual relationship with the lead firms, it is impossible to bring the lead firms to the bargaining table. A second reason is that effective collective bargaining with their legal employers — domestic firms that own factories — is unlikely in garment-production countries, for reasons explored in chapter two: autocratic states are hostile to trade unions; countries are competing against each other for MNEs' business, with the result that the comparative advantage of low labour costs is privileged by governments of developing countries over labour rights; and governments support factory owners (who are major employers and important sources of foreign exchange) over workers. This chapter discusses 'supply-chain collective bargaining', meaning transnational collective bargaining that includes lead firms. It addresses the following research question: what normative and practical shifts are required of the institution of collective bargaining in order to realise *de facto* collective bargaining rights for garment workers in global supply chains?

The International Labour Organization (ILO)'s recent flagship report on social dialogue states that '[c]ollective bargaining allows for institutional experimentation and incubation of new regulatory approaches'.[1] It recognises that collective bargaining agreements vary in content, level (workplace, regional, national, transnational), scale (workplace, sector, territory) and who the signatories are. This is attributable to significant variations in cultural and legal institutions that regulate collective bargaining, and because work relations constantly change.

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[1] International Labour Organization *Social Dialogue Report: Collective Bargaining for an Inclusive, Sustainable and Resilient Recovery* (2022) at 15, available at *https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_842807.pdf*, accessed on 20 June 2022.

Indeed, as chapter one showed, collective bargaining is embedded in social relations that are constantly evolving. Methodologically, the ILO's report embodies this recursive relationship by articulating overarching normative principles of collective bargaining and also drawing on case studies to inform the reader's understanding of the contemporary manifestations of the institution of collective bargaining. This chapter, as well as the following chapter, deploy a similar methodological approach. The first three parts of the chapter are devoted to an analysis of three supply-chain agreements in the garment sector. Part 5.5 distils the normative and practical shifts that would be required of the institution of collective bargaining for transnational supply-chain collective bargaining agreements to bring about durable distributional gains.

## 5. 2 The Bangladesh Accord: A critical response to Dias-Abey[2]

This section describes the Accord in more detail than did the previous chapter. First, it discusses the coalition partners and their collective strategy to bring retailers to the bargaining table. Then it discusses the initial success of the Accord and also its unintended consequences, and reflects on why the distributional gains that Dias-Abey celebrates did not prove durable.

The Bangladesh Accord is a legally enforceable agreement that was concluded by over 200 brands with two international trade union federations (IndustriALL and UNI Global Union) and seven Bangladeshi trade unions, after the collapse of the Rana Plaza factory in 2013. The global union federation, IndustriALL, has union members from more than 100 countries in the mining, energy and manufacturing sectors, including in Bangladesh. UNI Global has 900 union members and represents retail and distribution workers in Europe and North America.[3] Thus, for purposes of the Accord, IndustriALL represents trade unions from Bangladesh, and UNI Global represents trade unions from European countries

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[2] Most of this section has been published in Marlese von Broembsen 'Human rights and transnational social contracts: the recognition and inclusion of homeworkers?' in Laura Allfers, Martha Chen, & Sophie Plagerson (eds) *Social Contracts and Informal Workers in the Global South* (2022). Inclusion of the publication has been approved by the Doctoral Degrees Board of the University of Cape Town.
[3] Juliane Reinecke & Jimmy Donaghey 'After Rana Plaza: Building coalitional power for labour rights between unions and (consumption-based) social movement organisations' (2015) 22(5) *Organization* 720 at 727.

whose members work in the retail stores that sell the garments made by workers in Bangladesh.[4]

Four civil society organisations, the most important being the Clean Clothes Campaign (CCC) and the Workers' Rights Consortium (WRC), signed the agreement as 'witness signatories'. The CCC was established in 1989 by European activists. It is a network of approximately 200 organisations — trade unions, labour-rights organisations, women's organisations, consumer advocacy groups and organisations of homeworkers. The CCC has offices in Amsterdam and Brussels and 'national chapters' in several European countries and in the United Kingdom. It educates and mobilises consumers, lobbies companies and governments, and offers direct solidarity and support to workers' struggles.[5] The CCC pressures brands and retailers to take responsibility for labour-rights violations in their supply chains through research that maps supply chains and documents labour practices, through pressure tactics against brands (such as protests at flagship stores, and attending shareholder meetings) and campaigns aimed at consumers. Through its 'urgent appeals' mechanism, it responds to workers' reports of violations of international labour standards.

Headquartered in Washington DC, the WRC was established in 2000 by the American trade union confederation, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and is financed by Students United Against Sweatshops (SUAS). Most students on college and university campuses in the United States of America (USA) and Canada wear branded athletic and college sweaters and other clothing — a huge market for any supplier of college gear. Like the CCC, the WRC threatens to disrupt consumption. In this case, the consumers are students. SUAS is active on over 175 campuses in the USA and Canada. It has developed a labour code and has negotiated with university administrations to include its code in the contracts with brands that produce college clothing. The WRC audits the supply chains of the brands that make the clothing and SUAS uses these audit reports to put pressure on their university administrations not to renew

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[4] North-American brands refused to sign the legally binding Accord. Instead, they formed the Bangladesh Alliance, which has similar goals, but is not a binding agreement.
[5] See Clean Clothes Campaign 'About' (undated), available at *https://cleanclothes.org/about*, accessed on 12 August 2023

contracts with brands that have failed to comply with the code. In addition to auditing, the WRC undertakes and publishes research on supply chains, and supports workers in developing countries to bargain collectively with factory owners.

The Accord's objective is to improve the structural safety of 1 600 supplier factories in Bangladesh that employ 2.5 million workers.[6] Its principal terms are:

(1) Brands must disclose the names of their suppliers and subcontractors and contribute financially to the education of suppliers and workers on safety standards and to their costs of complying with building standards.[7] The Accord obliges lead firms to set aside funds for repairs and to pay workers during renovations.[8]

(2) Compliance with building standards is monitored through inspections by independent engineers and worker representatives on OHS committees; through the public disclosure of inspection and remediation reports; and by means of complaints mechanisms.[9]

(3) Disputes are reported to a representative steering committee comprised of three trade union representatives and three brands and is chaired by an ILO appointee. Disputes are resolved through arbitration, which is governed by the UNCITRAL Model Law on International Commercial Arbitration.[10]

(4) Brands agreed to remain in Bangladesh for at least two years and to maintain purchasing volumes as a financial incentive for suppliers to undertake repairs to their factories.

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[6] Manoj Dias-Abey 'Using law to support social movement-led collective bargaining structures in supply chains' 2019 *Australian Journal of Labour Law* at 4 in SSRN version, available at *https://ssrn.com/abstract=3400564*.

[7] According to Reinecke & Donaghey (op cit note 3 at 745): 'Signatory firms agree to terminate contracts with factories that fail safety inspections. Companies assume responsibility for funding the activities of the steering committee, safety inspectors and training coordinators based on their annual volumes of garment purchases from Bangladesh on a sliding, pro-rata scale up to US$500,000 per annum.'

[8] Dias-Abey op cit note 6 at 15.

[9] Ibid.

[10] Ibid.

(5) Brands agreed to break-off relationships with recalcitrant suppliers.

### *5.2.1 Initial success of the Accord*

The Accord was largely hailed a success,[11] for four reasons. First, unlike global framework agreements that are concluded between a global union federation and one lead firm, the Accord was signed by over 200 brands, which meant that no one brand was at a competitive disadvantage. Second, unlike the various corporate-social-responsiveness initiatives that rely on codes being enforced through inspections by private auditing forms, the Accord was legally enforceable. Twice, disputes with lead firms went to arbitration. They were settled before a decision was reached, but UNI Global admitted that, in one case, the lead firm made a payment of USD 2.3 million.[12] Third, admittedly only tier-one and -two factories are covered by the agreement, but by 2018, 934 factories had remedied their fire, electrical and building hazards, making it safe for their predominantly female workforce to come to work. Finally, the Accord paved the way for similar agreements. For example, in 2019, four legally enforceable agreements were concluded in Lesotho: five trade unions (including IndustriALL) and women's-rights organisations in Lesotho, as well as the WRC, Solidarity Center and Workers United, signed agreements with jeans manufacturer Nien-Hsing Textiles and Levi Strauss, The Children's Place and Kontoor Brands, to combat gender-based violence in Lesotho factories.[13]

According to Reinecke and Donaghey, who interviewed 29 key informants, the CCC and the WRC had existing relationships with the global union federations (GUFs). When the Rana Plaza factory collapsed, four labour rights organisations, seven (of the thirty-four) Bangladeshi trade union federations, and the two GUFs

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[11] Youbin Kang 'The rise, demise, and replacement of the Bangladesh experiment in transnational labour regulation' (2021) 161(3) *International Labour Review* 407 at 418.
[12] Dias-Abey op cit note 5 at 12.
[13] See Tula Connell 'Pact combats gender violence in Lesotho factories' *Solidarity Center* (15 August 2019), available at *https://www.solidaritycenter.org/pact-combats-gender-violence-in-lesotho-factories/*; also see Worker Rights Consortium 'Leading apparel brands, trade unions and women's rights organizations sign binding agreements to combat gender-based violence and harassment at key supplier's factories in Lesotho' *Worker Rights Consortium* (15 August 2019), available at *https://www.workersrights.org/press-release/leading-apparel-brands-trade unions-and-womens-rights-organizations-sign-binding-agreements-to-combat-gender-based-violence-and-harassment-at-key-suppliers-factories-in-lesotho/*.

formed a ‘labour caucus’ that jointly strategised to get brands to the negotiating table to take responsibility for the structural safety of the factories in Bangladesh that make their garments.

The CCC and the WRC made three specific contributions. First, both organisations had been working on making brands take responsibility for the structural safety of factories since the collapse of two factories in Pakistan — Spectrum (in 2005) and Tazreen (in 2012). They had therefore already drafted a Memorandum of Understanding (MOU). This MOU formed the basis of negotiations between the GUFs on the one hand, and the brands on the other.[14] Second, they provided knowledge and on-the-ground research on the garment industry in Bangladesh, which the GUFs used in their negotiations with the brands.[15] Third, they drew on existing relationships with fashion journalists to build public awareness and outrage, and they threatened to campaign against individual brands should they fail to sign the Accord.

The trade unions, which had existing relationships with the brands, enjoyed institutional power as the negotiating partners of the brands in Europe and the UK, and they possessed negotiation skills. The secretary-generals of both unions personally handled the negotiations. IndustriALL also had representational power as it represented its Bangladeshi trade union members. The different sources of countervailing power of the trade unions on the one hand and the labour-rights organisations on the other, and how these were deployed in service of a co-ordinated strategy, are captured in these comments by insiders to the process:

> Once you have exhausted your area of negotiation, once you’ve got your point where it’s just, you have to recognise as a union that you know, you just cannot get any further, the company is refusing to negotiate. That’s when we very much need the campaign organisations

[14] Reinecke & Donaghey op cit note 2 at 729–30.
[15] Ibid at 729.

> because they are simply better than us in public campaigning.[16]
>
> However, there was a fine line to decide when the possibility of negotiation was exhausted and when a public campaign, with the potential to create a more conflictual relationship with a company, should start. Social movement organisations agreed that this line 'where we'd have to break ranks and do a campaign' (Clean Clothes Campaign interviewee) would have to be negotiated with the unions. While social movement organisations were credited with mobilising consumer pressure, 'the maturity of IndustriALL and unions knowing about negotiation, not just campaigning, was the important counter point' (Ethical Trading Initiative interviewee). Thus, unions stressed that they worked 'very, very closely with those groups' (IndustriALL interviewee) and were in direct contact with them on an almost daily basis. In some cases, trade union organisations led campaigns and thereby shaped the emerging storyline in the media. In the United Kingdom, the Trades Union Congress identified eight brands that had not signed the Accord by September 2013. The union collaborated with the Clean Clothes Campaign and SumofUs to create a coordinated consumer-oriented campaign involving leafleting in front of brand-name apparel stores.[17]

UNI Global, whose members represented retail workers in stores that stocked the garments produced in Bangladesh, engaged with its union members to put pressure

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[16] Ibid at 732.
[17] Ibid at 728.

on brands. Its Swedish affiliate met with H&M at its headquarters and placed a full-page advertisement in:

> one of Sweden's biggest newspapers to urge garment retailers to sign the Accord. While they did not have to resort to worker mobilisation, the potential and threat of doing so was perceived as a powerful lever in motivating the company to sign the Accord.[18]

Similarly, GMB, USDAW and UNITE in the United Kingdom put pressure on UK brands.[19] Thus, brands faced potential economic loss from two sources: their own employees threatening to resort to industrial action *and* the threat of reputational damage that could lead to consumers boycotting their goods. Reinecke and Donaghey went on to comment:

> The Clean Clothes Campaign and Worker Rights Consortium were powerful in their ability to mobilise consumers to threaten to withdraw their purchasing power. This played a critical role in lifting labour rights violations from mere ethical to strategic concerns for companies. The key leverage point of campaign groups was creating a reputational risk to companies by damaging, or threatening to damage, their brand image through repeated negative press.[20]

Finally, trade unions' institutional power within the tripartite ILO structure made it possible for them to call on the ILO to chair the Accord steering committee, which gave the brands comfort in the neutrality of the ILO. The next section discusses the unintended consequences of the Accord.

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[18] Ibid at 731.
[19] Ibid at 727.
[20] Ibid at 728.

### *5.2.2 Unintended consequences of the Accord*

Supplier factories were not signatories and were excluded from the negotiation process. Most of the Bangladeshi tier-one and tier-two factories belong to employer associations (the Bangladesh Garment Manufacturers and Exporters Association (BGMEA) and the Bangladesh Knitwear Manufacturers and Exporters Association (BKMEA)). According to Rahman and Rahman, who interviewed 109 suppliers who are members of the BGMEA, the suppliers' greatest complaint was their 'lack of voice' during collective negotiations.[21] The implications of their exclusion are twofold. First, suppliers bore the costs of structural repairs under unrealistic time frames.[22] During the same period, brands reduced the prices per garment.[23] Kang explains the inverse relationship between increased expenses (due to repairs) and lower prices:

> Factory owners used many colourful metaphors contrasting the high costs of fire hydrants, certified fire doors, and sprinkler systems to low prices for their products.
>
> 'Price. I have only one issue. You give me the price, and I can give you the elephant. But the buyer gives me a peanut for the elephant. If you give me a peanut, you get the monkey. For an elephant, you need to give a banana. I provide an elephant for the peanut because there is no other option.'[24]

Second, workers (the intended beneficiaries) complained that the Accord's limits on working hours led to an intensification of work because their daily targets had now to be achieved in fewer hours.[25] As Dias-Abey rightly points out, the Accord sought

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[21] Rahman & Rahman in Sarah Ashwin, Naila Kabeer & Elke Schüßler 'Contested understandings in the global garment industry after Rana Plaza' (2020) 51(5) *Development and Change* 1296 at 1298.
[22] Kang op cit note 11 at 410.
[23] Ibid at 420.
[24] Ibid at 421.
[25] Ashwin et al op cit note 21 at 1299.

to address lead firms' procurement practices.[26] However, by excluding the parties that know how these practices actually work (and the changes that lead firms were likely to make in response to the Accord, and the implications thereof for supplier factories, SMEs,[27] and workers in all tiers of the chain), lead firms were able to claw back the distributional gains made by the Accord. Ashwin and his co-authors conclude that the exclusion of these stakeholders from participating as parties to the Accord has 'intensif[ied] power imbalances between lead firms and suppliers, leaving distributional inequalities within the industry intact'.[28]

A traditional collective bargaining agreement only regulates the behaviour of the signatories. Yet the Accord's primary objective was to regulate the behaviour of supplier factories, which were not signatories to the Accord. The Accord obliges lead firms to take responsibility for addressing labour-rights violations in their supply chains by better managing their suppliers. Lead firms must oversee and incentivise behaviour changes by their suppliers through contractual obligations in the procurement contract. In the event of non-compliance and in the case of recalcitrant suppliers, the lead firms must cancel their orders. Yet the Accord left intact the procurement practices of the lead firms, most especially the price per unit, which effectively protected the autonomy of the lead firm to decide, unilaterally, what it would pay per unit. This meant that lead firms could offset costs — such as contributing to factory renovations — by paying less per item. During the lifetime of the Accord, lead firms reduced the purchase price per unit by more than ten per cent.[29]

Although the garment factories lack market power, they are well organised. Their industry bodies, the BGMEA and BKMEA, wield considerable political power, since the industry is the biggest single employer in Bangladesh, earning the largest significant foreign currency of any sector, and is the primary driver of industrial development.[30] They represent 'factory owners' interests in politics and

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[26] Dias-Abey op cit note 6 at 14.
[27] Kang (op cit note 11 at 420) states that the SME subcontractors also had to comply with the Accord.
[28] Ashwin et al op cit note 20 at 1298.
[29] Mark Anner 'Squeezing workers' rights in global supply chains: purchasing practices in the Bangladesh garment export sector in comparative perspective' (2020) 27(2) *Review of International Political Economy* 320 at 333.
[30] Kang op cit note 11 at 414.

international trade'.[31] In 2018, the BGMEA put its weight behind its member, Smart Jeans, which brought a case in the High Court of Bangladesh, asking the court for a declaratory order to the effect that the Accord must close its office and leave the country when its five-year term expired. The court decided in favour of Smart Jeans. Smart Jeans also won on appeal.[32] At this point, US ambassador, Marcia Bernicat, the European Commission, and the German Partnership for Sustainable Textiles (which was established by the German government) pressured the Bangladeshi government to intervene.[33] This pressure paid off and a national institution was established with representatives from government, the global brands, national trade unions and Bangladeshi supplier factories to oversee the continued application of the Accord.[34] Ultimately, the Bangladesh Accord was renewed and renamed the International Accord (and has since been extended to Pakistan).

Felix Hauf's ethnographic study on the impact of the Indonesian Freedom of Association Protocol, which is similar to the Accord, offers us important insights into the unintended consequences of these kinds of supply-chain collective bargaining agreement on the labour movement more generally. The Protocol is discussed in the next section.

