

# *Blurring Legal Boundaries: Regulating for Decent Work*

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## INTRODUCTION

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

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

<sup>2</sup> International Labour Organization, *Declaration on Social Justice for a Fair Globalization* (Declaration presented to the International Labour Conference, 97th Session, Geneva, 2008), available at: [www.ilocarib.org.tt/projects/cariblex/conventions\\_24.shtml](http://www.ilocarib.org.tt/projects/cariblex/conventions_24.shtml).

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

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

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

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

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

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

<sup>6</sup> *Ibid.*

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

<sup>8</sup> *Ibid* at 7.

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

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

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

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

<sup>10</sup> International Labour Organization, above n 2.

<sup>11</sup> Teklè, above n 5, at 3.

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

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

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

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

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

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

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

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

## INFORMALISATION

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

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

<sup>18</sup> Hyde, A, 'What is Labour Law?' in G Davidov and B Langille (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford, Hart Publishing, 2006).

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

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

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

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

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

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

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

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

<sup>24</sup> *Ibid* at 20.

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

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

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

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

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

<sup>27</sup> Standing, G, ‘Global Feminisation Through Flexible Labor: A Theme Revisited’ (1999) 27 *World Development* 583, 585.

<sup>28</sup> Sankaran, K, ‘Flexibility and Informalisation of Employment Relationships’ in this collection.

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

<sup>30</sup> Chikarmane, P and Narayanan, L, ‘Transform or Perish: Changing Conceptions of Work in Recycling’ in this collection.

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

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

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

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

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

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

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

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

<sup>34</sup> *Ibid* at 2.

<sup>35</sup> *Ibid* (emphasis in original).

<sup>36</sup> *Ibid* at 3.

<sup>37</sup> Chikarmane and Narayanan, above n 30.

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

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

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

<sup>38</sup> International Labour Office, above n 22, at 3.

<sup>39</sup> *Ibid.*

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

<sup>41</sup> Lamphere, Zavella and Gonzales, above n 16.

<sup>42</sup> Sankaran, K, Sinha, S and Madhav, R, *WIEGO Law Pilot Project on the Informal Economy: Street Vendors in India* (undated), available at: [http://previous.wiego.org/informal\\_economy\\_law/india/content/sv\\_background\\_note.pdf](http://previous.wiego.org/informal_economy_law/india/content/sv_background_note.pdf).

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

their employment rights.<sup>44</sup> Anna Pollert's contribution to this collection describes problems in the United Kingdom in ensuring compliance with, and enforcement of, employment and labour laws for workers who are not represented by trade unions, and it suggests that is not possible to regard even standard employees in developed countries as effectively protected by employment and labour laws.<sup>45</sup>

### COMMERCIALISATION

The commercialisation of employment refers to the breakdown of the boundary between commercial activities and employment, on the one hand, and the erosion of the separation between work and care, on the other hand.<sup>46</sup> Like informalisation, it is part of the broader process of externalisation of risk through production and service changes and organisations. However, commercialisation is also involved in the shift of care work from unpaid care work by women in the home into paid care work, performed predominantly by women, either in the home or other institutions.

In developed countries, commercialisation takes many forms. Employment is increasingly project-, task-, or term-limited rather than ongoing, and pay has been individualised. Self-employment—often in the form of 'freelancers'—has increased, and the distinction between employment and self-employment is blurring as employment practices rapidly change.<sup>47</sup> Labour-only subcontracting, franchises, joint ventures, and project employment are examples of the commercialisation of employment.

The standard employment relationship, which is the target of labour regulation and the platform for many economic and social rights, is conceptualised as involving a bounded relationship: a contract between a single employer and an employee. However, changing organisational forms have weakened this platform. Vertical disintegration of firms and the breakdown of internal labour markets have resulted in the transformation of employees into independent contractors who are outside the scope of labour

<sup>44</sup> Pollert, A and Charlwood, A, 'The Vulnerable Worker in Britain and Problems at Work' (2009) 23 *Work, Employment & Society* 343.

<sup>45</sup> Davidov, G, 'The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions' (2010) 26 *International Journal of Comparative Labour Law and Industrial Relations* 61; Weil, D and Pyles, A, 'Why Complain? Complaints, Compliance and the Problem of Enforcement in the U.S. Workplace' (2005) 27 *Comparative Labour Law and Policy Journal* 59; Pollert, A, 'How Britain's Low Paid Non-Unionised Employees Deal with Workplace Problems' in this collection.