### 5. 3 The Indonesian Freedom of Association Protocol

The Indonesian Freedom of Association Protocol was initiated by the Play Fair campaign, a coalition that was co-ordinated by the International Textile, Garment and Leather Workers' Federation (ITGLWF), which is now a member of IndustriALL. Coalition members included the CCC and Oxfam.[35] The Play Fair campaign was started in 2004 in response to union-busting in factories that produced athletic clothing. Focusing their strategies on global athletic events, such as the Olympic Games and the World Cup, the campaign's initial goal was to sign an agreement with the World Federation of Sporting Goods Industries; ultimately, it

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[31] Ibid.
[32] Ibid at 415.
[33] Ibid at 423.
[34] Ibid at 408.
[35] Felix Hauf 'Paradoxes of transnational labour rights campaigns: The case of Play Fair in Indonesia (2017) 48(5) *Development and Change* 987 at 991.

settled on targeting athletic clothing brands such as Adidas and Nike that procure from Indonesia.[36]

The Protocol, which was negotiated by the ITGLWF, was signed by Indonesian trade unions, lead firms (including Nike, Adidas, Puma, Pentland and New Balance) and tier-one suppliers. Articles 4 and 5 of the Protocol outline the obligations of supplier factories to uphold rights to freedom of association, including the recognition and support of trade unions.[37] Article 6 obliges suppliers and trade unions to conclude a collective bargaining agreement within six months of union registration, in accordance with Indonesian labour law. Article 7 includes rights to freedom of information, and article 8 sets out the dispute-resolution process, including provision for 'Freedom of Association Supervision and Dispute Resolution Committees' at both workplace and national levels, with trade union representatives and company management serving on the workplace committees. Violations of the agreement are to be addressed by the dispute mechanism, which should attempt to reach consensus, failing which the dispute should be negotiated in accordance with national laws, or settled by a court of law.[38]

Situating the Protocol within the political economy of the trade union movement in Indonesia, Hauf contests the dominant narrative that the Protocol united a divided and fragmented trade union movement. He argues that the members of the Play Fair campaign failed to distinguish between authoritarian, yellow unions and independent, more progressive unions, and instead engaged with all trade unions interested in joining the initiative.[39] The initiative attracted more moderate and employer-backed, yellow unions, which split the Konfederarsi Serikat Nasional, since its more radical trade union members opposed the decision to participate in what they saw as a process that would co-opt the unions into an agreement that presupposed equal power relations, and which would limit their options for industrial action. From their perspective, the Protocol served to legitimise the yellow unions in the eyes of workers, and de-legitimised the more radical unions' forms of industrial

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[36] Ibid.
[37] See the International Trade Union Confederation's English translation of the Protocol, available at *https://www.ituc-csi.org/IMG/pdf/FOA_Protocol_English_translation_May_2011.pdf*, accessed on 28 July 2021.
[38] Ibid art 9.
[39] Hauf op cit note 35 at 996.

action.[40] These radical unions, which are explicitly anti-capitalist, engage in mass mobilisations, large-scale strikes, and militant protests (including blocking roads). In the absence of *structural* power, trade unions exercise *political* power to achieve their goals.[41] Although minimum wages in Indonesia are negotiated in tripartite forums, the provincial governor makes the final decisions. In 2011, trade unions mobilised around the issue of minimum wages and in 2012, in response to protracted (at times violent) industrial action, provincial governors increased the minimum wage.

Reflecting on why the union movement did not wholly support Bangladesh institutionalising the Accord when it expired after five years, Youbin Kang argues that the Bangladeshi trade unions that participated in the Accord are the more moderate 'transnationally orientated' trade unions. The more 'locally oriented, ideologically leftist unions' felt that the costs of complying with the Accord should have been channelled into increasing workers' wages.[42] These more militant trade unions embarked on wildcat strikes in 2016 and again in 2018–19; these lasted for many weeks 'with road and factory closures disrupting the industry'. The government attempted to resolve the dispute through tripartite discussions, and despite union calls for strikes to stop, workers only stopped once the government increased the minimum wage.[43]

As a counter example to the Accord, part 5.4 discusses a legally enforceable transnational supply-chain collective agreement in the garment sector that was initiated and negotiated by an Asian organisation, the Asia Floor Wage Alliance. This is followed, in part 5.5, by a reflection on the implications of these case studies for labour law and for transnational supply-chain collective bargaining.

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[40] Ibid at 997; also see Hasan Ashraf & Rebecca Prentice 'Beyond factory safety: Labor unions, militant protest, and the accelerated ambitions of Bangladesh's export garment industry' (2019) 43 *Dialectical Anthropology* 93–107.
[41] Hauf op cit note 35 at 999.
[42] Kang op cit note 11 at 425.
[43] Ibid at 430.

## 5.4 Asian-led supply-chain collective bargaining

Over the last 30 years, militant trade union unions, women's, labour, homeworkers' and migrants' rights organisations in many countries, including Bangladesh, Cambodia, Hong Kong, India, Indonesia, Malaysia, Philippines, Sri Lanka and Thailand, began to organise garment supply-chain workers. In 2000, Indian garment-sector unions in the private sector that were independent of political parties established the New Trade Union Initiative (NTUI).

From the beginning, the NTUI included campaigning as part of its armoury, and consequently sought alliances with women's organisations and labour-rights organisations in India, and alliances with organisations in buyer countries, most notably the CCC.[44] In Bangalore, India, the NTUI formed the South India Coalition for Garment Workers' Rights, which included both trade unions and civil society organisations. With support from campaign organisations in India and from buyer countries (including the CCC, the WRC and SOMO), the coalition combined traditional trade union activities (organising and mobilising) with campaign activities to push for trade union and collective bargaining rights.[45] The NTUI set about building a regional network across Asia, including Hong-Kong China.

### *5.4.1 Asia Floor Wage Alliance*

In 2007, the Asia Floor Wage Alliance (AFWA) was founded as a network of labour organisations and trade unions from Asian garment-producing countries, as well as from countries that were home to the lead firms. Veteran trade unionist and feminist, Anannya Bhattarcharjee, is the International Coordinator. She is also the President of the Indian Garment and Allied Workers Union.[46]

AFWA is distinguishable from other labour-rights networks in several respects. First, it was founded and is led by female, Asian trade unionists. Most of its members are trade unions and civil society organisations from Asian countries and it

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[44] Kang op cit note 11 at 412.
[45] Ibid.
[46] For a full history of AWFA, see Asia Floor Wage Alliance 'Asia Floor Wage Alliance: A short history at the brink of transition' (2017) at 4, available at *https://asia.floorwage.org/wp-content/uploads/2022/01/A-Short-History-on-the-Brink-of-Transition.pdf*, last accessed on 14 August 2023.

explicitly develops and supports women union leaders.[47] Second, as its name suggests, AFWA's focus is on arresting the proverbial race to the bottom by establishing a regional living wage. Based on a food basket of 3 000 calories to support a family 'with three consumption units' and with support from the CCC and the WRC, AFWA conducted research in six countries and developed a regional living wage expressed in purchasing power parity, which is translated into local currencies and updated periodically.[48] A regional living wage addresses workers' livelihoods, but it also addresses the structural issue of lead firms playing suppliers and countries off against each other to secure the lowest price. AFWA sees the living wage as 'inextricably tied to freedom of association, the end of short term contracts and of gender-based discrimination'.[49] It is clear that 'although it is important for employers to recognize the workers' right to organise, *superficial recognition in itself rarely leads to unionization and bargaining power*' (own italics).[50] This is so because it is difficult to organise workers who know that their demands cannot be met if their employers are not the ones fixing production prices, and higher wages may result in job losses if lead firms move to countries with lower wage structures.[51]

Third, unlike trade unions in the global North, AFWA engages in both union activities and campaigning. AFWA articulates this strategy as follows: campaign activities bring visibility to working conditions in the garment sector, which makes it easier to unionise workers and the more workers are unionised, the more effective on-the-ground campaign strategies are.[52] This recursive relationship between campaigning and mobilising is illustrated by its People's Tribunals: mock trials that bring individual brands to trial for violating fundamental human rights in their supply chains. Drawing inspiration from the Permanent People's Tribunals in Italy, AFWA commissioned human rights scholar Upendra Baxi to make the argument that a living wage is a fundamental human right. This formed the basis for bringing charges against individual brands in four Peoples' Tribunals held in Sri Lanka,

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[47] Ibid at 17.
[48] See Asia Floor Wage Alliance 'Calculating a living wage' (2022), available at *https://asia.floorwage.org/calculating-a-living-wage/*, accessed on 5 August 2023.
[49] AFWA op cit note 46 at 17.
[50] Ibid at 6.
[51] Ibid.
[52] Ibid.

Cambodia, India and Indonesia between 2011 and 2015.[53] On the one hand, the purpose of the tribunals was to launch the campaign for the right to a living wage (in counter distinction to a minimum wage). On the other hand, the tribunals were a means of mobilising and building solidarity among workers and trade unions of the region and to 'bring the process closer to workers'.[54] Each country established an organising committee, engaged in grass-roots-action research, trained workers to testify, and appointed juries comprised of 'eminent persons' from the country and abroad.[55] Few brands testified. Most were found guilty in absentia.[56] Very importantly, 'an alliance [was forged] between the affiliates of [GUFs] as well as new unions emerging from militant and different traditions, into a shared framework that foregrounded the wage struggle as the context for unionisation'.[57]

Fourth, from its inception, AFWA recognised the critical importance of associational power derived from transnational networks (such as the CCC, the WRC and Jobs for Justice), and it continues to strategise with its allies. However, associational power derived from transnational labour-rights organisations cannot stand in for workers' structural power at the national and regional level. AFWA has engaged in collective bargaining training at national and regional level, with a specific focus on women leaders and developed a 'multi-country complaint strategy'.[58] It has launched 'global days of action and solidarity' and, together with its allies (including the CCC and the WRC), supports national struggles. Although AFWA supports members at national level, its strategies are regional.

Finally, AFWA's organising strategies pay attention to gender, caste, and migrancy status.[59] Given the predominance of first-generation, young, female workers in the garment sector, AFWA addresses gender-based violence, which is endemic to the sector. In 2018, AFWA established the Women's Leadership

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[53] Ibid at 17.
[54] Ibid.
[55] Ibid.
[56] Ibid at 18.
[57] Ibid.
[58] AFWA op cit note 46 at 17.
[59] In relation to caste, see, e.g., Asia Floor Wage Alliance 'Statement by International Dalit Solidarity Network (IDSN) and Asia Floor Wage Alliance (AFWA)' (21 April 2021), available at *https://asia.floorwage.org/wp-content/uploads/2022/01/IDSN-AFWA-final-statement-PDF.pdf*, accessed on 12 August 2023.

Committee comprising women trade unionists, and which engages directly with brands. Its factory-level, 'safe-circle' organising approach to address gender-based violence empowers women themselves. These strategies formed the building blocks for the Dindigul Agreement.

### *5.4.2 The Dindigul Agreement*

When Jeyasre Kathiravel, a garment factory worker in Tamil Nadu, India was murdered in 2022 after months of sexual harassment, AFWA, together with US-based ally, Global Labor Justice-International Labor Rights Forum (GLJ-ILRF), launched the 'Justice for Jeyasre' campaign. Lead firms, who were identified by the campaign as buying from Eastman Exports (which owned the factory where Jeyasre worked), pressured Eastman to permit the WRC to interview workers for a report on the forms of gender and caste-based violence in Eastman's factories. This report ultimately led to the Dindigul Agreement, which was concluded in April 2022.[60] The agreement consists of two inter-related agreements to address gender and caste-based violence in the factories owned by Eastman Exports, including two garment factories, printing works, and spinning mills. Most workers in these factories are women, Dalits (the lowest caste in India), inter-state migrants (who cannot speak Tamil), and first-time labour-entrants between the ages of 18 and 25 from very poor rural families.[61] These intersectional identities make them vulnerable to, and powerless against, verbal, physical, and sexual harassment and violence from male supervisors.

The first agreement is between the 'Indian women- and Dalit-worker led' trade union, the Tamil Nadu Textile and Common Labour Union (TTCU) and the direct employer, Eastman Exports, with AFWA and GLJ-ILRF as 'witness signatories'. It covers all the factories owned by Eastman in Tamil Nadu. The second agreement is between the TTCU, the GLJ-ILRF, AFWA and H&M. Later, similar

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[60] According to AFWA, TTCU & GLJ-ILRF (*Dindigul Agreement: Year 1 Progress Report* (2023) at 29), the campaign included a social media campaign, a petition, a global online vigil and a speaking tour in ten cities in the USA, available at *https://laborrights.org/sites/default/files/publications/DINDIGUL%20AGREEMENT%20YEAR%201%20PROGRESS%20REPORT%202023_0.pdf*, accessed on 14 August 2023.
[61] Ibid at 25.

agreements were signed with Gap Inc and PVH.[62] The main features of these two interlocking agreements are as follows. First, the oversight mechanism comprises two committees: the Oversight Committee (OC) and the Implementation Committee (IC). The OC comprises the TTCU, Eastman, two brands (that rotate seats), AFWA and GLJ-ILRF — that is, in addition to the traditional parties to a workplace collective agreement, the committee includes representatives of the lead firms in the supply chains, and two labour rights NGOs (one Asian-based and one USA-based). This is the umbrella structure that oversees the implementation of the agreement, and it meets every three months. The IC, as its name suggests, is responsible for the implementation of the agreement. It comprises senior TTCU officials, the management of Eastman Exports and AFWA — that is, all the parties to the agreement that are in India, including AFWA, which signed as a 'witness'. The agreement states that the IC must draw up an implementation plan every six months, which must be approved by the OC.[63] The second agreement obliges the lead firms/brands to promote Eastman's compliance with the plans through economic incentives, and sanctions in the case of non-compliance. The parties have not made the terms of the second agreement public.

Second, the agreements are based on, and seek to implement, both international and national laws — namely, ILO Convention 190 on violence in the workplace; ILO Convention 87 on freedom of association and the right to organise; and India's Prevention of Sexual Harassment (POSH) Act.[64] Based on discussions with Dalit workers in the safe circles, as well as research conducted by the WRC, and scholarship on gender-based violence, the parties constructed a ladder of violations (an 'escalation ladder') with the bottom rung representing the least serious violation and the most serious occupying the top rung. Each rung has a pre-agreed remediation plan ranging from an apology (with dismissal for repeat offenders) to a criminal charge. Research shows that, if gender-based violence is addressed at the

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[62] AFWA, GLJ-ILRF & TTCU 'Fact sheet: The Dindigul Agreement to end gender-based violence and harassment' (2023), available at *https://laborrights.org/sites/default/files/publications/Dindigul%20Agreement%20Fact%20Sheet%20Jan.%202023.pdf*, accessed on 29 July 2023.
[63] AFWA et al op cit note 60 at 90.
[64] Ibid at 28.

initial stages, it is less likely to escalate to more serious violations.[65] The agreement provides for shop-floor monitors, who are also garment workers (and therefore on the factory floor), to confront supervisors in relation to offences on the lower rungs, as they happen. This has the effect of shifting power relations between workers and supervisors as well as addressing harassment immediately, which in most cases prevents it most from escalating to more egregious forms of sexual harassment. Workers can report incidents to shop-floor monitors, and each of the 58 shop-floor monitors also proactively supports 15–20 workers in safe circles to understand and use the grievance system. The agreement protects shop-floor monitors from retaliatory actions on the part of supervisors through a rebuttable presumption in favour of the monitor that any negative action on the part of the supervisor is retaliatory.

Third, the enforcement mechanisms are multi-tiered and 'bottom up': if an incident is either reported by a worker or witnessed by the shop-floor monitor, and the monitor is unable to deal with it, she reports it to the trade union.[66] The trade union and the factory management have weekly 'union-management dialogue meetings', where the parties agree to a remediation plan.[67] Shop-floor monitors attend this meeting if they have brought an incident for remediation. If the issue is not resolved by the union-management dialogue meeting, then the matter goes to a more senior body — with senior trade union officials and Eastman's senior management — for resolution at their monthly social dialogue. Ultimately, a matter that is not resolved to the satisfaction of the worker goes to the OC and to the POSH Committee, a committee that any enterprise in India with more than 10 employees must establish. The TTCU and management have separate monthly meetings with workers across all units to identify issues that are not being reported.[68] The final dispute-resolution mechanism is recourse to arbitration in Sweden.[69]

Fourth, the agreement was communicated to all employees (workers, supervisors and managers) in a joint ceremony at each workplace and through

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[65] Ibid at 40.
[66] Ibid at 45.
[67] Ibid at 74.
[68] Ibid at 78.
[69] AFWA et al op cit note 62 at 3.

training that sought to inculcate 'a culture of mutual respect' and 'institutional acceptance of the agreement'.[70] Fifth, and crucially, the agreement makes clear that workers' rights to freedom of association and collective voice is critical to eradicating gender-based violence. Workers need to be able to join the trade union, and the trade union must be able to organise without fearing repercussions. Both agreements contain clear and 'explicit' commitments to respecting workers' rights to freedom of association, with 'strong business consequences' for Eastman Exports should workers' rights to freedom of association be undermined.[71] Because the union was led by Dalit women, they could anticipate how the factory would undermine freedom of association. Since the union participated in the negotiations, the agreement anticipates these insights, which are incorporated into the typology of violations and remediations.[72]

A report on the impact of the agreement after one year suggests the agreement has addressed gender-based violence, fostered social dialogue, and built institutional and associational power through 'individual and collective empowerment of workers'.[73] The success in addressing gender-based violence is impressive but, for our purposes, the importance of the case study lies in the implications of the agreements for the latter two aspects. The report found that the weekly union-management dialogue meetings began to address issues other than gender-based violence. For example, workers began to raise issues related to withholding of wages,[74] social security,[75] occupational health and safety[76] and even the effect of high transport costs.[77] All these issues were addressed. Management raised issues related to workplace reorganisation and other issues related to productivity, which were also addressed. Tangible results include increased productivity, reduced absenteeism and staff turnover.[78] Thus the union-management social dialogue has reduced conflict in the workplace and evolved into a 'space to

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[70] AFWA et op cit note 60 at 36 and 50.
[71] Ibid at 42.
[72] Ibid at 42.
[73] Ibid at 42.
[74] Ibid at 34.
[75] Ibid at 75.
[76] Ibid at 72.
[77] Ibid at 76.
[78] Ibid at 70.

raise other issues' besides gender and caste-based violence.[79] The report includes many quotes by workers attesting to how they used to be afraid to raise issues, but feel empowered to raise their voices not only for themselves, but also for others both in the workplace and in the communities in which they live.

AFWA argues that it has shifted power in the supply chain and the workplace, and introduced 'a problem-solving model' that is the beginning of 'democratic workplace culture'. Indeed, workplace democracy, argues AFWA, plants the seeds for 'societal democracy'.[80]

## 5.5 Normative and practical lessons for the institution of collective bargaining

The purpose of this chapter has been to explore, through case studies, how the institution of collective bargaining must evolve (seeking the necessary normative and practical shifts) for it to realise *de facto* collective bargaining rights for workers in global garment supply chains. This part first discusses the normative aspects, then the practical. Chapter seven explores the implications of these case studies for the discipline of labour law.

### *5.5.1 Distilling normative principles for transnational supply-chain collective bargaining*

Philosophically, collective bargaining can be reduced to two logics. The first logic — mostly advanced by scholars and institutions promoting neo-classical (or new institutional economics) perspectives on labour markets — is that collective relations result in greater efficiency (increased production, fewer strikes, reduced absenteeism, less staff turnover and therefore a saving in training new employees).[81] The second logic, familiar to labour law scholars, is that collective bargaining redistributes 'how productivity gains and risks are allocated between different

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[79] Ibid at 66.
[80] Ibid at 54.
[81] Virginia Doelgast & Chiara Benassi 'Collective bargaining' in Adrian Wilkinson, Jimmy Donaghey, Tony Dundon & Richard Freeman (eds) *Handbook of Research on Employee Voice* (2014) 227 at 242.

stakeholder groups.[82] This section proceeds to analyse the distributional impact of the Accord and the Dindigul Agreement, with the purpose of identifying the normative principles for supply-chain bargaining that are most likely to result in durable distributional outcomes for workers, and reduce unintended distributional outcomes.