<sup>46</sup> Marchington, M *et al* (eds), *Fragmenting Work: Blurring Organizational Boundaries and Disordering Hierarchies* (Oxford, Oxford University Press, 2006).

<sup>47</sup> Davidov, G, 'Freelancers: An Intermediate Group in Labour Law?' in this collection.

protection.<sup>48</sup> The boundaries of the firm have proved to be quite porous, ‘making it difficult to know where the firm ends and where the market or another firm begins’.<sup>49</sup> Emerging organisational forms, such as networks, have combined with older, pre-Fordist organisational forms—especially subcontracting and employment agencies—to blur the traditional boundary of the firm. Prominent researchers have suggested ‘it is more plausible to regard ‘market’, ‘hierarchy’, and ‘network’ as concepts that have proven valuable in differentiating elements or dimensions of organising practices within and between organisations, rather than as alternative designs of economic organisation’.<sup>50</sup> Decentralisation and fragmentation of production has contributed to the commercialisation of employment.

The structure of enterprises determines not only what form the work arrangements take, but also which entity in a common enterprise bears the responsibility for employing labour and the attendant work-related obligations. The blurring of organisational boundaries affects whether a worker falls within the scope of labour protection and which entity bears the responsibility for legal obligations owed to employees in different legal contexts. Moreover, the organisational form that an enterprise takes has a profound impact upon equity in employment conditions.<sup>51</sup>

The ease with which firms can adopt different organisational forms enables them to disaggregate different components of production and service provision around the globe. Global production and supply chains proliferate, and new technologies have resulted in the expansion of global services. Manuel Castells explains how

the core activities of production, consumption, and circulation, as well as their components (capital, labour, raw materials, management, information, technology, markets) are organised on a global scale, either directly or indirectly through a network of linkages between economic agents.<sup>52</sup>

However, while capital, goods and services move easily across national borders, the mobility of people across borders is very restricted.<sup>53</sup>

<sup>48</sup> Collins, H, ‘Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws’ (1990) 10 *Oxford Journal of Legal Studies* 353.

<sup>49</sup> Powell, WW, ‘The Capitalist Firm in the Twenty-First Century: Emerging Patterns in Western Enterprise’ in P DiMaggio (ed), *The Twenty-First Century Firm: Changing Economic Organization in International Perspective* (Princeton, Princeton University Press, 2003) 58.

<sup>50</sup> Rubery, J ‘Introduction: Fragmenting Work Across Organizational Boundaries’ in Marchington *et al*, above n 46, at 10.

<sup>51</sup> Collins, H, ‘Multi-segmented Workforces, Comparative Fairness, and the Capital Boundary Obstacle’ in G Davidov and B Langille (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford, Hart Publishing, 2006) 317; Earnshaw, J, Rubery, J and Cooke, FL, *Who is the Employer?* (London, Institute of Employment Rights, 2002) 2.

<sup>52</sup> Castells, above n 3, at 6.

<sup>53</sup> Trebilcock, M and Howse, R, *The Regulation of International Trade*, 3rd edn (London, Routledge, 2005) ch 19.

Organisational forms interact with the structure of markets to influence work arrangements. Some markets are structured in ways that increase the vulnerability of workers to poor outcomes and labour market risk. For example, David Weil has shown how the presence of large, concentrated business entities that have greater market power than the large set of small-scale organisations with which they interact has this effect.<sup>54</sup> He describes four types of monopsony markets with distinctive competitive dynamics that cause or exacerbate worker vulnerability; they are: strong buyers sourcing products in competitive supply chains; central production co-ordinators managing large contracting networks; small workplaces linked to large, branded national industries; and small workplaces and contractors linked together by common purchasers. Brendan Johnson's study of truck owner drivers in this collection is an example of workers providing services in the first type of monopsony market<sup>55</sup> and Shae McCrystal's study of postal delivery workers is an example of workers operating in the third type of market.<sup>56</sup>

The changes in how enterprises are organised combined with the structure of markets have resulted in a transformation in, and polarisation of, work arrangements.<sup>57</sup> At the high end of the spectrum are the knowledge workers, who are associated with the rise of the 'new economy' and networked organisations.<sup>58</sup> Although they fall outside the standard employment relationship, these workers are not typically considered to be in need of labour protection.<sup>59</sup> Moreover, such 'workers' tend to come from privileged social locations; they are highly educated or have access to social and economic capital, and typically are not obligated to engage in unpaid domestic and caring activities.

<sup>54</sup> Weil, D, 'Rethinking the Regulation of Vulnerable Work in the USA: A Sector-Based Approach' (2009), 31 *Journal of Industrial Relations* 411.

<sup>55</sup> Johnson, B, 'Developing Legislative Protection for Owner-Drivers in Australia: The Long Road to Regulatory Best Practice' in this collection.

<sup>56</sup> McCrystal, S, 'Organising Independent Contractors: The Impact of Competition Law' in this collection.

<sup>57</sup> In the context of South Africa, Jan Theron describes this process of the externalisation of work as leading to a hierarchy of work relations in the extended workplace; Theron, J, 'Re-inventing Inequality in the Post-apartheid Workplace' in O Dupper and C Garbers (eds), *Equality in the Workplace: Reflections from South Africa and Beyond* (Cape Town, Juta & Co, 2009) 133.

<sup>58</sup> Dickens, L, 'Problems of Fit: Changing Employment and Labour Regulation' (2004) 42 *British Journal of Industrial Relations* 595; Stone, KVW, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge, Cambridge University Press, 2004); Hyde, A, *Working in Silicon Valley: Economic and Legal Analysis of a High-Velocity Labor Market* (Armonk, NY, ME Sharpe, 2003).

<sup>59</sup> However, in a labour market in which knowledge workers are oversupplied, they too are easily transformed into contingent workers who may well be in need of labour protections. See Purcell, J, Purcell, K and Tailby, S, 'Temporary Work Agencies: Here Today, Gone Tomorrow?' (2004) 42 *British Journal of Industrial Relations* 705.

At the other end of the spectrum are ‘precarious’ or vulnerable workers who are associated with sub-contracted labour.<sup>60</sup> These workers are poorly paid and employed in atypical and unstable jobs, which more often than not fall outside the scope of collective representation or legal regulation. They tend to be drawn from vulnerable social locations. Women, people from ethnic minorities and racialised groups, and workers with precarious immigration statuses, whether temporary or undocumented, are overrepresented in precarious work arrangements that fall outside the norm of the standard employment relationship.

In the middle, are an increasing number of workers, such as independent contractors, freelancers, and franchisees, who enjoy some control over, and independence in, their work process as well as some capital (human or otherwise). Although they are not legally subordinated to a specific employer, these workers are also exposed to a number of risks—such as illness and lack of work—that individuals are not well placed to meet. Moreover, they often operate in markets in which individuals have little bargaining power. While some of these workers are drawn from social locations that make them vulnerable to exploitation, others, especially those who have access to capital or professional qualifications, are not.

Commercialisation also refers to how the flow of labour across national boundaries is being recharacterised as a matter of the free trade in services and not migrant, labour, or immigration law. As a matter of international law, migrant workers who are working temporarily within the national territory of a host state are entitled to the same laws and terms and conditions of employment as permanent residents or citizens of the host state.<sup>61</sup> The effect of this rule is to provide equality of treatment between temporary migrant workers and the residents of a host state by raising the conditions of the former to the latter. However, the logic of the General Agreement on Trade in Services (GATS), especially Mode 4, which deals with the provision of services by the presence of an individual in another territory, is to treat labour as just another commodity and, as such, subject to the principle that the sending country should be able to take advantage of the fact that its workers earn lower wages.<sup>62</sup> However, highly developed democracies have resisted Mode 4. While GATS Mode 4 has made it easier for managerial and professional workers to cross borders in order to engage in services, it has not made it easier for the vast majority of workers without formal credentials or recognised skills to migrate in order to find work.

<sup>60</sup> Fudge, J and Owens, R, ‘Precarious Work, Women and the New Economy: The Challenge to Legal Norms’ in J Fudge and R Owens, *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Oxford, Hart Publishing, 2006) 7–9.

<sup>61</sup> Wickramasekara, P, ‘Globalisation, International Labour Migration and the Rights of Migrant Workers’ (2008) 29 *Third World Quarterly* 1247, 1256.

<sup>62</sup> Kelsey, above n 7, at 190–3.