Part 5.2 showed that the Accord resulted in unintended distributional consequences: lead firms lowered their price per garment to recover the costs of improving the safety of buildings and factory; and employers/factory owners demanded unpaid overtime from their workers, and more units per hour. These unintended distributional outcomes are largely attributable to the fact that not all supply-chain actors were invited to the bargaining table. As is the case with all collective agreements, the Accord involved trade-offs between the signatories, including the witness signatories. Brands agreed to sign the Accord in exchange for UNI Global calling off industrial action by their European members, and in exchange for the social movements/labour-rights organisations holding off campaigns against individual brands. The trade-offs were therefore between European actors. Supplier factories were not involved in the negotiations and, as a result, there was no trade-off between the brands and their suppliers; nor were suppliers' perspectives (on likely brand behaviour to compensate for the contributions to upgrading buildings) built into the agreement. Similarly, there were no trade-offs between the suppliers and their workers, or between the suppliers and their SME subcontractors. In sum, the Accord resulted in a gain for workers — safer factories — at the cost of an intensification of work (more units to be produced per hour) or working overtime without pay; thus, the net distribution was zero. Indeed, the Accord negatively redistributed bargaining power between lead firms and suppliers because it legitimised lead firms' coercive power over their suppliers, as evidenced by this factory owner's remark:

> An outsider cannot dictate to you how to live. They can educate you, and you must understand what is required.

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[82] Ibid at 330.

> But I am complying not by will, but by force, because I am scared.[83]

As previously noted, the Dindigul Agreement comprises two agreements. The first is between the Indian trade union that directly represents the workers in the factory (the TTCU), the two NGOs, and the brands. The TTCU could anticipate how Eastman would undermine freedom of association, and these insights were incorporated into the ladder, which presumably featured in both agreements. The trade-off between the signatories of the first agreement — the NGOs and the retailers — was that the NGOs would not campaign and inflict reputational harm to their brands in exchange for the retailers using their market power to enforce the provisions of a second agreement, which was a workplace agreement between the trade union and Eastman Exports (with the NGOs as witness signatories). The brands therefore used their power to bring about a redistribution of power between Eastman and the TTCU; between shop-floor monitors and supervisors; and between workers and their employer — and Eastman was part of negotiations and a signatory.

The first principle for transnational supply-chain collective bargaining agreements, therefore, is that all stakeholders — 'all who are affected' to use Nancy Fraser's term[84] — must participate in collective negotiations. Suppliers must be signatories to the agreements, as must the owners of informal enterprises to whom they subcontract, and worker representatives of workers throughout the chain, including industrial outworkers. There is a precedent for including all the garment-chain stakeholders, including industrial outworkers. The New York 'jobbers' agreements were collective agreements negotiated in the early twentieth century by the International Ladies Garment Workers Union (ILGWU) and companies called jobbers, which outsourced garment production. These agreements — one with jobbers and one with the workshops to which jobbers outsourced production — established joint liability for wages and working conditions by jobbers and the firms

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[83] Kang op cit note 11 at 420.
[84] See Nancy Fraser *Scales of Justice: Reimagining Political Space in a Globalizing World* (2009).

to which they subcontracted.[85] Although all the signatories were from the USA, these principles could be replicated at the global level.

Second, supply-chain collective agreements must include workers, not just trade union officials, in the enforcement mechanisms. For this to be realised, the intersectional identities of the workforce (such as gender, status of work, caste, and class) must be recognised. Traditionally, labour law scholarship has identified labour in class terms. Several scholars, most notably Jennifer Gordon, Judy Fudge, Kerry Rittich and Kamala Sankaran, have challenged the privileging of class over an intersectional lens that highlights the vulnerability of female, migrant, low-caste and informal workers. For collective bargaining to address insider-outsider critiques, actors (at least trade unions and labour-rights NGOs) must consciously adopt normative commitments to empowering individual workers and building trade unions led by workers with outsider status. As part of this commitment, they should embrace participatory methods that build confidence and that enable all workers to have equal voice — like the safe-circles approach and the formation of a women leaders' committee. This is critical for the building of structural power (of which freedom of association is a part), which will be explored further in chapter seven.

### *5.5.2 Practical shifts required of the institution of collective bargaining*

According to Virginia Doelgast and Chiara Benassi, the term 'collective bargaining' was first used by Beatrice Webb in 1891 to mean collective action by workers that has the purpose of negotiating a formal agreement.[86] Section 2 of ILO Convention 154[87] defines collective bargaining as:

> all negotiations which take place between an employer, a group of employers or one or more employers'

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[85] See Mark Anner, Jennifer Bair & Jeremy Blasi 'Toward joint liability in global supply chains: Addressing the root causes of labor violations in international subcontracting networks' (2013) 35(1) *Comparative Labor Law & Policy Journal* 1–44.
[86] Doelgast & Benassi op cit note 81 at 230.
[87] International Labour Organization *Convention Concerning the Promotion of Collective Bargaining* C154 (27 June 1978) Adopted: 03/06/1981; EIF: 11/08/1983.

> organisations, on the one hand, and one or more workers' organisations, on the other, for —
>
> > (a) determining working conditions and terms of employment; and/or
> >
> > (b) regulating relations between employers and workers; and/or
> >
> > (c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations.

This definition thus addresses who can negotiate and what they can negotiate about. With respect to *who* can negotiate, the ILO supervisory mechanisms have expanded on the parties listed in Convention 154, to include stated federations and confederations.[88] In practice, at the national level, other parties have also been parties to a collective agreement, including the state, trade unions, works councils, employers, middle managers, and employees too.[89] Who can be a party to negotiations depends on the bargaining structure of the sector and '[the] rights accorded them through law and practice'.[90] The ILO's flagship report on social dialogue identifies a key criterion for organisations to participate: they must be representative.[91]

With respect to terms, the issues to be addressed by collective agreements (namely, *what* may be negotiated by the parties), collective agreements now include topics tangential to the traditional issues outlined in Convention 154. The ILO report, which analysed more than 500 collective agreements from 21 countries,[92] lists the following topics: gender discrimination and sexual harassment; managing

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[88] Bernard Gernigon, Alberto Odero & Horacio Guido 'ILO principles concerning collective bargaining' (2000) 139(1) *International Labour Review* 33 at 36.
[89] Doelgast & Benassi op cit note 81 at 230.
[90] Ibid.
[91] ILO op cit note 2 at 29.
[92] Ibid at 18.

the risks of climate change; performance-related pay; and balancing work and care responsibilities.[93] It states that collective agreements can also craft specific 'regulatory solutions' for a particular industry, geography, work situation or enterprise. For example, in some countries in Asia, collective agreements in the garment sector provide for bonuses during festivals, and in other instances platform workers have negotiated for 'health checks' and a 'winter bonus'.[94] Indeed the report states that topics are 'shaped by the parties to the negotiation' and 'can serve as a regulatory standard …[a] benchmark'.[95] The ILO sees collective agreements as 'institutional experimentation and incubation of new regulatory approaches'.[96]

The third aspect of collective agreements relates to *where* — that is, at what level — the collective agreement is concluded. Paragraph 4(1) of the ILO Collective Bargaining Recommendation, 1981 (No 163) states that the parties should be able to decide which level is most appropriate — whether the 'establishment, the undertaking, the branch of activity, the industry, or the regional or national levels'. Gernigon and his co-authors suggest that the supervisory mechanisms leave it to national systems to determine how agreements at different levels relate to one another. Paragraph 4(2) of Recommendation No 163 states that '[i]n countries where collective bargaining takes place at several levels, the parties to negotiations should seek to ensure that there is co-ordination among these levels'.[97] Enforcement at the global level is a challenging issue, as Hyde expressed. However, the Accord and the Dindigul agreements showcase different enforcement mechanisms that have been successful; although collective bargaining at the global level is relatively novel, an international collective bargaining forum established for seafarers could serve as a model for the garment sector.[98]

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[93] Ibid at 175.
[94] Ibid at 90 .
[95] Ibid.
[96] Ibid at 31.
[97] Gernigon op cit note 87 at 43.
[98] ILO op cit note 2 at 29. For details of the seafarers' international bargaining forum see the website of the International Transport Federation at https://www.itfseafarers.org/en/your-rights/international-bargaining-forum, accessed on 3 February 2024.

In conclusion, there are no significant practical shifts required of the institution of collective bargaining to realise *de facto* rights for supply-chain workers.

## 5.6 Conclusion

Each of the collective agreements discussed in this chapter redistributes power. None is economically redistributive since workers' poverty wages and lead firms' procurement practices remain unaddressed. However, it is a matter of time before these issues come to the fore. The OECD is planning a handbook for brands on living wages in garment supply chains, which signals a shift in consciousness; and labour-rights organisations are strategising an 'enforceable brand agreement' about living wages. The case studies hold important tactical lessons. First, the Dindigul Agreement showed that getting lead firms to the bargaining table was relatively easy because no brand can survive if associated with gender-based violence (GBV), and there were no significant financial implications for brands to address GBV in their supply chains. Nevertheless, it establishes a precedent for brands to engage in collective negotiations about the working conditions of workers in their supply chain, and it institutionalises social dialogue in factories.

Second, the case studies demonstrate that associational power derived from organisations that threaten lead firms with economic loss is indeed a critical source of countervailing power, but it cannot replace structural power and associational power at the national level. AFWA is building associational power from the bottom up by empowering migrant, lower-caste, first-time labour-market entrants to become union leaders and by supporting them to organise co-workers by addressing GBV, which matters for workers, but does not affect the profits of suppliers or brands. By choosing an issue like GBV, AFWA and the TTUC have created a space for factory workers to realise their right to freedom of association; and freedom of association is the precursor to collective bargaining.

# Chapter 6

## Collective bargaining between street vendors and local authorities

### 6.1 Introduction

Chapter four, the literature review, explored the conceptual and legal basis for labour law to include informal self-employed workers, such as street vendors, within its scope. It concluded that Freedland and Kountouris' theory of labour law as personal work relations (PWR) is best suited to realising rights to collective bargaining for the informal sector because it privileges collective voice — rights to freedom of association and collective bargaining — over other labour rights. Having established a legal basis for labour law (as personal work relations) to include the informal sector within its scope, this chapter discusses case studies to reflect on the possible normative and practical shifts that may be required of the institution of collective bargaining to realise rights to collective bargaining for street vendors.

The chapter proceeds as follows. Part 6.2 analyses four case studies of collective relations between organisations of street vendors and local authorities. Drawing on the International Labour Organization (ILO) definitions of social dialogue and collective bargaining, the chapter shows that the case studies exemplify different forms of social dialogue. The first two case studies concern the struggle by street for national legislation that recognises street vendors' rights to work in public space (in India) and a similar by-law that was promulgated in Sao Paulo, Brazil in the early 1990s. It is argued that both laws institutionalise a form of workplace cooperation. The third case study analyses the collective agreement concluded between the Federation of Petty Traders and Informal Workers Union of Liberia (FEPTIWUL) and the Monrovia City Corporation (MCC), which is the statutory body that manages Monrovia, the capital city of Liberia. It is argued that this is a collective bargaining agreement. The fourth case study analyses agreements between the Zimbabwean Chamber of Informal Economy Association (ZCIEA) and three different local authorities. It will be argued that these agreements are like global framework agreements, except that they are concluded at the level of the city.

Part 6.3 discusses case studies of collective bargaining laws for so-called self-employed (dependent contractors) in Canada, the United States of America

(USA), and Australia. They showcase innovative solutions that could be applied to collective bargaining laws for informal self-employed workers.

## 6.2 Case studies of collective relations between street vendors and local authorities in India and Sao Paulo, Brazil

In India, street vendors fought for national legislation that obliges local authorities to establish town vending committees comprising representatives of all stakeholders. Similarly, in Sao Paulo, Brazil, the city council promulgated a law that obliged local authorities (called 'regional administrations') to establish a 'street vending permanent commission' comprised of stakeholder representatives. The chapter argues that in both cases the legislation institutionalised a form of social dialogue. This is followed by a discussion and analysis of agreements between organisations of street vendors and local authorities in two African countries — Liberia and Zimbabwe.

### *6.2.1 The Indian Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act*[1]

The National Association of Street Vendors of India (NASVI) (comprising organisations of street vendors, trade unions and NGOs) was founded in 1988. Its objective was to advocate for national legislation to compel municipalities to recognise and protect street vendors' livelihoods.

The use of public space is a local authority competency, and it took more than a decade for NASVI to persuade the national government (through media campaigns, protests and hunger strikes) to promulgate national legislation. Eventually, the government established a task team to draft a policy on street vending, which included representatives from NASVI, residents' associations, civil society and the government. The policy recognised that everyone has a right to work and is entitled to equal protection by the law. It also recognised the need to balance two competing policy considerations: preventing over-crowded, unsanitary streets on

[1] This case study has been published in Marlese von Broembsen 'Collective bargaining for self-employed street vendors?' (2022) 2 *Global Labor Rights Reporter* 36. The University of Cape Town's Doctoral Degrees Board has granted permission to include the publication in this thesis.

the one hand, and creating an enabling regulatory framework for street traders to generate a livelihood on the other. In 2014, the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act (Street Vendors' Act) was promulgated.[2]

The Act mandates local governments to create, in each zone, a town vending committee (TVC) to be responsible for all decisions related to street vending. The committee must comprise different stakeholders, including residents' associations and different departments within local authorities. On the TVC, street vendors must comprise 40 per cent, women, scheduled castes must comprise at least a third, and civil society representatives must comprise at least 10 per cent of committee members. Section 22(2) of the Act stipulates that the TVC should be chaired by a 'Municipal Commissioner or Chief Executive Office' and that the 'appropriate Government' may nominate officials to represent the local authority, the planning authority, traffic police and police. Other TVC members include representatives from associations of street vendors, market associations, traders' associations, non-governmental organisations, community-based organisations, resident-welfare associations, banks, and other interested stakeholders. The local authority must provide the TVC with office space. Local authorities have to 'frame a scheme' within six months of the promulgation of the Act after due consultation with the TVC, have to issue street vending plans to address the 'identification of vending zones', specify 'spatial plans for street vendors' and establish 'measures for efficient, and cost-effective distribution of goods and services'[3]

Implementation is uneven, and vendors continue to be harassed by the police and local authorities. According to a 2022 report by the Parliamentary Standing Committee on Urban Development and despite the statutory obligation on local authorities to 'frame a scheme' that designates public space as trading areas, only

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[2] Act 7 of 2014, available at *https://www.indiacode.nic.in/bitstream/123456789/2124/1/a2014-07.pdf*, accessed on 26 October 2021.
[3] Shruti Gupta 'Standing Committee report summary: Implementation of Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014' *PRS Legislative Research* (15 September 2021), available at *https://prsindia.org/files/policy/policy_committee_reports/Report%20summary_Street%20Vendors.pdf,* accessed on 28 May 2022.

1 169 out of 4 372 local authorities have complied.[4] In only 17 out of 28 states have all the 'eligible' cities established town vending committees. Vendors report that meetings are held without a proper agenda and that they have been coerced into signing documents 'without being given the opportunity to read'. They continue to work without basic infrastructure (such as toilets and shelter from the elements), despite paying licensing and permit fees, and harassment and evictions from trading sites continue unabated.[5]

The next section discusses a similar model of workplace cooperation in Sao Paulo, Brazil, which failed for similar reasons. It then discusses the provisions of a draft bill that proposes institutional innovations to address the failures of localised workplace cooperation without a city-wide supervisory institution.

### *6.2.2 'Street vending Permanent Commissions' in Sau Paulo, Brazil*[6]

In 1989, the Workers' Party (established by the trade union movement and several social movements) won the local election in Sao Paulo—a city of approximately twelve million people. Eager to support part of her constituency, the newly elected mayor legalised street vending, since under the previous regime it was unlawful to vend goods in a public space.[7] She issued a decree[8] that obliged every local authority to establish a Street Vending Permanent Commission (CPA) that comprised representatives of three groups of stakeholders: street vendors, shop owners' associations (which in many cities resist the legalisation of street vendors as they regard them as unfair competition), and municipal departments.[9] The CPAs' responsibilities included 'interpreting and enforcing' the decree and advising local

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[4] Roopa Madhav 'India's Street Vendor Protection Act: Good on paper but is it working?' *WIEGO Blog* (13 June 2022), available at *https://www.wiego.org/blog/indias-street-vendor-protection-act-good-paper-it-working*, accessed on 16 April 2023.
[5] Ibid.
[6] This case study is drawn from Mariana Prandini Assis 'Whose law? our law!': Critical reflections on legalization, social Dialogue and street vendors' organizing in São Paulo' *WIEGO Organizing (Law) Brief* No 15. (September 2023), available at https://www.wiego.org/sites/default/files/publications/file/wiego-organizing-brief-15.pdf, accessed on 8 December 2023.
[7] Ibid at 3.
[8] Decreto n.27.660.
[9] Prandini Assis op cit note 6 at 4.

authorities on 'street vending-related matters'[10] Two years later, CPAs were institutionalised through a a by-law that regulated street vending in the city.[11]

The Workers' Party lost the next election and street vendors' gains—recognition as workers, a recognition of their right to work, and representative voice through participation in the CPAs—were reversed. It took ten years for the Workers' Party to be re-elected. Once again, upon election the new Worker Party mayor issued a decree[12] that reinstated the CPAs. This time, CPAs included a fourth stakeholder: representatives from social movements. CPAs now had the authority to allocate land as vending sites and were responsible for issuing permits; hearing appeals; and summoning representatives from state departments to provide information or technical assistance.[13] Mariana Prandini Assis notes that '[t]hey were operationalized as an important space for social dialogue in their early years, embodying the political vision of workers' active involvement in the decision-making process of issues that affected them and in decisions affecting their working conditions'.[14]

Yet when a new party came to power, CPAs were dismantled again. Analysing why CPAs were unable to resist strategies by the new regime to undermine the decision-making power of the CPAs, Itikawa argues that the 'institutional design' of these social dialogue institutions was to blame:

> The CPA's institutional design localized the issues within the administrative perimeters of each regional city hall office, forcing street vendors' representatives to negotiate separately with each regional administrator and often in isolation from one another. This arrangement obscured the fact that street vendors were trading and fighting to work in one and the same city, which is governed by the same laws, master plan and municipal administration. Moreover, it reinforced local forms of patronage and fuelled divisions among workers; some groups ended up

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[10] Ibid.
[11] Lei 11.039/91
[12] Decree 42600/2002
[13] Prandini Assis op cit note 6 at 4.
[14] Ibid.

> being privileged and others punished, depending on which regional administration they were dealing with.[15]

Street vendor representatives were often prevented from attending meetings of the CPA, or meetings were held without their knowledge. Prandini Assis explains that 'because the CPAs were fragmented throughout the city, it was difficult to connect individual cases and identify a pattern of violations'.[16] Ultimately, the new administration revoked street vendors' permits en masse and through another decree[17], which aimed to 'reorder public space, ensuring accessibility to pedestrians and preserving the landscape urban and historical heritage',[18] street vending once again became an unlawful livelihood activity.