These workers are still subject to temporary migration schemes under which receiving countries impose mobility restrictions on migrant workers (typically by tying them to the sponsoring employer) and the workers are vulnerable to exploitation.<sup>63</sup> Kelsey explains the sleights of hand that support these segmented streams of migration:

First, to substitute ‘trade’ for a ‘labour’ paradigm, the ‘market’ that is being accessed must be reclassified as the *services* market of the purchaser, instead of the *employment* market of the host state (at least for those professionals, executives and skilled workers that inhabit the privileged tier in the international labour market). Second, the argument that mode 4 ‘conceptually does not fall under the administrative machinery applicable to permanent migration’ rests on a sharp, objective and illusory distinction between foreign workers engaged in services and non-services activities, and between short-term and longer-term foreign services workers.<sup>64</sup>

The globalisation of services helps to create a new international division of immaterial labour. ‘Immaterial labour’ is a term coined by Michael Hardt and Antonio Negri to describe labour that ‘produces an immaterial good, such as a service, a cultural product, a knowledge, or communication’, and they identify three forms of immaterial labour: the first involves industrial production that has incorporated information technologies; the second is analytic and symbolic labour, which can either involve creative manipulation or be routine; and the third is affective labour that has traditionally been regarded as women’s caring work.<sup>65</sup> Moreover, these ‘categories are infused with class relations’:

At one level, transnational corporations require international mobility for their executives, managers, and specialists, and for associated professions. At the same time, they seek to minimise the cost of the mundane labour component of services, whatever the mode of delivery—remotely across the border (call centre operators); to visiting foreign consumers (hotel workers); by contractors for foreign-owned enterprises (cleaners); or through temporary migrants (construction labourers or domestic services).<sup>66</sup>

#### PAID DOMESTIC AND CARE WORK

Domestic work is an example of immaterial labour, and it includes the activities of caring for other, often dependent, people and household tasks

<sup>63</sup> Martin, JP, ‘Temporary Labour Migration: An Illusory Promise?’ (2008) *International Migration Outlook: SOPEMI 2008* 17, 20.

<sup>64</sup> Kelsey, above n 7, at 193 (emphasis in original), quoting Chanda, R, *Movement and Presence of Natural Persons: Issues and Proposals for the GATS Negotiations* (Geneva, South Centre, 2004) 1.

<sup>65</sup> Hardt, M and Negri, A, *Empire* (Cambridge, MA, Harvard University Press, 2000) 209 (footnote omitted).

<sup>66</sup> Kelsey, above n 7, at 189.

that have traditionally been performed by women, especially mothers, primarily for affective reasons and as part of deeply rooted social and cultural roles.<sup>67</sup> A defining characteristic is that this work takes place in the home, the private domain of the family. The boundaries between home/market and private/public are deeply inscribed in contemporary legal doctrines, discourses and institutions. When performed for wages in the household, domestic work troubles boundaries that distinguish different spheres of social activity, which are associated with specific discourses and technologies of legal regulation.<sup>68</sup> Moreover, when they cross national boundaries, domestic workers also cross a number of different legal fields or jurisdictions.<sup>69</sup> Adelle Blackett explains how

the law at once jealously guards the public borders of the state through immigration laws, while reifying the private borders of the home despite the public activity that proliferates behind its doors. Restrictive regulation of the immigration dimensions of the trans-national ‘maid trade’ stands in stark contrast to the abject neglect of the employment and labour law dimensions of domestics’ workforce participation.<sup>70</sup>

Over the past 30 years, women’s labour force participation has increased substantially and a growing proportion of care work has been commercialised, ‘even though much is still performed within the household, either as unpaid work by family members or as paid activities performed by hired domestic help’.<sup>71</sup> Moreover, neoliberal policies have subjected women across the globe to similar pressures. Privatisation in developed countries has weakened the welfare state, and in developing countries, social protection has contracted. In the developed world, the emphasis is on increasing women’s labour force participation, and policies designed to reconcile the competing pressures of paid work and care work emphasise paid maternity, parental, and (very occasionally) paternal leave, flexible hours of work, and childcare services.<sup>72</sup> In the developing world, the availability of inexpensive

<sup>67</sup> Following the lead of Adelle Blackett, I am deliberately using the terms ‘care work’ and ‘domestic work’ interchangeably. See Blackett, A, ‘Introduction: Regulating Decent Work for Domestic Workers’ (2011) 23 *Canadian Journal of Women and the Law* 1. See also the discussion in footnote 1.

<sup>68</sup> Albin, E, ‘From “Domestic Servant” to “Domestic Worker”’ in this collection.

<sup>69</sup> Fudge, J, ‘Global Care Chains, Employment Agencies and the Conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada’ (2011) 23 *Canadian Journal of Women and the Law* 235.

<sup>70</sup> Blackett, A, ‘Promoting Domestic Workers’ Human Dignity through Regulation’ in A Fauve-Chamoux (ed), *Domestic Service and the Formation of European Identity: Understanding the Globalization of Domestic Work, 16th–21st Centuries* (Bern, Peter Lang, 2005).