With support from the Office of the Public Defender and the Gaspar Garcia Centre for Human Rights, organisations of street vendors brought two class actions against the local authority. They argued that their rights to due process had been infringed[19] and invoked rights to participation (in urban decision-making processes), the right to collective bargaining, the right to work,[20] and last, the right to the city.[21] The matter was decided by the São Paulo State Court of Justice and its decision was confirmed by the Superior Court of Justice. The court decided in favour of the vendors on two grounds. First, the court held that the city had failed to satisfy the criteria for 'administrative due process'. Second, it held that street vendors have a right to participate in decisions affecting their livelihoods. Allan Ramalho Ferreira, one of the public defenders that represented the street vendors, commented that 'the

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[15] Luciana Itikawa in Prandini Assis op cit note 6 at 5.
[16] Prandini Assis op cit note 6 at 5.
[17] Decreto n. 53.154/2012
[18] Prandini Assis op cit note 6 at 5.
[19] In common law countries this would constitute an administrative law argument, but in civil law countries in Latin American, administrative law refers to regulations passed by government administrators.
[20] Prandini Assis op cit note 6 at 6.
[21] For a discussion on the right to the city, see David Harvey 'The right to the city' in Richard T. LeGates & Frederic Stout (eds) *The City Reader* (2020); UN Habitat 'The Right to the City and Cities for All' *Habitat III Policy Papers* (2017), available at *https://habitat3.org/wp-content/uploads/Habitat%20III%20Policy%20Paper%201.pdf,* accessed on 4 December 2023. Also see Mathew Idiculla and Roopa Madhav ('"The "Right to the City" and emerging Indian jurisprudence: implications for informal livelihoods' *WIEGO Law and Informality Insights* No.3 (2021) available at https://www.wiego.org/sites/default/files/resources/file/WIEGO_LawNewsletter_March%202021_EN.pdf, accessed on 4 December 2023) for a discussion of Indian jurisprudence on the right to the city.

Judiciary's recognition of the right to participation in city affairs and to social dialogue, an element of the right to democracy in the city, is a very important victory'.[22]

Ramalho's interpretation of the judgment is notable in two respects. First, it is remarkable that the court interpreted the constitutional right to participation as a right to social dialogue.[23] Second, the court indicated that social dialogue must occur at the level of the city rather than in the workplace. Part 6.3. explores the implications for labour law of institutionalising social dialogue at city level.

During the class actions, vendors and their organisations recognised the imperative to build associational power. Forty-three organisations of street vendors (representing both vendors with permits and vendors trading without permits) proceeded to establish the Forum of Street Vendors of the City of São Paulo (Fórum dos(as) Trabalhadores(as) Ambulantes da Cidade de São Paulo.) [24] The Forum, which still exists, includes representatives from civil society organisations and from social movements that are allies, as well as academics and lawyers.[25] Meeting (often online) up to three times a week, it has fulfilled several roles. First, it has built solidarity among street vendors from different parts of the city and among vendors with different legal entitlements (depending on whether they have permits or not) through identifying common problems attributable to the power relations with the city authority that controls their workplace. Second, it has become a space to experiment with, and practice, democratic decision-making. By adopting a 'Pact of Convivality' that contains rules for members of the forum — such as when and how to speak, and a duty to listen—it encourages deliberative-democratic decision-making.[26] Third, the forum enabled street vendors to develop a 'shared political

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[22] Prandini Assis op cit note 6 at 6.
[23] Unfortunately, the author does not have access to the decision, which if reported would be in Spanish. Admittedly therefore, the analysis rests on Prandini Assis's interview with a lawyer that represented the applicants. See Prandini Assis op cit note 6 at 6.
[24] Prandini Assis op cit note 6 at 7.
[25] Other groups of self-employed informal workers have adopted a similar strategy. For example, in the city of Bel Horizonte, the National Movement of Waste Pickers waste pickers have established a similar forum that includes academics, researchers, civil society organisation and other allies.
[26] Alcântara et al. 2013 in Prandini Assis op cit note 6 at 8.

agenda' and a common position on policy and legal proposals made by the local authority.[27]

In 2020,[28] with support from forum-allies, street vendors developed a draft street vending bill. Over the last four years, they have engaged with the city through 'public hearings' on aspects of the bill.[29] The way in which the bill institutionalises social dialogue reflects the lessons learnt from the failed CPAs. It includes a two-tier institution: at the level of the city, the bill provides for the creation of a 'Municipal Council', which will include representatives from four constituencies: street vendor organisations; the city administration; the city council; and civil society. The council will be responsible for overseeing the implementation of the statute 'across the different administrative regions' of the city. At municipal level, it provides for the creation of a CPA within each municipal area.[30]

### *6.2.3. Analysing the case studies from a labour law perspective*

According to the ILO, social dialogue is a 'governance paradigm'.[31] Bipartite social dialogue between workers and employers includes 'collective bargaining or other forms of negotiation, cooperation and dispute prevention and resolution' such as 'workplace cooperation'.[32] Workplace cooperation, which can be constituted voluntarily or mandated by statute, involves employers and workers engaging in 'information sharing, consultation [and/or] joint decision-making'.[33] If mandated by statute, the statute usually prescribes the form, composition, objectives, and functions of the workplace cooperation.[34] Based on this definition, both town vending committees in India and CPAs in San Paulo, Brazil constitute a form of workplace cooperation between the different stakeholders.

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[27] Prandini Assis op cit note 6 at 8.
[28] Ibid at 10.
[29] Ibid.
[30] Ibid at 11.
[31] International Labour Organization *Social Dialogue: Recurrent Discussion under the ILO Declaration on Social Justice for a Fair Globalization* ILC.102/VI (2013) at 2 para 7.
[32] Ibid at 5 para 16.
[33] Ibid at 31 para 22; also see Gianni Arrigo & Giuseppe Casale 'A comparative overview of terms and notions on employee participation' *ILO Working Document No 8* (February 2010) for a review of the variety of institutional forms that comprise workers participation in the workplace.
[34] ILO op cit 31 at 3 para 128.

Despite, or even because of their poor implementation, the case studies were included in this chapter because they illustrate the risks inherent in both the human rights and regulatory theories of labour law. These examples of workplace cooperation, which were designed autonomously from labour law — a body of law that anticipates and designs procedural rules for conflict in the workplace — show that the parties failed to: anticipate power tactics on the part of the local authority (as the entity controlling the workplace); recognise that organisational rights (such as for organisations to elect representatives to town vending committees, rights to organise, and rights to information) are necessary for the proper functioning of workplace cooperation; and include a mechanism for dispute resolution.

Institutionalising workplace cooperation within the traditional labour law framework has several positive implications for informal self-employed workers. First, as expressed above, labour law assumes that the relationship between workers and employers is a *power* relationship, and the interests of the owners of capital and workers are not aligned. As will be explored more fully in chapter seven, to depoliticize the relationship — to assume a win-win partnership (which these statutes appear to do) — is foolhardy. Second, if street vendors enjoy rights to collective bargaining through labour law, by implication they are recognised as workers and therefore as part of the labour movement. This creates the opportunity to advocate for their recognition as social partners and for their participation in social and economic policy more broadly. Indeed, their recognition as workers also has advantages for the discipline of labour law—an argument that will be expanded upon in chapters seven and eight.

The next section discusses two case studies of collective negotiations between street vendors and local authorities.

### *6.2.4. Collective negotiations between street vendors and the local authority in Monrovia, Liberia*[35]

Eighty-six per cent of the workforce in Liberia is informally employed.[36] A significant percentage earns a livelihood through trading informally. In 2009, in the capital city of Monrovia, there was a stand-off between the police (who blamed street traders for garbage in the streets) and street vendors (who blamed the city for the collapse of the city's solid waste management). The police routinely carried out raids, confiscated street vendors' goods, and assaulted vendors. The vendors organised and registered the Federation of Petty Traders and Informal Workers Union of Liberia (FEPTIWUL), which grew to 3 000 paid members. FEPTIWUL initiated negotiations with Monrovia City Corporation (MCC), the statutory body that manages the city.[37]

It took a decade of negotiations with two different administrations to conclude, in September 2018, a Memorandum of Understanding (MOU).[38] The MOU established institutions for co-decision-making, outlined the responsibilities for both parties, and included breach-of-contract provisions. It established two institutions: a Federation Task Force and a sanitation team. The Task Force (the decision-making and implementation body) was composed of three FEPTIWUL members, nine members from different MCC departments and state institutions (including the departments of planning, solid waste, environment and community service), the city police, and the mayor's office. The transport union and, interestingly, the media, also enjoyed representation. The Task Force's vision was to ensure that street trading is 'organized and regulated' so that streets are clean and

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[35] This case study has been published in Marlese von Broembsen 'Collective bargaining for self-employed street vendors?' (2022) 2 *Global Labor Rights Reporter* 36. See op cit note 1 for confirmation of permission for its inclusion in the thesis.
[36] International Labour Organization 'Social dialogue for the transition from the informal to the formal economy' *Global Deal Thematic Brief* (2020) at 12, available at *https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_750495.pdf*, accessed on 26 October 2021.
[37] See Milton A Weeks 'Collective bargaining negotiations between street vendors and the city government in Monrovia, Liberia' *WIEGO* (November 2012), available at *https://www.wiego.org/sites/default/files/resources/files/Weeks-Collective bargaining-Liberia.pdf*, accessed on 20 August 2023.
[38] See Sarah Orleans Reed & Mike Bird 'Liberia's street vendors pioneer new approach with city officials' *WIEGO Blog* (29 January 2019), available at *https://www.wiego.org/blog/liberia's-street-vendors-pioneer-new-approach-city-officials*, accessed on 16 April 2023.

there is ‘unity and a good working relationship’ between the city police and the Task Force. A term of reference for the Task Force is annexed to the MOU. The sanitation team (run by FEPTIWUL) was responsible for ensuring that traders clean the streets where they trade. The MCC committed to collecting garbage daily.

FEPTIWUL assumed responsibility for creating a database of its members and sharing it with the MCC within three months, issuing members with identity cards, and collecting annual permit fees from members. It assumed responsibility for ensuring that its members stay within designated zones (according to a map annexed to the agreement), comply with regulations requiring them to give pedestrians space, and have their identity cards and permits on them. In exchange, the MCC undertook to ‘protect FEPTIWUL members and their goods’ on streets designated for trading. The MOU obliged the MCC to take disciplinary action against any staff member who violated the agreement. Should an official breach the agreement three times, FEPTIWUL could take legal action. Where vendors traded on sites not designated for trading, the parties would ‘design a strategy’ for their relocation within an agreed timeframe. The parties agreed to hold monthly and quarterly meetings to monitor implementation of the agreement. Should street vendors fail to pay their ‘municipal taxes’, they would be fined between 25 and 50 dollars and issued a warning. FEPTIWUL members would be given three warnings before the MCC could institute legal proceedings. The MCC could confiscate the goods of street vendors who contravened regulations but had to return the goods within a day of the vendor paying the fine (for perishable goods) and within seven days (for non-perishable goods). Failure to pay the fine would result in legal proceedings.

In case of a breach of agreement by either party, the other party could give 30 days’ notice to terminate the agreement. ‘Management’ would meet within 30 days to resolve the difference, and if unresolved, either party could take the matter to arbitration or institute legal proceedings. Initially, both parties to the MOU adhered to the terms; unfortunately, FEPTIWUL later breached the MOU. Despite its failure to transform local relations, it has inspired other informal-worker organisations in Sierra Leone and Zimbabwe. Although these MOUs are not as detailed as the Liberian example, they represent a transformative moment in the relations between street vendors and local authorities.

### *6.2.5 Collective bargaining between street vendors and local authorities in Zimbabwe*

Supported by the Zimbabwe Congress of Trade Unions (ZCTU), 22 informal traders' associations across Zimbabwe established a national federation in 2002 — the Zimbabwe Chamber of Informal Economy Association (ZCIEA). Its 205 327 members include street vendors, construction workers, waste pickers, and other informal workers — with street vendors constituting the majority.

In 2015, leaders from the ZCIEA participated in regional workshops organised by research-advocacy network Women in Informal Employment: Globalizing and Organizing (WIEGO) to prepare a platform of demands for the General Discussion on formalising the informal economy at the International Labour Conference (ILC) in Geneva in June 2015. Officials of the ZCIEA were elected to represent street vendors at the ILC and participated in discussions in the Worker Group. When the leaders returned, they began to develop strategies to implement ILO Recommendation 204[39] in Zimbabwe, especially in relation to the right to freedom of association and collective bargaining. They decided to focus on street vendors for two reasons: vendors comprised the largest group within their membership and Recommendation recognised their workplace — streets and pavements — as a workplace. As an affiliate of StreetNet, and with support from the Solidarity Center,[40] the ZCIEA's leaders received negotiation and collective bargaining training. These leaders went on to train leaders of all the ZCIEA's chapters in collective bargaining and negotiation skills.

The national government devolves certain powers and authority to provincial governments ('the territories'). Within each province, there are urban councils (in municipal areas) and rural district councils (in rural and agricultural areas). Between 2019 and 2021, the ZCIEA signed 19 'memoranda of understanding' with local authorities of both kinds. The first MOU was concluded between the ZCIEA and the

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[39] International Labour Organization *Recommendation Concerning the Transition from the Informal to the Formal Economy* No. 204 (2015).
[40] Established by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) in North America, the Solidarity Center supports trade unions in developing countries.

Chikomba Rural District Council.[41]The ZCIEA's branch leadership approached the district council in 2018 to begin negotiations. Initially, the district council declined to negotiate. The ZCIEA's strategy was to gain credibility by undertaking development activities in the district. The strategy paid off and the council recommended that the ZCIEA approach the provincial administrator to authorise an MOU. The provincial administrator duly issued a letter of authorisation — a form of recognition. Then followed a vetting by the provincial offices of the Department of Social Services to ascertain that the ZCIEA was independent of political parties. Armed with the necessary credentials, the ZCIEA made representations to a meeting of councillors from all 30 wards in the district. Two of the councillors were members of the ZCIEA and persuaded a majority to vote in support of the district council concluding an MOU with the ZCIEA; the council passed a unanimous motion in support of the Chikomba Rural District Council concluding an MOU with the ZCIEA. Approximately 18 months later, negotiations between the parties concluded with an agreement.

Similar processes were followed with other local authorities, except that the accreditation process was less complex since the urban councils could make the decisions without requiring authorisation from the provincial administration or district offices. According to a councillor in Gwanda, when the ZCIEA leaders approached the council to negotiate, the council considered the ZCIEA's level of representivity, its constitution, its willingness to engage with the council, and its list of demands.[42] Below is an analysis of one of these agreements.

In July 2020, the ZCIEA and the Chitungwiza local authority concluded an agreement. The MOU states:

> [Its purpose] is to establish a bipartite social dialogue and engagement principles to form a negotiating forum and structures to improve the conditions of [informal] workers as well as their environment. The purpose of the MOU is to express the willingness of both parties to engage in an

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[41] Rutendo Mudarikwa 'Street Vendor Memoranda of Understanding in Zimbabwe' (2021) report documenting research findings (unpublished, on file with the author).
[42] Ibid at 26.

> effort to promote the rights of informal workers. That is working together to make sure that informal workers' concerns are addressed as they arise.[43]

The MOU proceeds to list vendors' concerns, which essentially deal with two issues: access to space and infrastructure to trade, on the one hand; and finances — the collection and management of rentals and taxes — on the other. The clauses on infrastructure cover stalls, bins and toilets, including making stalls and toilets accessible for people with disabilities. The three clauses on finances seek to regularise the collection of rentals for the use of space and to address corruption. These clauses propose three mechanisms: first, 'a once-off charge to avoid the demand of payments anytime'; second, rent for stalls could be paid using an electronic platform rather than cash; and third, a 'proper council revenue collection system that promotes transparency and discourages corrupt practices'.

The agreement outlines a process to give effect to the agreement — a one-day meeting to formulate a 'community-based strategic plan' to 'allocate tasks for both parties'. The parties would independently evaluate the progress made in relation to the agreed activities 'from time to time'. The parties' obligations are specified. The ZCIEA is obliged to:

(a) report on 'activities' on the first of every month;
(b) implement the programme 'using government structures that are in the district';
(c) disseminate any study or survey results to 'all stakeholders';
(d) plan, implement, monitor and evaluate programmes with communities;
(e) network and co-operate with organisations and similar 'development programmes';
(f) attend the local authority's social services and reconstruction and development meetings; and
(g) maintain transparency with respect to its sources of funding.

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[43] MOU is on file with the author.

The Rural District Council is obliged to:

(a) allow the ZCIEA to 'undertake development activities';
(b) provide an 'overall development framework' for the implementation of development programmes and 'assist' in carrying out needs assessments;
(c) support the ZCIEA to mobilise communities to support these development programmes; and
(d) assign a senior council official to co-ordinate these activities on behalf of the Chief Executive Officer.[44]

The agreement goes on to outline the ZCIEA's vision and objectives, which reflect the dual roles reflected in the agreement thus far: those of a trade union and a development organisation. It states that the ZCIEA's vision is 'to ensure a decent standard of living for all Zimbabweans within a stable economy' and it plans to do so by 'transforming informal economy activities into mainstream activities'.[45] Its stated objectives address workers, their organisations and regional and national policy. With respect to workers, the ZCIEA's objective is to act in the interests of workers through a 'democratisation of the environment' by offering rights-awareness training and engaging in lobbying and advocacy for policy changes. With respect to its member organisations, the ZCIEA's objective is to build the capacity of its regional and local structures 'to engage authorities at all levels and demand accountability'.

The period of the agreement is two years. The termination clause states that the 'partnership' will end on the agreed date; or the ZCIEA may end the agreement on one month's notice. In the event of a breach of contract by either party, the other party may cancel the agreement immediately. The agreement does not provide for a dispute-resolution procedure, nor does it provide for notice to be given calling for specific performance in the event of breach as a step prior to cancellation.

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[44] Ibid.
[45] Ibid.

### *6.2.6 An analysis of the two African case studies*

The ILO supervisory bodies — the Committee of Experts on the Application of Conventions and Recommendations (CEACR), and the ILO Committee on Freedom of Association — agree that Convention No 87 on Freedom of Association and Protection of the Right to Organise, 1948[46] and Convention No 98 on the Right to Organise and Collective Bargaining, 1949[47] apply to all workers, irrespective of their contractual status.[48] The ILO Committee on Freedom of Association has stated:

> The criterion for determining the persons covered by that right [protected by C98] … is not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practice liberal professions, who should nevertheless enjoy the right to organize.[49]

It went on to state that self-employed persons are entitled to collective bargaining rights as constituent of their association rights.[50] Recommendation 204[51] states that even self-employed workers without a contractual link to an employer enjoy rights to freedom of association and collective bargaining. Section VII states:

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[46] International Labour Organization *Freedom of Association and Protection of the Right to Organise Convention* C87 (1948) Adopted: 09/07/1948; EIF: 4/7/1950.
[47] International Labour Organization *Right to Organise and Collective Bargaining Convention* C98 (1949) Adopted: 01/07/1949; EIF: 18/7/1951.
[48] International Labour Organization *Social Dialogue Report 2022: Collective Bargaining for an Inclusive, Sustainable and Resilient Recovery* (2022) at 51, available at *https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_842807.pdf*, accessed on 20 June 2022.
[49] ILO Committee on Freedom of Association *Case No 2013 (Mexico): Definitive Report – Report No 326*,(November 2001) at para 416; also see Nicola Countouris & Valerio de Stefano 'The labour law framework: Self-employed and their right to bargain collectively' in Bernd Waas & Christina Hießl (eds) *Collective Bargaining for Self-Employed Workers in Europe: Approaches to Reconcile Competition Law and Labour Rights* (2021) at 5.
[50] Shae McCrystal & Tess Hardy 'Filling the void? A critical analysis of competition regulation of collective bargaining amongst non-employees' (2021) 37(4) *International Journal of Comparative Labour Law and Industrial Relations* 355 at 362.
[51] International Labour Organization *Recommendation Concerning the Transition from the Informal to the Formal Economy* No.204 (12 June 2015).

> 31. Members should ensure that those in the informal economy enjoy freedom of association and the right to collective bargaining, including the right to establish and, subject to the rules of the organization concerned, to join organizations, federations and confederations of their own choosing.

Finally, article 5(3)(d) of Convention 154[52] states that 'collective bargaining should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules'. Increasingly, the courts of member states invoke these ILO Conventions and the jurisprudence of the ILO's supervisory mechanisms when adjudicating rights to freedom of association for self-independent contractors.[53] Having established that the ILO Conventions on the right to freedom of association and collective bargaining apply to informal self-employed workers, the section that follows analyses the case studies to determine whether the MOUs are in fact collective agreements.

In both cases, negotiations and discussions were undertaken with an agreement in mind. The question is whether the agreements constitute collective bargaining agreements. The previous chapter outlined three aspects to this question: the content of the agreement (the *what*); the parties to the agreement (the *who*) and the level of the agreement (the *where*).

As set out in the previous chapter, article 2 of Convention 154 outlines the three goals of collective bargaining: (a) to determine working terms and conditions; (b) to regulate the relationship between individual employers and individual workers; and (c) to regulate the relations between the organisations of employers and the workers' organisations. The previous chapter showed that, in practice, the parties

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[52] International Labour Organization *Convention Concerning the Promotion of Collective Bargaining* C154 (1978) Adopted: 03/06/1981; EIF: 11/08/1983.

[53] See the South African Labour Court decision, *Simunye Workers' Forum v Registrar of Labour Relations* Case No. J 1375/ 2022 at para 14. Also see Sara Slinn 'Collective representation and bargaining for self-employed workers' (2021) *Osgood Labour and Employment Commons* at 4, available at https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1220&context=reports, accessed on 16 August 2023 for a discussion on the Canadian Supreme Court invoking ILO conventions as well as labour-related clauses in UN covenants.

decide the content of the agreement. The ILO regards collective agreements as 'institutional experimentation and incubation of new regulatory approaches'.[54] Indeed, collective agreements can craft specific 'regulatory solutions' for a particular industry, geography, work situation or enterprise.[55]

In the case of Monrovia, the substantive provisions of the agreement between FEPTIWUL and the Monrovian local authority relate to (a) regulating the relationship between the parties, with provisions establishing their respective responsibilities and dispute-resolution mechanisms; and (b) the terms and conditions of street vendors' work. The agreement therefore meets the 'what' criteria to qualify as a collective bargaining agreement. In the Zimbabwean case, the MOU lists street vendors' concerns in relation to their working conditions and it describes potential solutions. The MOU also regulates the relationship between the parties. However, the obligations of the respective parties lack sufficient specificity to be construed as enforceable provisions. The content of the agreement does not disqualify it from being a collective agreement, but the MOU is not enforceable, and is therefore not a contract.

With respect to *who* can negotiate, chapter five showed that who can engage in collective negotiations depends on the bargaining structure of the sector and '[the] rights accorded them through law and practice'.[56] A key criterion for organisations to participate is that they must be representative.[57] In both cases, the signatories are the local authority and an association of vendors. Chapter five showed that the state can be a party to an agreement. Both FEPTIWUL and the ZCIEA are representative organisations.

The third aspect of collective agreements relates to *where* — the level at which the collective agreement is concluded. Chapter five referred to ILO Collective Bargaining Recommendation No 163, which states that the parties should be able to decide which level is most appropriate — the 'establishment, the undertaking, the

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[54] International Labour Organization *Social Dialogue Report: Collective Bargaining for an Inclusive, Sustainable and Resilient Recovery* (2022) at 31, available at *https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_842807.pdf*, accessed on 20 June 2022.
[55] Ibid at 18.
[56] Ibid.
[57] Ibid at 29.

branch of activity, the industry, or the regional or national levels'.[58] The ILO's *Social Dialogue Report 2022* indicated that the Recommendation does not imply a *numero clausus* of possible levels and mentioned other designations, such as territory.[59] In the case of each of these MOUs, the workplace is a legally designated area of public space.

The Monrovian MOU satisfies all three criteria for a collective agreement, whereas the Zimbabwean agreement does not, as it is not an enforceable agreement. Nevertheless, it represents the outcome of 'negotiation, consultation and exchange of information', which builds trust:

> The very process of collective bargaining is a vital contribution to sound industrial relations … irrespective of whether the parties reach an agreement or not … the structuring and institutionalization of compromises made by the respective parties can gradually contribute to trust, stability and labour peace.[60]

To be more specific, it resembles the global framework agreements discussed in chapter five. When the first global framework agreement was signed in 1988 between Danone (a French multinational enterprise (MNE)) and the International Union of Farmworkers, (a global union federation (GUF), the terms of the agreement were similarly unspecific and signalled an intention on the part of the signatories to engage with each other on labour standards rather than and conclude an enforceable agreement. The agreement paved the way for a collective agreement of a different scale — transnational — and between parties not recognised as collective bargaining partners by labour law. In time, over 300 global framework agreements have been concluded between GUFs and MNEs and, over time, the contents of the agreements have become more specific and wide-ranging.

The objective of global framework agreements initially was to establish a long-term relationship between the parties through negotiating '[a] set of standards

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[58] International Labour Organization *Collective Bargaining Recommendation* R163 (1981) at para 4.
[59] ILO op cit note 54 at 17.
[60] Ibid at 32.

that apply to the company and all its suppliers across a supply chain'.[61] As the name suggests, the agreement aims to provide a framework as a basis for trade unions at the national level to organise and bargain collectively with suppliers in the MNE's supply chain.[62] Hammer's distinction between 'rights agreements' (which only reference core ILO labour standards) and 'bargaining agreements' (which are both more specific and more enforceable, and cover a wider range of issues) recognises that the former more generalised agreement is the typical outcome of weaker union bargaining power and the latter is the more likely outcome of stronger union bargaining power.[63]

Like global framework agreements, where the global rather than national union is the signatory, some of the agreements between the ZCIEA and local authorities are signed by the apex structure rather than by local affiliates of the ZCIEA. The stated purpose of the agreement is 'to establish a bipartite social dialogue (sic) and engagement principles to form a negotiating forum and structures'. The agreement envisages a partnership between the local authority and the ZCIEA as stakeholders in local economic development; it also establishes a process (starting with a one-day workshop) for the local chapter to negotiate the terms and conditions of work relating to its members' concerns regarding access to space, infrastructure, and the fiscal arrangements between the parties.

This section has analysed four case studies concerning collective negotiations between organisations of street vendors and local authorities. The next section discusses collective bargaining laws for street vendors. Indeed, labour law as personal work relations could incorporate informal self-employed workers in two ways: by amending labour laws to include informal self-employed workers only in the collective bargaining aspects of labour law; or through collective bargaining laws tailored to a particular occupational group. Section 6.3. discusses examples of

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[61] Mark P Thomas 'Global industrial relations? Framework agreements and the regulation of international labor standards' (2011) 36(2) *Labor Studies Journal* 269 at 274.
[62] Ibid.
[63] Nikolaus Hammer 'International Framework Agreements: global industrial relations between rights and bargaining' (2005) 11(4) *Transfer* 511 at 520.

collective bargaining laws for groups of self-employed workers in Australia, Canada and the USA.

### 6.3 Collective bargaining laws for street vendors

Workers in the informal economy are engaging in collective negotiations with local authorities all around the world.[64] In the absence of collective bargaining laws, however, it is difficult to get local authorities and other bargaining counterparties to the bargaining table. Also, bargaining against the backdrop of common-law rules of contract puts the informal sector in a much weaker bargaining position than if there were a statutory framework for collective negotiations.

The first hurdle for the informal sector to enjoy *de jure* rights to collective bargaining is that the labour laws of most countries prohibit informal workers from registering their organisations as trade unions. The registration criteria sometimes also exclude the informal sector: for example, contact details for an employer may be required; union leadership may have to fulfil certain educational requirements; workers with a criminal record may be prohibited from running for union office, which is a problem for vendors in that many countries criminalise street vending; registration fees may be prohibitive; assets may need to be audited; and some laws require assets to be deposited in certain banks whose minimum account balances are too high for unions in the informal economy.[65] Other criteria include the prohibition of funding from sources other than member dues. Since the earnings of informal-sector workers are low, it is difficult for a union of informal workers to survive on members' fees. Many associations raise funds from development donors and, like the ZCIEA, are operating as part-union, part-development organisation. This could disqualify them from registering as trade unions.

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[64] See Verena Schmidt, Edward Webster, Siviwe Mhlana & Kally Forrest 'Negotiations for workers in the informal economy' *ILO Working Paper 86* (2023), available at *https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_864924.pdf*, accessed on 16 August 2023; also see Françoise Carré, Pat Horn & Chris Bonner 'Collective bargaining by informal workers in the global South: Where and how it takes place' *WIEGO Working Paper No 38* (October 2018), available at *https://www.wiego.org/sites/default/files/publications/files/Carre_Collective_Bargaining_Informal_Workers_WIEGO_WP38.pdf*, accessed on 16 August 2023.

[65] Discussions between the author and Jeff Vogt, the Rule of Law Director of the Solidarity Centre during May 2023.

The two options for the informal sector to enjoy *de jure* rights to collective bargaining are: to amend existing collective bargaining laws; or to introduce collective bargaining laws for different sectors. South Africa is experimenting with the first option. Workers in the informal economy are recognised as a 'social partners' in the tripartite National Economic Development and Labour Council (Nedlac) and Nedlac has created a Recommendation 204 subcommittee. Through its representation on this subcommittee, the informal sector has put forward proposals for the labour laws to be amended to realise rights to freedom of association and collective bargaining, and Nedlac has commissioned proposals for legislative reform.

There is a growing body of collective bargaining laws in countries such as Australia and Canada that extend collective bargaining rights to associations for self-employed workers such as artists and truck drivers. These laws provide useful examples or street vendors on how to pursue the second option for specific sector-based legislation.

### *6.3.1 Collective bargaining laws for the self-employed in the USA, Canada, and Australia*

Workers who are classified as independent contractors (that is, self-employed workers) face several obstacles in effectively realising a right to collective bargaining. Competition law prohibits agreements that fix prices — on the basis that such agreements are anti-competitive, not in the interest of the public, and therefore unlawful. However, employees are exempt from competition law because their contracts constitute an exchange of labour power for wages. As Razziolini puts it, collective agreements about workers are about human beings, and market imperatives are therefore subordinated to labour law, which safeguards employees from being commodified.[66] In contrast, self-employed people are contracting for services rendered, and competition law therefore applies to their contracts.

Increasingly, however, there is judicial consensus that the right to collective bargaining (and therefore exemption from competition-law constraints) is not based on an employment contract, but on 'conditions of social and economic disparity that

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[66] Orsola Razzolini 'Self-employed workers and collective action: A necessary response to increasing income inequality' (2021) 42(2) *Comparative Labor Law and Policy Journal* 293 at 305.

justifies collective rights'.[67] Nevertheless, this right is still limited to people with a notional employer. For example, the Court of Justice of the European Union in the *Albany* and *KNV Kunsten* judgments[68] found that if the person is genuinely self-employed (in other words, there is no notional employer), then they are an 'undertaking' and not entitled to collective bargaining rights.[69]

Shae McCrystal[70] identifies three ways in which states have extended collective bargaining rights to self-employed workers. First, collective bargaining laws have expanded the scope of who is an employee to include dependent contractors, either through deeming provisions and criteria that assist courts and labour tribunals to determine which workers fulfil the criteria (as is the case in Australia and Canada),[71] or by means of rebuttable presumptions that dependent contractors are employees, such as is the case in South Africa.[72] If they qualify, dependent contractors can access collective bargaining structures and dispute-resolution mechanisms.[73] Collective bargaining may take place against the backdrop of statutory minimum standards, or if these statutes do not apply, they 'bargain against the background of the common law position'.[74] In some cases, collective bargaining laws have been amended to recognise specific sectors or categories of worker as employees. For example, a 2012 amendment to Australia's Fair Work Act[75] identifies homeworkers in the textile, clothing and footwear sector (industrial outworkers) as employees. Likewise, an amendment to South Africa's Basic Conditions of Employment Act[76] identifies domestic workers as employees.

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[67] Ibid at 307.
[68] *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* Case C-67/96, ECLI:EU:C:1999:430 (21 September 1999); and *FNV Kunsten Informatie en Media v Staat der Nederlanden* Case C-413/13, ECLI:EU:C:2014:2411 (4 December 2014).
[69] Razziolini op cit note 66 at 307 and 310. For a discussion of these cases, see Victoria Daskalova 'The Competition Law Framework and Collective Bargaining Agreements for Self-Employed: Analysing Restrictions and Mapping Exemption Opportunities' in Bernd Waas & Christina HieBl (eds) *Collective Bargaining for Self Employed Workers in Europe: Approaches to Reconcile Competition Law and Labour Rights* (2021) at 19.
[70] See in
[71] Ibid at 673.
[72] See s 200A and s 213 of the Labour Relations Act 66 of 1995.
[73] McCrystal op cit note 70 at 675.
[74] Ibid.
[75] Fair Work Act 2009 (Cth)
[76] Basic Conditions of Employment Act 75 of 1997.

Second, separate legislation may be enacted that establishes a collective bargaining regime for a particular occupational group — for example, the Canadian Status of the Artist Act of 1992 This section discusses case studies from Australia, Canada and the USA that illustrate how the right to collective bargaining might be extended to self-employed workers through separate legislation.

According to McCrystal, the Canadian Status of the Artist Act established one of the first collective bargaining regimes for self-employed workers in the world. It deems self-employed artists to be employees for purposes of qualifying for exemption from competition law; but for other purposes, artists are self-employed. Artists are heterogenous, may contract with many different parties, and may not have access to work all the time.[77] The Act introduces several features that differ from traditional collective bargaining models. First, the bargaining unit does not have to be a trade union. It can also be an association. Second, recognition is not contingent on majority representation. Instead, the labour tribunal issues a bargaining certificate if it is satisfied that: (i) it is appropriate for the association to bargain collectively; and (ii) the association is 'most representative' in the sector. Representivity is determined with reference to the size of the sector, 'the density of membership held by the association' and whether other associations have applied for a bargaining certificate.[78] Only artists 'can challenge certification of an association' on the basis of not being representative. Once an association is certified, it has exclusive authority to bargain and to conclude collective agreements that are extended to the whole industry. These collective agreements constitute 'minimum floors', which create a safety net for artists and 'eliminate the worst forms of competition to the bottom that occur when work is scarce'.[79] The real innovation is the statutory creation of mechanisms to coerce parties to negotiate, although McCrystal does not describe what these are. The Act provides for associations of 'engagers' (producers) but according to McCrystal, most often, collective bargaining is between an

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[77] Shae McCrystal 'Collective bargaining by self-employed workers in Australia and the concept of "public benefit"' (2021) 42(2) *Comparative Labour Law and Policy Journal* at 686.
[78] Ibid at 687.
[79] Ibid at 688.

association of artists and a single producer because producers are not obliged to form an association for purposes of bargaining.[80]

A second example is the Quebec Home Childcare Providers Act, which did not challenge the status of child-care providers as independent contractors but established a 'sector-based collective bargaining scheme' for them as self-employed workers.[81] This meant that they had to bargain against a common-law background without reference to statutory protections afforded to employees. In this case, the workers wanted to bargain collectively, not with the employers (parents), but with the government, which subsidises childcare. The Act provided that an association (rather than a trade union) should apply to the labour board for certification if it represented the majority of child-care workers in the territory. Upon certification, the association would have exclusive bargaining rights and all child-care workers in the territory would be obliged to pay it membership dues.[82] The bargaining counterparty is the relevant Minister, and the negotiation issues include conditions of work, such as hours of work and annual leave. Both parties are obliged to negotiate in good faith, and pressure tactics and unfair labour practices are protected.[83] McCrystal notes that the statute avoids the difficulties associated with determining the bargaining unit by relying instead on the territory to determine which workers are covered by the collective agreement.[84]

The third example concerns transport drivers in Australia, who are classified as independent contractors. The Road Safety Remuneration Act 2012 sought to address accidents caused by truck drivers who — because they were paid so little — were working too-long hours to make ends meet. The Act introduced a statutory minimum pay rate for truck drivers, irrespective of whether they were independent contractors or employees, and established a collective bargaining regime for self-employed truck drivers.[85] It established an independent tribunal to govern the collective bargaining regime, which comprises labour commissioners and industry specialists; and collective agreements between truck drivers and their 'hirers' must

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[80] Slinn op cit 53 at 17.
[81] Ibid at 689.
[82] Ibid at 690.
[83] Ibid.
[84] Ibid.
[85] Ibid at 691.

be approved by the tribunal.[86] Unfortunately, the Act failed to challenge their classification as independent contractors even though contractual relations are thinly disguised employment relations. Provisions in the Act that dilute the truck drivers' bargaining power provide, first, that the tribunal must approve any collective agreement (using the competition-law principle — whether the terms of the collective agreement are in the 'public interest');[87] and second, that industrial action is outlawed. However, the tribunal could conduct research on truckers' working conditions and resolve disputes.[88] The Act was repealed in 2016 in response to pressure from corporations that the legislation was causing chaos in the sector and contravened competition law.[89]

Estlund and Liebman write about four initiatives by taxi and App-based drivers and one for domestic workers. In a New York district, the Independent Drivers' Guild organised drivers by offering services and advocating for statutory protection on behalf of its members. It was approached by Uber, who wanted to experiment with worker representation. The initial agreement between the Guild and Uber just provided for a social dialogue forum for drivers to engage with Uber and Lyft; and for them to access limited decisions and to appeal deactivation decisions. Later, the Guild, together with the NY City Taxi and Limousine Association, initiated advocacy for statutory protection. Under discussion is a draft ordinance, which includes a provision exempting workers from antitrust law.[90] The New York Taxi Alliance is fighting for employee status because collective bargaining is likely to yield limited results if negotiations are conducted without 'a floor of employment protection' as the basis for negotiations.[91]

In Connecticut, USA, in March 2021, a Bill called the Act Concerning Transportation Network Company Drivers was introduced. Both drivers and the App companies rejected aspects of the Bill, which meant it was never passed, but the Bill included some interesting features worth mentioning. The Bill provides for: (a) a

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[86] Ibid at 692.
[87] Ibid at 692.
[88] Slinn op cite note 53 at 23.
[89] Ibid at 22.
[90] Cynthia Estlund & Wilma B Liebman 'Collective bargaining beyond employment in the United States' (2021) 42(2) *Comparative Labor Law & Policy Journal* 371 at 392.
[91] Ibid at 395.

certification process of an association as a voluntary and/or exclusive representative of drivers; (b) the establishment of an industry council for sectoral bargaining comprising the App company representatives and trade union representatives; and (c) the council to 'collectively negotiate recommendations' concerning the terms and conditions of work for workers covered by the council.[92] If no agreement is reached, then either side could submit the dispute for arbitration. If agreement is reached, the recommendations are sent to the State Board of Labor Relations, which reviews the recommendations to ensure compliance with laws and that agreements do not breach antitrust laws. The Board also plays a supervisory role.[93] The arbitration is an interesting feature to consider for street vendors.