<sup>71</sup> Benería, L, ‘The Crisis of Care, International Migration, and Public Policy’ (2008) 14(3) *Feminist Economics* 1, 2. See also Razavi, S and Staab, S, ‘Underpaid and Overworked: A Cross-National Perspective on Care Workers’ (2010) 149 *International Labour Review* 407.

<sup>72</sup> Benería, above n 71, at 5.

domestic service, the large informal economy, and the feminisation of migration as a form of survival strategy suggest that the policies needed in developing countries for balancing different types of work may differ from those in developed ones.<sup>73</sup>

Rural to urban migration historically has provided a supply of domestic workers.<sup>74</sup> Moreover, historically and across a diverse range of countries, both developed and developing, women from disadvantaged racial and ethnic groups have tended to provide care services to meet the needs of more powerful social groups, while their own care needs have been downplayed and neglected.<sup>75</sup> Nowhere is this process of racialisation and subordination more evident than when it comes to the globalisation of care and social reproduction.

Arlie Hochschild coined the term the 'global care chain' to refer to 'a series of personal links between people across the globe based on the paid or unpaid work of caring'.<sup>76</sup> Global care chains are transnational networks that are 'formed for the purpose of maintaining daily life'; these networks comprise households that transfer their caregiving tasks across borders on the basis of power axes as well as employment agencies, governments and their departments, and other agents, institutions, and organisations.<sup>77</sup> Elaborating on the concept of global care chains, Nicola Yeates emphasises the great diversity of agents involved in the provision of care services, which 'include recruitment and placement agencies, overseas job promoters and job brokers provided by commercial and non-commercial, governmental and non-governmental bodies'.<sup>78</sup> These agents operate in different contexts and according to different logics; they are governed internally by '[r]elations of power and authority' that operate within the chain and externally by immigration and labour regulation.<sup>79</sup>

A defining characteristic of paid domestic work is that it is located in the employer's home. However, care work, as Guy Mundlak's Chapter so clearly shows, can take place in a number of different institutional settings. Paid child care, for example, can take place either in the child's or the carer's home, a for-profit enterprise, a not-for-profit agency, a worker-owned and operated

<sup>73</sup> *Ibid.*, at 6.

<sup>74</sup> Tsikata, D, 'Employment Agencies and Domestic Work in Ghana' in this collection.

<sup>75</sup> Razavi, above n 43, at 2.

<sup>76</sup> Hochschild, AR, 'Global Care Chains and Emotional Surplus Value' in W Hutton and A Giddens (eds), *On the Edge: Living with Global Capitalism* (London, Jonathon Cape, 2000) 131.

<sup>77</sup> Pérez Orozco, A, *Global Care Chains* (Gender, Migration and Development Series, Working Paper 2, (United Nations International Research and Training Institute for the Advancement of Women, Santo Domingo, Dominican Republic, 2009).

<sup>78</sup> Yeates, N, *Global Care Chains: A Critical Introduction* (Global Migration Perspectives Paper No 44, Global Commission on International Migration, Geneva, September 2005) 9.

<sup>79</sup> *Ibid.* See also Yeates, N, *Globalizing Care Economies: Explorations in Global Care Chains* (Houndmills, Palgrave Macmillan, 2009). Yeates expands the conception of global care chains to examine highly skilled care workers such as nurses.

co-operative, or it can be delivered as a public service by government. The question of the institutional setting in which work is performed is critical to whether or not the work is precarious or well regulated. As Alice Sindzingre explains, ‘all institutions are characterised by their forms—their definitions, names, and modes of organisation—and “contents”—their meanings, function, relevance, and elements’.<sup>80</sup> Institutional setting, rather than the dichotomy of formality versus informality might explain better the quality of certain kinds of paid work.<sup>81</sup>

### REGULATING FOR DECENT WORK

In response to the broad changes in the standard employment relationship and to the recognition of the growth in informal employment, the ILO initiated a major organisational review, which led to its Decent Work Agenda. Launched in 1999, the Decent Work Agenda radically broadens the ILO’s traditional constituencies to focus on people at the periphery of formal systems of labour and social protection. Its goal is to promote opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security, and human dignity. Decent work is captured in four strategic objectives or pillars: fundamental principles and rights at work and international labour standards; employment and income opportunities; social protection and social security; and social dialogue and tripartism. Significantly, these objectives hold for all workers, women and men, in both formal and informal economies; in wage employment or working on their own account; in the fields, factories, and offices; in their homes or in the community.<sup>82</sup>