Also in New York, an agreement was reached between the Independent Drivers' Guild, trade unions (including the union confederation, AFL-CIO), and App-driver and delivery companies for an 'industry wide regulation of network workers'. Its stated public policy objective was to promote 'stable and sustainable working conditions'.[94] The agreement has the following features:

(a) It establishes a Network Worker Relations Board to approve collective bargaining agreements and to supervise the Act;
(b) It establishes that workers have a right to choose the union representatives;
(c) It establishes two bargaining units — one for couriers and one for 'rideshare drivers'.
(d) It provides that every network must enter into a labour-peace agreement and the company has to give the union access to workers and may not discriminate against members on the basis that they are members of trade unions. The union in turn undertakes not to strike, go slow, boycott or picket before certification.
(e) Once the union is certified, the App companies must charge 10c extra per ride to finance the trade union.

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[92] Ibid at 396.
[93] Ibid at 397.
[94] Ibid at 398.

(f) The Industry Council has one year to negotiate recommendations on certain issues, including: a transferable pension fund; an appeals process for drivers who are deactivated; minimum earnings (including for waiting periods); unemployment insurance and workmen's compensation; the formation of a 'Works Council'; and possibly a 'multi-employer industry association'.

(g) The recommendations would be put to the vote. If workers approve the recommendations, they would be reviewed by the Board and become 'industry regulations'.[95]

The agreement has yet to be enacted and, because it is silent on the status of the workers, some worker groups and labour law scholars have rejected it.[96]

As a final example of collective bargaining laws for self-employed workers, in 2018, the Seattle City Council put forward a Domestic Workers' Bill of Rights. The Bill is silent on the employment status of domestic workers, but it establishes a tripartite Domestic Workers Standards Board that includes non-traditional social partners: 'hiring entities', domestic-worker organisations and the public. The Bill provides that the Standards Board must agree on recommendations on working conditions, protections, and benefits, which would create minimum standards in respect of hours of work pay. The city would regulate the industry standards.

These cases suggest several strategies for realising rights to collective bargaining for street vendors, which are discussed under part 6.3.2.

### *6.3.2 Reflections on collective bargaining laws for street vendors*

The ILO's 2022 Flagship *Social Dialogue Report* includes five principles that should inform collective bargaining laws:

(i) *Effective recognition of the 'representative parties' for collective bargaining purposes*: paragraph 3(b) of Recommendation No 163 states that criteria for representation must be 'pre-established and objective'. Such criteria may include thresholds for representivity

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[95] Ibid at 399.
[96] Ibid at 400.

and conditions that must be met should no union meet the thresholds. Alternatively, the legislation may determine the bargaining unit, based on territory, sector or occupation.[97] In both Canadian examples, the bargaining unit is an association, not a trade union. Since the labour legislation in many countries precludes informal workers from registering their associations as trade unions, this is an important precedent. For artists, recognition is not contingent on majority representation. The association must show that it is 'most representative', which is determined with respect to the density of membership and whether other associations have applied for a bargaining certificate. Only artists can challenge the certification or claim that the organisation is not representative.

(ii) *Measures that provide a baseline for negotiations*, such as minimum wages, working-time standards, leave and social protection: for street vendors, these could relate to the baseline rules in relation to allocation of space for trading; permitting processes; and due process in the case of goods being confiscated by authorities or street vendors being evicted from their trading sites.[98]

(iii) *Inclusive application of an agreement*: where the representative parties in a bargaining unit or sector are sufficiently representative, either the agreement or legislation can provide that the terms of the agreement should extend to all the workers in the sector. In case of home child carers, the bargaining unit is the territory rather than an occupational group or sector. A geographical delineation would make sense for street vendors too because the issues differ in different cities.

(iv) *Adaptability:* if bargaining occurs at different levels, the favourability principle should apply (which can be legislated or

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[97] ILO op cit note 54 at 53.
[98] Ibid at 16.

captured in the collective agreement). The lower-level collective agreement (for example, at a municipal rather than national level) can only differ or 'opt-out' of the higher-level collective agreement, and lower standards, under conditions specified by legislation or in the higher-level agreement. The principle of adaptability could apply to collective agreements at the national level about issues such as social security, and to local-level agreements about implementation of social security and workplace conditions.

(v) *Continuity after the collective agreement has expired:* legislation or the collective agreement can provide that the terms of the agreement prevail until a new collective agreement has been concluded.

The case studies illustrate other important aspects, including the possibility of creating a statutory bargaining partner where an employer body does not exist; statutory protection of pressure tactics (since the right to strike may not be applicable); supervision of implementation of collective agreements; and providing for a dispute-resolution process. For example, the bargaining counterparty for home child carers is the relevant Minister, a government official. For street vendors, the most important bargaining counterparty is local government but, in many cases, several departments — health, traffic, development, environment — regulate public space. A statutory bargaining counterparty would therefore make sense. The Childcare Providers' Act includes good faith obligations and protects carers' right to pressure tactics without the threat of dismissal. Similarly, statutes should protect street vendors from a revocation of their permits should they withhold payment of fees payable to local authorities when negotiations break down.

A statutory framework for oversight of the collective agreement is also important. The Industry Wide Regulation of Network Workers has established an industry council for sectoral bargaining comprising App-company representatives and trade union representatives. This council's role is to 'collectively negotiate recommendations' and if no agreement is reached, either side can submit the dispute for arbitration; or if recommendations are reached, they are put to the vote. If workers approve, the recommendations become industry regulations. The Industry

Council has one year to negotiate recommendations on identified issues. It is not clear what happens if the time expires — perhaps either party can submit the dispute for arbitration. This too might be a model for street vendors.

### 6.4. Conclusion

Collectively, these case studies illustrate that there are no significant shifts required of the institution of collective bargaining for street vendors to be able to bargain with local authorities; and that collective bargaining laws for street vendors are possible.

The obvious question is why would the state institutionalise collective bargaining for street vendors, given the relations between the local authority and vendors described in chapter three? In India, the legislation was brought about through struggle — a combination of litigation, engaging in policy spaces, protests and public campaigns. The MOU in Liberia was a response to ubiquitous (sometimes violent) clashes in the workplace, leading the local authority to conclude that a collective agreement was preferable to the ongoing conflict. In Zimbabwe, the ZCIEA drew on international (soft) law (Recommendation 204) for normative legitimacy for their demands, and to an extent on transnational associational power based on their membership of StreetNet International and WIEGO. ILO standards are a source of 'soft' power, which is reflected in the weak agreement.

However, as street vendors' legitimacy as workers grow, they will be able to use the ILO supervisory mechanisms — the Committee of Experts for the Application of Conventions and Recommendations (if they are registered as trade unions), and the Freedom of Association Committee — to build jurisprudence on how states must realise Conventions 98 and 154 on freedom of association and collective bargaining for informal self-employed workers.

In the absence of a right to strike, organisations of street vendors will have to exercise their political power (since they comprise a significant voter base)[99] and their economic power (by withholding daily/monthly fees paid to local authorities), and they need to identify strategies to deploy transnational associational power — that is, they will have to identify pressure tactics for collective negotiations to succeed. The next chapter theorises these questions of power as it reflects on the implications of these case studies for labour law.

[99] See Carlin Carr (‘"Take away these tolls": How Accra's poorest market workers got their wages back’ *WIEGO Blog* (8 May 2018) available at https://www.wiego.org/blog/take-away-these-tolls-how-accras-poorest-market-workers-got-their-wages-back (accessed on 13 January 2023)) for an example of informal workers that used their political power to improve their working conditions. The female head loaders, ‘kayayei’ (woman employed by market vendors to carry goods on their heads to markets) in Accra, Ghana, mobilised, organised, and wielded political power—their vote—to contest the legitimacy of a daily toll that the local authority charged them when they entered their place of work — the market. Supported by WIEGO, they analysed party manifestos and developed a ‘platform of demands’ that they presented to all political candidates who were running for election as local government level. This was followed by a dialogue between kayayei leaders and the candidates, with the kayayei explaining the impact of the tax on their livelihoods. The National Patriotic Party (NPP) included in its election manifesto an undertaking to abolish kayayei daily tolls. When the NPP won the election, the kayayei mobilised for the undertaking to be honoured, and three months later the tolls were abolished.

# Chapter 7

## Institutionalising collective bargaining for supply-chain workers and street vendors

### 7.1 Introduction

This thesis has shown that supply-chain workers enjoy *de facto* rights to collective bargaining if collective agreements regulate the supply chain rather than just the employment relationship. Chapter five has shown that there are no barriers to supply-chain collective agreements in terms of the 'what' (the content) and 'where' (the level). Indeed, a global bargaining forum for seafarers sets the precedent for collective agreements at the global level, and collective agreements include a variety of topics. As to the 'who' (the parties to the agreement), the Dindigul Agreement illustrates that the institution of collective bargaining must evolve and recognise other parties (such as NGOs) as signatories. Similarly, collective negotiations and agreements must include 'all who are affected' — that is to say, in the case of supply chains, all actors in all tiers of the chain. This chapter addresses how supply-chain agreements could be institutionalised.

Chapter six argued that the agreement between FEPTIWUL and the local authority has all the characteristics of a voluntary collective bargaining agreement — that is, if informal self-employed workers are seen as subjects of labour law. Chapter four argued that street vendors and other informal self-employed workers can indeed be subjects of 'labour law as the law of collective relations' if 'personal work relations' replaces the employment contract as the classification mechanism that determines who is covered by labour law. The case studies in chapter six illustrate how labour law as personal work relations might be operationalised. They also show that no significant normative shifts are required of the institution of collective bargaining since the state is already a bargaining-counterparty as an employer for public sector unions; and, as stated above, collective agreements cover many different topics. Chapter six concluded with broad proposals for a legislative collective bargaining framework for street vendors. This chapter considers the circumstances under which the state would agree to extend collective bargaining rights to all street vendors – in other words, under what circumstances would the state be amenable to institutionalising collective bargaining?

Institutional economist, Schmoller, explains what is meant by institutionalisation:

> By institutions, of a political, legal or economic nature, we mean an arrangement at a particular point in the life of a community, serving set objectives that has attained its own existence and development and which forms a framework or mould for the action of successive generations … An institution therefore represents a set of habits and rules of morals, customs and law … that constitute a system.[1]

Institutionalists differ on how institutions are created, but they agree that the economy, politics, and law cannot be separated.[2] Collective bargaining is fundamentally an economic institution, since usually its core function is to redistribute profits. It is also a legal institution, since the 'framework' of collective bargaining is constituted by labour laws.[3] Finally, it is a political institution since it is the outcome of a political settlement. The previous chapters have engaged with the economic and legal aspects of collective bargaining. This chapter focuses primarily on the political dimensions of collective bargaining, and thus its focus is on power relations.

Politically, the institution of collective bargaining is generally theorised as a 'class compromise' between workers and the owners of capital.[4] Labour law scholar Breshin Rogers describes the compromise as a 'grand bargain' between trade unions representing workers and employers, with the state mediating between the two groups.[5]

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[1] Gustav von Schmoller in Bernard Chavance *Institutional Economics* (2009) at 4.
[2] Philip A Klein 'The institutionalist challenge: beyond dissent' in Marc R Tool (ed) *Institutional Economics: Theory, Method, Policy* (1993) at 16.
[3] And ultimately based on property law; see Robert L Hale 'Coercion and distribution in a supposedly non-coercive state' (1923) 38(3) *Political Science Quarterly* 470–494.
[4] See Erik Olin Wright 'Working-class power, capitalist-class interests, and class compromise' (2000) 105(4) *American Journal of Sociology* 957.
[5] Brishen Rogers 'Libertarian corporatism is not an oxymoron' (2016) 94 *Texas Law Review* 1623 at 1626.

Erik Olin Wright argues that the 'class compromise' is arrived at in one of three ways: (a) trade unions 'capitulate' for 'opportunistic' reasons; (b) there is a 'stalemate' and the parties decide that it is in their respective interests to limit further damage inflicted by the other party and strike a bargain; or (c) it is based on mutual cooperation.[6] Using game theory, Wright analyses the power relations between workers and the owners of capital to theorise when collective relations based on mutual cooperation is likely.[7]

The chapter proceeds (in part 7.2) to explain Wright's theory and to explore its relevance for the two categories of worker that are the focus of this thesis — global supply-chain workers and street vendors. Part 7.2 concludes that both Wright's theory (which seeks to explain the politics of institutionalising collective bargaining) and labour law (which institutionalises the political settlement that we call collective relations) need significant revision to be relevant to these and other workers from the global South. Part 7.3 integrates the structuralist perspectives of chapters two and three — specifically the core-periphery analytic — with the case studies both to illustrate why Wright's and labour law's conceptual apparatus are outdated, and to identify the paradigm shifts required of Wright's theory and of labour law. Each of these shifts is discussed in part 7.4.

## 7.2 Wright's theory of collective relations

According to Wright, 'the possibilities for stable, positive class compromise generally hinge on the relationship between the associational power of the working class and the material interests of capitalists'.[8] His proposition is that when workers' associational power is strong enough to threaten the material interests of capital, then it is in the interests of capital to compromise.[9] Wright defines associational power as the power that is generated from the collective — that is to say, when workers form

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[6] Wright op cit note 4 at 957.
[7] See Stefan Schmalz, Carmen Ludwig & Edward Webster ('The power resources approach: Developments and challenges' (2018) 9(2) *Global Labour Journal* at 114) for a discussion on a historical background for, and the importance of, Wright's theory for analysing 'sources of labour power'.
[8] Wright op cit note 4 at 958.
[9] Ibid.

collective organisations (such as unions, political parties and work councils), they wield countervailing power to the power of capital.[10]

This dynamic of struggle and compromise takes place, he argues, in three 'institutional contexts' within the nation state — namely, the state, the market, and within firms, or rather, at the level of 'society, industry and workplace'.[11] These contexts mirror the levels at which collective agreements can be concluded, resulting in workplace agreements, sectoral agreements, and national agreements. He identifies three different 'spheres': the political sphere; the sphere of exchange (where distributive decisions are reached); and the sphere of production (the workplace, once a worker is hired).[12] He argues that each sphere requires a different 'working class organisation' to promote working-class interests within the sphere. For the sphere of exchange, he argues that trade unions are the appropriate collective form. For workplaces, where ongoing social dialogue is needed to maintain relations, he proposes work councils, and for the political domain, he argues that workers need to organise as political parties. Within each of these spheres, employers and workers make compromises in response to 'threats, force, resistance' by the other party.[13]

According to Wright, 'capitalist–class interests are best satisfied when the working class is highly disorganized'.[14] However, if the working class's associational power threatens employers' interests, then the employers are likely to conclude that their interests are best served by negotiating, and ultimately by institutionalising collective bargaining through laws that establish procedures and processes for bargaining. These procedures and processes define and confine industrial conflict to agreed parameters.

Conversely, if workers' associational power becomes too overpowering, 'the space for positive cooperation would disappear and employers would adopt an oppositional stance'. [15] He qualifies this statement by saying that employers

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[10] Ibid at 962.
[11] Smaltz et al op cit note 7 at 119.
[12] Wright op cit note 4 at 963.
[13] Ibid at 964.
[14] Ibid at 959.
[15] Ibid at 960.

cooperate if labour law solves collective action problems, such as enabling employers to act jointly.[16]

Wright argues that, as working-class power grows in the political domain, the state redistributes more through social-welfare measures and raises the minimum wage, if the state is the institution that sets the minimum wage. This is illustrated in Bangladesh and Indonesia, where the state raised the minimum wage in response to unions exercising political power.

This framework is useful for two reasons. First, it counters the push towards depoliticisation of freedom of association and collective bargaining, particularly by the ILO and the OECD's Global Deal, which seeks to promote social dialogue as a 'partnership'.[17] Wright claims that assumptions that 'mutual cooperation is optimal' for both parties 'corresponds to a naïve liberalism … where "win-win" solutions are always assumed to be possible'.[18] The case studies of the Bangladesh Accord and the Indonesian Protocol on Freedom of Association demonstrate the risks of abstracting collective bargaining from its political context. Second, it has strategic utility for workers. Wright's theory signals the tactical importance of identifying the different institutional contexts and spheres in which associational power must be deployed, and that exercising effective countervailing power to the power of capital may require different organisational forms. However, Wright's three institutions — society, industry, workplace — do not map easily onto global supply chains or the realities of street vendors' work.

### *7.2.1. Adapting Wright's theory for garment supply chain workers*

In the case of workers in garment supply chains, the primary sites of 'exchange' (the sphere of distributive decisions) are in the first place between countries (the terms of exchange being reflected in bilateral trade agreements), and secondly in negotiations

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[16] Wright op cit note 4 at 978.
[17] The Swedish Prime minister, Stefan Löfven, presented the idea of a partnership to promote inclusive growth through social dialogue to the United Nations' Economic and Social Council in 2016. The Council endorsed the idea of creating such an institution, and the UN, the OECD, and the ILO established 'The Global Deal', which is a multi-stakeholder body comprised of governments, trade unions, employer organisations, businesses and civil society organisations.
[18] Wright op cit note 4 at 996.

and agreements between lead firms from developed countries and suppliers in developing countries — that is, parties from different countries. As the case studies showed, in global supply chains, workers must contend with employers (factory owners), as well as brands, that are the *de facto*, if not *de jure* their employers. As sections 7.3 and 7.4 reflect, the idea that employers faced with strong associational power will decide that it is in their interests to institutionalise collective bargaining is misplaced in the context of global supply chains. Furthermore, within one chain, the sphere of production/workplace is multi-dimensional, since production takes place in factories (for factory workers), workshops (garment workers working for informal enterprises), and homes (in the case of industrial outworkers). Not all these workers are recognised by labour laws as employees. Even in factories, some workers are fixed-term contract workers, while others are paid by the piece. These issues elicit several questions. For example, what are the implications for exercising associational power and for the forms of organising? If labour laws classify homeworkers and piece-rate workers in factories as independent contractors, can they belong to the same trade union as workers classified as employees, or must they form their own organisations?

### *7.2.2. Adapting Wright's theory for street vendors*

For street vendors, Wright's theory needs to be adapted more fundamentally. Indeed, his typology of spheres, especially 'exchange' and 'production' has to be re-conceptualised. The sphere of 'exchange' could be conceived of as the distribution of access to (and use of) public land. The production sphere — traditionally when workers have already been hired — could be reinterpreted as the trading sphere — namely, where relations in both informal and formal markets are managed once vendors legally occupy sites, as exemplified by the case study of the Indian Street Vendor Protection Act. Part 7.4 returns to a discussion of the spheres.

Nevertheless, the theory has tactical utility for vendors. If vendors organise and exercise countervailing power by, for example, collectively withholding daily fees payable to local authorities, or by engaging in political protest, the state is likely to counteract their collective action with force if it feels too overpowered, or if workers have too little associational power. However, if vendors are organised and they coordinate their protests throughout the country, then it may indeed be in the

state's interest to institutionalise a framework for collective negotiations (through laws) to rationalise its resources for dealing with street vendors' collective protest.

The theory also highlights the need for countervailing power to be expressed through different organisational forms, depending on the institutional context and the sphere. Arguably in the sphere of exchange (the distribution of property rights), street vendors would need to build coalitions with academics, urban planners, lawyers, and different interest groups. Street vendors in Delhi have done just this.[19] In Johannesburg, South Africa, an organisation of waste pickers, the African Reclaimers Association (ARO), has deployed a similar strategy by building coalitions with ratepayer associations to put pressure on the City of Johannesburg's Department of Environment and Infrastructure Services to engage in collective negotiations on the formal inclusion of waste reclaimers in its waste management system. .[20] In Buenos Aires, Argentina, more than 20 years ago, waste pickers formed the 3000 member-strong worker-cooperative, the Movimiento de Trabajadores Excluidos (Movement of Excluded Workers), which has succeeded in securing waste management contracts for the cooperative with the city.

This section has briefly alluded to alternative institutional forms to trade unions: coalitions, co-operatives, and associations. Of course, unlike registered trade unions, these institutions negotiate against the backdrop of common law. It raises a question that begs research that falls beyond the scope of this thesis: should other institutional forms be recognised as bargaining partners, and/or should collective bargaining laws allow for a much broader concept of what constitutes a trade union?[21]

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[19] Mathew Idiculla 'Urban planning and informal livelihoods in India: An analysis of urban planning laws and processes in Delhi and Bangalore' *WIEGO Working Paper No 44* (July 2022), available at *https://www.wiego.org/sites/default/files/publications/file/working%20paper-44-urban-planning-india.pdf* at 21.

[20] See Jane Barrett 'Informal waste reclaimers organising to get the stage ready for collective negotiations with the local state: A case study of Johannesburg reclaimers 2018–2022' *LLRN Conference paper* (2023) (on file with author) at 4-5.

[21] The courts are beginning to engage with these issues. In *Simunye Workers' Forum v Registrar of Labour Relations* Case No. J 1375/ 2022, the registrar in South Africa refused to register the Simunye Workers' Forum (an 'unregistered trade union' of non-standard workers) because he was not satisfied that it was 'a genuine trade union'. Recognising that '[n]ew forms of worker organisation will inevitably emerge to …better serve the interests of the more vulnerable', the Labour Court in South Africa found that for the registrar to require that a trade union conform to a particular structure would amount to 'an unjustifiable inroad into the appellant's autonomy and establish an obstacle that may

### *7.2.3. Institutionalising a discursive relationship between exchange and trading*

Both the Indian and Brazilian case studies underline the need for street-vendor organisations to institutionalise the inter-relationship between the exchange sphere (the distribution of access to and use of public space) and the sphere of trading (once sites for trading are allocated). The Indian case study illustrates how vendors' associational power — as a coalition of different interest groups and academics — persuaded the state that it was in the state's best interest to compromise and institutionalise workplace co-operation (town vending committees) in the sphere of trading. NASVI failed, however, to institutionalise the recursive relationship between the sphere of trading and the sphere of exchange. In other words, if the organisation/union protecting workers' class, caste and gender interests within the sphere of trading is unable to exercise the power necessary to hold the other parties to the terms of the compromise, institutionally those structures should be able to call on NASVI, which represented it in the sphere of exchange.

The implementation model of the Dindigul Agreement has achieved this. The factory monitors and the weekly social-dialogue meeting between lower levels of the trade union and Eastman Enterprises manage the sphere of production. Unresolved issues are escalated to the monthly meeting of senior trade union officials and Eastman's senior management and the Implementation Committee. If not resolved, the issue is escalated to the Oversight Committee, which comprises the signatories to the agreements — in other words, the parties engaged in the domain of exchange.

If street vendor organisations in São Paulo succeed in institutionalising a two-tier institution (a quadripartite city-wide institution that oversees the implementation of the legislation and 'street vending permanent commissions' in each administrative district of the city) the legislation may address the weakness of localised workplace cooperation. However, since the Bill was drafted without reference to the principles of labour law's institution of collective bargaining, it is unlikely that the legislation will provide adequate mechanisms for workers to exercise countervailing power should the city council and the city administration

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amount to a system of previous authorisation, contrary to the principles of Convention 87 and section 23 of the Constitution'.

(that constitute two of four stakeholders represented on the city-wide institution) refuse to cooperate with street vendor representatives, and vendors will be unable to use dispute resolution mechanisms available to employees.

Like labour law, Wright's theory is focused on power relations. Like labour law, Wright's framework for these relations is the nation state, and it focuses more specifically on employment relationships within the bounds of the nation state. Structuralism, which analyses power relations among classes, interest groups, and among countries, studies a social system as a whole and is concerned with power relations inherent within social systems, and their distributive consequences. Structuralism's lens is adjustable, depending on the nature of the system being studied. Part 7.3 integrates the structuralist theory from chapters two (on global supply chains) and three (on the informal sector) with the case studies of chapters five and six. The analysis allows us to identify, both theoretically and practically, the background assumptions of labour law (and also of Wright's theory); and to see why these assumptions are outdated or irrelevant for most workers in the global South, and in broad terms, to identify the directions for further research and theory building.

## 7.3 Integrating structuralist political economy perspectives with the case studies

Structuralist development economists, Prebisch and Singer, developed the core-periphery analytic (discussed in chapter two) to understand and analyse the power relations among industrialised and developing countries. Subsequent scholars have applied the analytic to global supply chains and to the relationship between the formal and informal economies in developing countries.

Analysing global value chains from a core-periphery perspective renders visible the structural implications for collective bargaining of the re-organising of production from vertically integrated firms into global value chains. First, as discussed in chapter two, it was an assumption of collective bargaining in core countries that profits from more efficient production would be distributed between workers and the corporation — that is, wage increases were linked to more efficient production. However, in the periphery countries, because of power relations within the chain and the structure of the garment sector (oligopoly/ies at the top of the chain

and intense competition at the bottom), instead of distributing profits (derived from more efficient production) to themselves and to workers, suppliers drop the prices they charge buyers in order to remain competitive.[22] In other words, they distribute value up to the lead firm, instead of down to workers. Second, the state in periphery countries is concerned not only with mediating relations between trade unions and employers (as is the case in core countries) but is also appeasing foreign capital as well as governments of core countries (as evidenced in the discussion about the Accord). Pursuing economic development therefore conflicts with realising labour rights for a periphery country's citizens because in low-wage global value chains, the labour costs remain low if unions are weak, and low labour costs attract MNEs to purchase from the country. Third, employers in periphery countries behave like capitalists everywhere: they identify strategies to increase their profits. In the garment sector, factory owners employ the following strategies: they (a) employ a compliant, non-unionised workforce — namely, young women, migrants (both inter-state and from neighbouring countries), who are first-time labour market entrants from lower castes/classes; (b) outsource and subcontract production, including to industrial outworkers (women working from their homes) — a practice that is unregulated; and (c) circumvent labour laws by appointing workers on fixed-term contracts and paying workers by the piece.

In relation to the informal economy, structuralist analyses of the relationship between the formal (the core) and informal (periphery) economies render visible the distributional aspects of their relationship. As discussed in chapter three, structuralist development economists have argued that the informal sector depresses wages in the formal sector because it provides access to goods and services that are much cheaper than can be purchased from the formal sector. The formal sector can therefore pay lower wages if their employees' consumption needs are met by the informal sector. It is thus not in the interests of the Employer group (at the ILO) to recognise informal self-employed workers (such as street vendors) as labour who have rights to bargain collectively about their working terms and conditions with the state.

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[22] Of course, in core countries, the link between more efficient production and increased wages has also been disrupted because financialised capitalism means that distribution to shareholders is privileged over distribution to workers.

However, as Wright predicts, if groups such as street vendors build sufficient associational power (in the form of a coalition such as NASVI) and deploy a range of tactics (including litigation), the state may decide that it is in its interest to institutionalise collective relations. As the case study of the Street Vendor Act shows, institutionalising workplace co-operation through statutory town-vending committees has in most cities proved unsuccessful. The better route would have been to institutionalise collective bargaining by drawing on collective labour law's procedural safeguards and institutional mechanisms. These include institutional arrangements to supervise the enforcement of collective agreements, dispute resolution procedures, and coercive tactics to force parties to bargain in good faith.

## 7.4 The paradigmatic shifts required of labour law and Wright's theory

Labour law and Wright's theory are premised on a political economy and background assumptions that have no traction for most workers in the global South. Harry Arthurs' view that labour law risks becoming 'politically irrelevant and intellectually ossified'[23] is unfortunately true, certainly for most of the developing world. The thesis shows that labour law and Wright's theories must be revised and expanded in four respects.

First, as has been illustrated, there is a need for labour law (and Wright) to theorise a global frame. To be sure, labour law scholars have written about transnational labour law.[24] However, besides Ruth Dukes, few have theorised a transnational labour law. In an article published in 2014,[25] and in a subsequent book,[26] Dukes develops the idea of a labour constitution as a transnational project. She builds on Gustav Teubner's work, proposing a polycentric concept that recognises 'a plurality of economic orders' with different jurisdictional spheres (national, supranational, subnational); plural state and non-state actors; and different

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[23] Harry W Arthurs 'Labour law after labour' *Comparative Research in Law & Political Economy Research Paper No 15/2011* (2011), available at *http://digitalcommons.osgoode.yorku.ca/clpe/53* at 17.
[24] See, e.g., Adelle Blackett & Anne Trebilcock (eds) *Research Handbook on Transnational Labour Law* (2015).
[25] Ruth Dukes 'A global labour constitution?' (2014) 65(3) *Northern Ireland Legal Quarterly* 283–301.
[26] Ruth Dukes *The Labour Constitution: The Enduring Idea of Labour Law* (2014).

constitutional norms derived from 'labour laws, constitutional laws, human rights instruments, trade agreements, corporate codes'.[27] Despite its promise, Dukes pronounces her project stillborn for the simple reason that the trade union movement is too weak to bring about institutional re-design or to enforce labour norms at the global level.[28] Unfortunately, she reproduces the cast recognised by labour law — organised labour, organised employers, and the state — and she fails to register the countervailing power of transnational NGOs (such as the Clean Clothes Campaign and the Workers' Rights Consortium and many others) whose power resides in the threat to brands of reputational harm and potential consumer boycotts of their products. Dukes also fails to consider the possibility of coalitions of trade unions with NGOs. [29] All three case studies of the garment sector show that coalitions are critical to bringing about supply-chain collective agreements — in other words, agreements that regulate labour relations transnationally.

Second, and linked to the first critique, is the fact that both Wright's theory and labour law's paradigm assume a liberal democratic state that supports collective bargaining, including through providing a legal infrastructure to enforce collective agreements. This is a false assumption. Not only are most governments in Asia hostile to trade unions but, as restated in part 7.3, they are mediating a multiplicity of relationships. Similarly, chapter three described the tensions for African governments as they pursue economic development (in particular, the implications of the World Bank's urban renewal agenda for workers), and the complicity of the state and politically connected elites with global capital. A theory of the state falls beyond the scope of this thesis, but the issues that are raised challenge labour law scholars and labour sociologists, such as Wright, to develop a theory of the state that accords with reality for workers in both developed and developing countries.

Third, the institution of collective bargaining is both a product of, and embedded in, a liberal capitalist social order.[30] In this context, the policy objective of

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[27] Ibid at 196.
[28] Ibid at 404.
[29] Marlese von Broembsen 'Constitutionalizing Labour Rights: Informal Homeworkers in Global Value Chains' (2018) 34 (3) International Journal of Comparative Labour Law and Industrial Relations 257 at 272.
[30] Karl E Klare 'Labor law as ideology: Toward a new historiography of collective bargaining law' (1981) 4(3) *Industrial Relations Law Journal* 450 at 455.

collective bargaining laws is to contain industrial violence to safeguard societal stability, which is important for the legitimacy of the liberal democratic state.[31] This is achieved through collective bargaining laws that limit trade unions' options for collective action — for example, by making wildcat strikes and secondary boycotts unlawful. Institutionalising collective bargaining also constrains unions in a more insidious way — by establishing a hegemony that it is in the 'social interest' to resolve disputes within the framework established by collective bargaining law.[32]

The discussion of the Protocol and the Accord in chapter five makes visible the risks and limitations of these background rules in Asia. The trade unions that participated in the Accord opposed the wildcat strikes by other unions — strikes that resulted in the Bangladeshi government increasing the minimum wage. In Indonesia, the Protocol split the labour movement into more moderate affiliates of IndustriALL and more radical unions, because the radical unions refused to participate in the Protocol. They saw that a partnership model of industrial relations would domesticate the political power that the Indonesian trade unions wield through mass mobilisation and (sometimes violent) protests, which has yielded more direct economic gain for workers than social dialogue. For them, the collective bargaining framework acts as 'a struggle dissipating framework that … circumscribes the lawful boundaries of collective action'.[33] In both countries, unions are contesting the legitimacy of economic and political structures — that is, their objectives are structural and more material than securing safer factories or superficial commitments to freedom of association. To be sure, these case studies speak to the need for labour law scholars, legal anthropologists, and sociologists to re-theorise the state and labour law's liberal democratic framework.

The case studies on the informal economy speak to the need for a theory that disaggregates the state, which includes differentiating between national government and local government — and in federated systems, between national-level governments and state-level governments. In several African countries, progressive

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[31] See Zoe Adams 'A structural approach to labour law' (2022) 46(30) *Cambridge Journal of Economics* 1 at 8; also see Tonia Novitz & Phil Syrpis 'Assessing legitimate structures for the making of transnational labour law: The durability of corporatism' (2006) 35(4) *Industrial Law Journal* 367 at 372.
[32] Klare op cit note 30 at 459.
[33] Ibid at 454.

national constitutions ostensibly extend labour and human rights to informal self-employed workers; yet local authorities undermine these same rights.[34] Similarly, in federal systems, governments of different states in the same country advance or undermine labour rights. This is true for the United States of America, and India, for example.

Fourth, both labour law and Wright's theory of countervailing power need revision. Wright conceptualises countervailing power as associational power that assumes different institutional forms (worker parties, trade unions and work councils), depending on the institutional context and the sphere in which the struggle is waged. Labour law conceptualises countervailing power as a bundle of three rights: the right to freedom of association, the right to collective bargaining, and the right to strike. The case studies challenge labour law to create a theory of the right to strike that includes workers without an employment contract. Indeed, International Lawyers Assisting Workers (ILAW) and labour law scholars from Bristol University are embarking on such a project.[35]

The case studies on the garment sector challenge Wright's theory in several respects. First, the case studies suggest that a more fluid, polycentric concept of associational power is called for. The Dindigul study problematises the assumption that class alone is the unifying identity that cements the collective. It shows that gender, caste and migrant status — an intersectional lens — is critical for building associational power. An intersectional lens translates into organising strategies (such as the Asia Floor Wage Alliance's safe circle approach) that are foreign to male-dominated trade unions. In India, it also led to establishing female, Dalit-led trade unions. The case studies also showed that the complexity of transnational supply chains demand complex organisational configurations, including transnational coalitions of global union federations and NGOs from both garment-production and garment-buying countries. Most importantly, the case studies illustrate that in the absence of structural power and of contractual relationships with lead firms,

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[34] Pamhidzai H Bamu 'Street vendors and legal advocacy: Reflections from Ghana, India, Peru, South Africa and Thailand' *WIEGO Resource Document No 14* (2019 at 4, available at *https://www.wiego.org/sites/default/files/publications/file/Bamhu-WIEGO-Resource_Document-14-Street-Vendors-Law-Five-Countries-2019.pdf*

[35] This is a book project called 'Re-Imagining the Right to Strike'.

associational power as conceived of by Wright cannot force lead firms to the bargaining table. Lead firms can simply relocate production to another country. Instead, workers can pressure lead firms to come to the bargaining table through NGOs from developed countries threatening reputational damage to their brands — a different form of associational power.

Second, the case studies of the informal sector show that two of Wright's three spheres (exchange and production) need to be revised. The sphere of production must be replaced with the concept of workplace, which might be a site of production (such as a factory, a workshop or a home, but also a boat, a mine and others) or it may be a dumpsite (in the case of waste pickers) or informal markets on streets and pavements.

Writing in 1942, Robert Hale[36] (both an institutional economist and a legal scholar) explains the economic relations that underlie Wright's sphere of exchange. He argues that the 'propertyless man' has to eat. He is 'free' to eat, but if he eats someone else's bag of peanuts, goes onto someone's land to consume the products of the land, or uses their tools to produce income to eat, they can resist. Indeed, they have the right to resist, and this right is backed up by the force of the state, which both creates and enforces property rights. His only option is, therefore, to sell his labour, such as to the owner of a factory. Hale analyses the respective bargaining power of the 'propertyless man' and the owner of the factory as follows: the 'propertyless man' has the 'coercive power' to withhold his labour, whereas the factory owner derives his 'coercive power' from his ownership of the factory, to which the labourer needs access in order to eat. Labour law is therefore based on property relations: one party has property rights and the other does not, and thus the exchange is between the owner of the property and the owner of the labour power — access to property in exchange for labour power.[37]

In developed countries, most of the workforce accesses property for purposes of making a living through an employment contract. In developing countries, a

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[36] Robert Hale 'Coercion and distribution in a supposedly non-coercive state' (1923) 38(3) *Political Science Quarterly* 470.
[37] See Hugh Collins, Gillian Lester & Virginia Mantouvalou (eds) *Philosophical Foundations of Labour Law* (2019) at 9: 'an employer's power is based on ownership of private property'.

significant percentage of the working class is structurally excluded from accessing property to make a living through an employment contract because full-time, permanent jobs are scarce. This is increasingly also the case for many people in developed countries. Yet, they need to access property to earn a living. Street vendors need access to public property to trade and, as argued in chapter four, they can access property by making rights-based claims addressed to the state. Indeed, the chapter cited the example of the street vendors in India, as well as waste pickers in several Latin American countries, who have successfully litigated for access to public land and to waste on the basis of constitutional rights to life and to equality. The chapter went on to argue that informal self-employed workers could invoke the right to work and the right to equality enshrined in international-law instruments to which their countries are signatories.

Thus workers need to identify the social and legal sites and mechanisms where property rights may be distributed and identify how to exercise countervailing power in those domains. For global supply-chain workers, these sites include trade negotiations and agreements between their countries and trading partners, corporations' shareholder meetings and national tripartite structures. For street vendors, sites include urban-planning laws and spatial-development plans (developed by local authorities every few years).

Social and economic relations between property owners and those seeking access to property in order to live are constituted by law.[38] Chapter six shows that street vendors' rights to access to public property is also constituted by nuisance, vagrancy, sanitation and other by-laws that authorise the state to use violence to remove street vendors and other self-employed workers from publicly owned property and to confiscate their moveable property. The task is to identify sites and strategies to exercise different forms of associational power to make distributional claims, politically, in courts, in international fora and in the court of public opinion.

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[38] Adams op cit note 33 at 6.

## 7.5 Conclusion

The chapter has integrated the political economy perspectives of chapters two and three with the case studies to explore how collective bargaining might be institutionalised. Although collective bargaining is an economic, legal and political institution, this chapter has been concerned with the political dimension. In other words, it has focused on power relations, which is also the DNA of labour law. Labour law institutionalised a political settlement, which Rogers calls ‘a grand bargain’ between the working class and the capitalist class. Wright’s theory analyses how this grand bargain is achieved. The thesis has shown that this grand bargain/class compromise does not translate into rights to collective bargaining for many workers in the global South. One reason is that the theoretical categories and the conceptual apparatus of labour law are either outdated or not fit for purpose for the two groups of workers with which this thesis is concerned — workers who are emblematic of much work in the global South.

Both labour law and Wright’s theory are constrained by their national frame, their underlying assumptions of the state, and their theories of countervailing power. This chapter has shown that, if revised, Wright’s theory has tactical value for workers in global supply chains and for street vendors. It has outlined areas of research and theory building for labour law scholars and labour sociologists for a labour law that is relevant to workers in the global South.

# Chapter 8

# Conclusion

## 8.1 Introduction

Despite significant scholarship that theorises a labour law that transcends the contract of employment, the academy struggles still to conceptualise how labour law and its core institution, collective bargaining, could be extended to workers without a contractual relationship of any kind with the entity that controls their work.

This thesis has sought to show, both conceptually and practically, how the right to collective bargaining might be realised for two groups of workers that do not enjoy a contractual relationship with the entity that controls their terms of work — namely, supply-chain workers seeking collective relations with the MNEs whose products they make, and street vendors seeking to bargain with the local authorities that decide whether, and on what terms, they may use public space to trade.

Since labour law is 'a product of historical and political compromises'[1], the thesis recognises that the institution of collective bargaining cannot be abstracted from capitalism and the economic and social relations that capitalism produces.

This thesis thus began (in chapter two) by describing the different stages of industrial capitalism and the commodification of labour. Workers and their trade unions in the United Kingdom (the birthplace of industrial capitalism) responded to their poor working conditions with industrial action, which was often violent, and which was violently put down by the repressive apparatus of the state. Ultimately, the unrest led to a not-always-explicit pact (first in the United Kingdom and later in Europe) between the state, capital and labour — a *détente* that is commonly described as the social contract. Brishen Rogers captures how labour law constitutes the social contract:

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[1] Hugh Collins, Gillian Lester & Virginia Mantouvalou 'Introduction: Does labour law need philosophical foundations?' in Hugh Collins, Gillian Lester & Virginia Mantouvalou (eds) *Philosophical Foundations of Labour Law* (2018) 1 at 2.

> Labor law … mediated these conflicts, institutionalizing workers' movements that otherwise threatened to destabilize the industrial economy. It represents a grand bargain of sorts. States recognized unions' rights to exist, granted them powers to bind workers to collective agreements, required employers to bargain with them, and often granted them special powers in economic policymaking processes. In exchange, unions consented to the basic terms of capitalist employment and promised to curtail or end industrial strife.[2]

Labour law — and the institution of collective bargaining in particular — promoted industrial (indeed societal) stability, a democratisation of the economy, and reduced inequality.[3]

Chapters two and three chronicle two significant changes in the global political economy that disrupted the primacy of the nation state and the legitimacy, and efficacy, of the national social contract. First, globalisation (the 'second unbundling') resulted in MNEs exiting the national social contract, and offshoring production to a workforce for which they ostensibly have neither a legal nor moral responsibility. Second, the modernisation theory of development, which predicted that developing countries would industrialise and become like developed countries, was debunked. Since the informal sector was not going to disappear, development economists re-theorised the informal sector. Previously conceptualised as a 'reserve army of labour' within newly industrialising countries, they were now recast as micro-entrepreneurs.

With corporations (rather than states) driving economic development, governments of developing countries now compete for foreign direct investment and for their firms to produce goods for MNEs. Producing goods for global supply

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[2] Brishen Rogers 'Libertarian corporatism is not an oxymoron' (2016) 94 *Texas Law Review* 1623 at 1626.

[3] Marlese Von Broembsen 'Human rights and transnational social contracts: the recognition and inclusion of homeworkers?' in Laura Allfers, Martha Chen, & Sophie Plagerson (eds) *Social Contracts and Informal Workers in the Global South* (2022) at 147.

chains brings foreign currency into developing countries and generates jobs. They see the garment sector as a gateway to industrialisation. The thesis has focused on two categories of workers who are symbolic of, and affected by, these shifts — namely, garment workers in global supply chains, and street vendors.

Labour law's crisis of the last 30 or so years is 'existential'[4] because the social contract that it 'institutionalises' is crumbling. Indeed, even the World Bank talks about 'the need to re-think the social contract',[5] as does the International Monetary Fund, the International Labour Organization (ILO), and the International Trade Union Confederation (ITUC). On 26 January 2021, the then-General Secretary of the ITUC, Sharron Burrows, addressed the World Economic Forum about 'a new social contract'. Reflecting on the 500 million formal sector jobs lost during the COVID pandemic and the pre-pandemic figure of two billion informal workers, Sharon Burrow called for a new social contract that meets demands from workers around the globe. What is clear is that the old social contract, based on the nation state and having three constituents, no longer has traction.[6] The implications for labour law are referred to in chapter one.

Labour law scholars have responded to the implications of globalisation on the one hand, and to insider-outsider critiques on the other, by asserting that labour law's *raison d'être* is not just to institutionalise collective relations. Some argue that 'labour law as human rights' can travel across jurisdictions and include workers who are excluded from the scope of labour law. Others argue that labour law can be harnessed for economic development. A third group has argued for a global constitutionalisation of labour law, but in theory only, since (they argue) the trade union movement is too weak to bring new global institutions to fruition. This is the context that informs the thesis.

Garment supply-chain workers and street vendors were selected for several reasons. First, most of the world's workers live and work in developing countries,

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[4] Mark R Freedland & Nicola Kountouris *The Legal Construction of Personal Work Relations* (2011) at 5.
[5] Maurizio Bussolo, María E Dávalos, Vito Peragine & Ramya Sundaram *Toward a New Social Contract: Taking On Distributional Tensions in Europe and Central Asia International Bank for Reconstruction and Development* (2018).

and supply-chain workers and informal self-employed workers represent archetypal jobs in the developing world. The thesis emphasises labour law's myopic focus on workers of the global North, which comprise a relatively small percentage of the world's workforce. Second, these two groups push the frontiers of labour law conceptually, as will be enlarged upon in parts 8.2 and 8.3. Third, they challenge labour law's fundamental assumptions, namely (a) its frame: the nation state; (b) its underlying assumptions about the state: that it is a liberal-democratic institution; (c) its conception of countervailing power; and (d) the property relations on which labour law rests.

By challenging labour law scholars to incorporate, and take seriously, the theoretical implications of incorporating workers of the global South into the institution of collective bargaining, the thesis contributes to re-asserting 'labour law as the law of collective relations'. As will be argued, incorporating informal self-employed workers into the ambit of labour law can contribute to alleviating labour law's existential crisis.

This concluding chapter proceeds as follows. Parts 8.2 and 8.3 focus on supply-chain workers and informal self-employed workers respectively. They summarise the questions that the thesis sought to address, and the contribution this thesis makes to 'labour law as the law of collective relations'. Part 8.4 concludes the thesis with a provocation.

## 8.2 Garment supply-chain workers

Most garment production takes place in Asia. For many Asian countries, the clothing, textile and footwear sector is a major export sector and a major employer. For these countries, garment production is thus imbricated in economic development. Chapter one described the structure of global supply chains: lead firms (from the global North) contract with first-tier suppliers (from the global South), who in turn contract with second-tier suppliers, informal workshops and homeworkers. Chapter two described the power relations among the different tiers and the implications for workers — insecure work, very low wages, occupational health and safety risks, and for some factory workers, rights to freedom of association and collective bargaining in law, but not in practice.

For collective agreements to result in positive distributive consequences for garment workers, agreements must regulate relations across the supply chain and not only the employment relationship. To bring lead firms to the bargaining table, however, is challenging. First, workers have no contractual relations with the lead firms whose procurement practices determine their conditions of work. Therefore, there is no basis in labour law for attributing responsibility to these firms. Second, lead firms are in different countries to the workers, which presents jurisdictional and enforcement challenges. Third, workers lack structural power to coerce lead firms to engage in collective negotiations.

The thesis addressed these challenges by asking three questions. Similar questions structured the discussion on street vendors:

1. Which *conceptual* basis for a transnational labour law is the most likely to realise rights to collective bargaining for global supply-chain workers?
2. What are the *normative* and *practical* ways in which the institution of collective bargaining must evolve to realise *de facto* rights to collective bargaining for garment workers in global supply chains?
3. How might transnational supply-chain bargaining for garment workers be institutionalised?

In relation to the first question, the literature chapter (chapter four) reviewed three legal bases for holding lead firms in global supply chains responsible for the poor working conditions of the workers who produce their goods — namely tort, human rights and contract. The chapter concluded that sector-based, multi-party contracts that include trade unions and lead firms from different countries hold the most promise; and Dias-Abey's proposition that existing multi-party, social movement-led agreements are nascent supply-chain collective agreements was discussed. Chapter five, which addressed question two, complicated Dias-Abey's analysis and built on his theory by analysing two other case studies — the Indonesian Protocol on Freedom of Association, and the Dindigul Agreement on gender-based violence and harassment.

The chapters on supply-chain workers make the following contribution to labour law's institution of collective bargaining. First, workers in global supply chains challenge labour law to re-think its institution of collective bargaining — to expand the cast of who participates in collective negotiations; to re-theorise workers' sources of countervailing power; to expand and re-think procedural rules and enforcement mechanisms; and to work with trade unions on creating legal mechanisms to institutionalise supply-chain collective bargaining across jurisdictions. Second, and more fundamentally, supply-chain workers challenge labour law to engage critically with its background assumptions about the state and to re-think its liberal democratic premise. If labour law is 'a product of historical and political compromises', then the question to consider, is what the contemporary historical and political realities demand of labour law and of labour law scholars now.

## 8.3 Informal self-employed workers

The thesis has shown that urban public space is a site of class struggle: on the one hand, informal self-employed workers need access to public space to work and to provide products and services to the public, and on the other hand, governments (backed by the middle class and politically connected elites) are pursuing urban renewal programs funded by global capital that result in mass evictions of vendors from public spaces in cities. Even in secondary cities, street vendors endure low-level daily harassment, confiscation of goods and extortion, and they lack secure rights of access to public space. This is in the context of structural unemployment.

The labour law academy resists the idea of extending labour law to self-employed informal workers such as street vendors. Scholars agree that street vendors and other informal self-employed workers should enjoy labour rights, but they argue that these rights should be extended via human rights law or other regulations. This thesis shows — conceptually, practically and ideologically — why they should be subjects of labour law.

The thesis has addressed the conceptual question both on a meta level (by drawing attention to the property relations upon which labour law is premised), and it has engaged critically with labour law theories that transcend the employment

contract and provide a basis for labour law to include informal self-employed workers in its scope.

Hale's compelling account of the propertyless man who needs to eat reveals the foundations of the social contract, and indeed of labour law — namely, property relations. Historically, most of the workforce (in the global North) accessed property by means of an employment contract. However, the workforce in developing countries — sometimes up to 90 per cent of the workforce — is structurally unable to access property for livelihood purposes through an employment contract. These worker-citizens nevertheless need access to property to eat. Chapter four showed that street vendors and waste pickers have successfully relied on constitutional rights to gain access to property (public land and waste) to earn a livelihood. The argument is that labour law's premise that there is only one way to access property rights — by means of an employment contract — is outdated. Informal self-employed workers challenge labour law to examine its assumptions of how property relations are constituted, and to re-theorise property relations to account for access to property both by means of an employment contract and on the basis of worker-citizen claims based on constitutional and human rights.

Chapter four reviewed four labour law theories that transcend the employment contract: human rights, the capability approach, the regulatory theory and personal work relations. It argued that the first three theories de-centre collective bargaining and depoliticise workers' struggle for labour rights. Each fails to develop a theory of power. By contrast, 'labour law as personal work relations' (PWR)'s concept of a 'personal work nexus' replaces the employment contract's classification function (which determines who qualifies as a subject of labour law), but leaves unchallenged labour law as 'the law of collective relations'. In other words, power relations remain the 'constituting narrative' of labour law. Furthermore, the chapter showed that PWR can incorporate informal self-employed workers, arguing that the most important relationship in street vendors' 'personal work nexus' is their worker-citizen relationship with the state, which is rights-based. Chapters six and seven illustrate how PWR might be operationalised for informal self-employed workers to bargain collectively without any major revisions needed to the institution of collective bargaining.

Chapter six advanced practical reasons to realise rights to collective bargaining for informal self-employed workers through labour law. The analysis of workplace cooperation in India (in the form of statutory town vending committees) and in Sau Paulo, Brazil, illustrated the risks of institutionalising collective relations without recourse to the institutional framework of labour law, which anticipates ongoing power struggles. Ideas for collective bargaining laws for street vendors arise from both the case studies of collective negotiations between local authorities and street vendor organisations (in Liberia and Zimbabwe), and experiments (in Australia, Canada and the USA) with collective bargaining laws for those workers usually excluded from labour law.

Last, there are ideological arguments for informal self-employed workers to be subjects of labour law (rather than of human rights law) for the purposes of realising rights to collective bargaining. There are significant different personal and societal outcomes to the two approaches. Recognising workers as having rights to register their organisations as trade unions (and through their trade unions become members of national and global union federations that are participants in the historical social contract) could translate into democratic participation in the workplace, in the economy, and in global rule-setting fora. This is very different from recognising individual workers as citizens having a right to bargain collectively for workplace rights. Fudge has argued (see chapter 4) that claims based on human rights rest on workers' claims to being human, which is politically much weaker than making claims through democratic, representative participation in workplace decision-making.

The inclusion of informal workers in the ambit of labour law also has positive implications for the discipline. It represents a pathway out of labour law's 'existential crisis'. Chapter three showed that informal self-employed workers constitute almost half of the global workforce. This percentage increases in developing countries. With the fastest-growing youth population in the world, Africa and its vast working-class workforce of informal self-employed workers represent an opportunity for labour law to re-imagine its concept of the workplace, and of the working class.

For trade unions in developing countries dominated by informal employment, incorporating informal workers into the formal trade union movement is literally a

matter of political and financial survival. Dave Spooner and John Mark Mwanika explain why this is so:

> [M]ost trade unions throughout the world are still facing declining membership and power, despite enormous investment in organising in recent years. In many countries in Sub-Saharan Africa the decline in formal employment, especially in the private sector, has reached a critical point where unions are unable to meaningfully represent workers to employers or government, or even face complete collapse. For some unions, the recruitment of large numbers of informal workers has become essential for survival.[7]

Indeed, the Amalgamated Transport & General Workers Union (ATGWU) in Uganda provides illustrates this point. With support from the International Trade Union Federation, ATGWU approached organisations of informal transport workers to affiliate more than ten years ago. In 2015, the 36 000 member-strong Operational Taxi Stages Association (KOTSA) and the 38 000 member-strong Kampala Metropolitan Boda-Boda Association (KAMBA) joined ATGWU, among several other organisations of informal (self-employed) workers.[8] Spooner and Mwanika conclude that 'by rebuilding a mass organisation of transport workers through the affiliation of informal workers' associations, ATGWU is poised to become financially fully self-sustainable'.[9]

## 8.4 Challenging labour law's underlying assumptions

As an institution, collective bargaining has economic, legal and political dimensions. The thesis has shown that it is legally possible to establish a global regime for garment supply-chain workers since such a regime exists for seafarers; and it has made proposals for collective bargaining laws for street vendors, based on the case

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[7] Dave Spooner and John Mark Mwanika 'Transforming Transport Unions through Mass Organisation of Informal Workers in Uganda' *Friedrich Ebert Stiftung (FES*) (August 2017) at 4 available at https://library.fes.de/pdf-files/iez/13643.pdf, accessed on 13 January 2023.
[8] Ibid at 6.
[9] Ibid at 11.

studies and laws for self-employed workers in Canada, Australia and the USA. Chapter seven explored the politics of institutionalising collective bargaining. Its focus was thus on power relations.

Drawing on Erik Olin Wright's theory of how workers might institutionalise a durable class compromise, the chapter showed that his theory is tactically useful for the two groups of workers, and that it challenges the depoliticisation of social dialogue and collective bargaining by multilateral institutions, including the ILO.

The chapter proceeded to discuss the challenges that the case studies pose to his theory. It began by integrating the structuralist analysis discussed in the political economy chapters (chapters two and three) with the case studies of chapters five and six. Structuralists analyse power relations between countries and between the formal and the informal economy — a bigger, more sophisticated lens than Wright and labour law's theories of power relations between the owners of capital and workers within the liberal-democratic state. It then explained how Wright's theory would need to be revised to include supply-chain workers and street vendors. Last, it showed how the case studies challenge Wright to embrace a polycentric, fluid concept of associational power (rather than conceiving of associational power only as workers forming their own organisations) and to take into account the intersectional identities of workers — their gender, migrancy status, and caste identities — to complement its class analysis. This is not simply a question of identity politics, but as the case study of the Dindigul agreements show, it challenges the structure of trade unions, their organising strategies, and the issues on which they focus.

Finally, the chapter reflected on how the case studies challenge four aspects of Wright's theory and labour law's paradigm because they are either outdated, or irrelevant to the two groups of workers. First, both are premised on the nation state and have limited traction for transnational struggles. Second, both need to re-theorise their concept of the state as a liberal democratic institution that mediates between capital and labour. There is a need to theorise: relations between governments of developing countries with governments of industrialised countries; the implications of the World Bank and the IMF's policies on governments and on class relations; the relations between political elites and their governments; and the relations between global capital and governments in developing countries. Third, both need to revise

their conception of countervailing power; and fourth, both need to revise their premise of how workers access property since workers not only access property by means of an exchange (of labour power for access to property) but also on the basis of constitutional and human rights as worker-citizens.

## 8.5 Conclusion

The objective of the thesis has first been to contribute to the evolution of labour law's institution of collective bargaining through its focus on two groups of workers emblematic of work in the global South, and second, to show that 'labour law as collective relations' can and should enlarge its scope to include informal self-employed workers.

By focusing on these two groups of workers from the global South, the thesis reasserts the relevance, and legitimacy, of 'labour law as the law of collective relations'. By highlighting the political economy of global supply chains and of the informal sector, the thesis challenges labour law's underlying premises, and its narrow focus on the employment relationship. The previous chapter highlights both the urgent need for labour law scholars and labour sociologists to revise theory to support the labour movement, and the value of a recursive relationship (to borrow from Dias Abey) between experiments in collective bargaining and theory-building.

Finally, the thesis issues a provocation. The days of industrial capitalism, both as socio-economic order and mode of accumulation, are in decline. As financial capitalism comes of age, it is unlikely that the majority of the workforce in the global North will continue to access property (the means of production) by means of an employment contract. It is significantly less likely that the developing world will industrialise and provide employment for a workforce that is overwhelmingly informal and self-employed. Indeed, to revisit earlier themes, Arthurs argues that labour law should transcend work relations as the only site of struggle and reconstitute itself as 'the law of economic subordination and resistance'. Likewise, Karl Klare has argued that since labour law's goal is to democratise the economy, participation by workers should not be privileged above participation by 'consumers, spouses and local residents'. In essence, like Arthurs, he argued for the displacement of employment as the central organising identity for the countervailing force against

capital. Yet, in effect, supply-chain collective bargaining (with NGOs constituting consumer pressure on lead firms) establishes an alliance between workers and consumers.

If labour law were to de-centre the employment relationship in favour of labour law as personal work relations, it would include in its ambit a different conception of the working class — one that is informal, is genuinely self-employed, and is vast. Indeed, might this working class in the global South be harbingers of a post-industrial, plural conception of labour law that is based both on contract and (worker-citizen) status?

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