The June 2002 International Labour Conference adopted a resolution concerning decent work and the informal economy that called for the needs of workers and economic units in the informal economy to be addressed, with emphasis on an integrated approach from a decent work perspective.<sup>83</sup> A crucial component of the decent work perspective is the emphasis on the ILO’s 1998 *Declaration on Fundamental Principles and Rights at Work*, which articulates fundamental rights: freedom of association and the

<sup>80</sup> Sindzingre, A, ‘The Relevance of the Concepts of Formality and Informality: A Theoretical Appraisal’ in B Guha-Khasnobis, R Kanbur and E Ostrom (eds), *Linking the Formal and Informal Economy Concepts and Policies* (New York, Oxford University Press, 2006) 70.

<sup>81</sup> Mundlak, G, ‘The Wages of Care-Workers: From Structure to Agency’ in this collection; Bernstein, S, ‘Sector-Based Collective Bargaining Regimes and Gender Segregation: A Case Study of Self-Employed Home Childcare Workers in Quebec’ in this collection.

<sup>82</sup> International Labour Conference, 87th Session, *Decent Work: Report of the Director General of the International Labour Organization* (Geneva, International Labour Organization, 1999).

<sup>83</sup> International Labour Office, above n 22, at 2.

effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.<sup>84</sup> The ILO is clear that the fundamental principles and rights at work, and the conventions with which they are associated, apply to all workers, and that ‘there should not be a two-tiered system or separate regulatory framework for formal and informal workers—although there may be a need for different modalities and mechanisms for guaranteeing them in the less regulated, less formal parts of the economy’.<sup>85</sup>

According to the ILO, ‘informal work can be treated as a legal problem’.<sup>86</sup> This problem can arise in a number of ways. Workers could be covered by legislation that is not enforced. Or it may be the case that labour legislation has lagged behind changes in forms of work organisation such that workers, such as temporary agency workers, are excluded from its scope. Another possibility is that workers are excluded from labour legislation because such legislation only applies to formal and narrowly defined employment relationships.

In 2008, the ILO adopted its third major statement of principles and policies since the 1919 Constitution, the *Declaration on Social Justice for a Fair Globalisation*.<sup>87</sup> The Social Justice Declaration enshrined the four strategic objectives of the Decent Work Agenda in a major policy document. However, at the same time, the ILO has largely moved to ‘soft’ law techniques and away from its traditional Convention-based system. The 1998 Declaration signalled the beginning of this shift in direction, as it established follow-up procedures based on country and ILO reports. The Decent Work Agenda, although it expanded the ILO’s focus beyond the four fundamental principles and rights at work, continued with the ‘soft’ law approach, and is directed at reducing poverty and creating sustainable development.<sup>88</sup>

At the same time, the ILO’s Decent Work Agenda has begun to make greater inroads in breaking down the conceptual and regulatory barriers between the workplace and the household. The 2010 International Labour Conference discussed the report *Decent Work for Domestic Workers* and voted to bring an international convention for domestic workers

<sup>84</sup> International Labour Organization, *Declaration of Fundamental Principles and Rights at Work* (Declaration presented to the International Labour Conference, 86th Session, Geneva, 1998).

<sup>85</sup> International Labour Office, above n 22, at 40.

<sup>86</sup> *Ibid* at 48.

<sup>87</sup> International Labour Organization, above n 2.

<sup>88</sup> International Labour Conference, 96th Session, *Strengthening the ILO’s Capacity to Assist Members’ Efforts to Reach Its Objectives in the Context of Globalization: Report V* (Geneva, International Labour Office, 2007) iv.

to the 2011 Conference, where it was adopted.<sup>89</sup> The Convention, and accompanying recommendation, goes a long distance towards providing a regulatory regime that recognises domestic work as valuable and productive work deserving of the same protections as any other forms of work. Specifically designed for care work that is performed in private households, the Convention formalises the employment relationship by requiring written contracts or collective agreements, setting maximum hours and hours of rest, and requiring the payment of wages.<sup>90</sup> Among other things, it also calls attention to the need to protect domestic workers, especially migrants, who are recruited or placed by private agencies.<sup>91</sup>

Migrant workers, especially workers who are working in the host country for a temporary period without rights to permanent settlement, also challenge legal boundaries, but in this case the boundaries between immigration and labour law, on the one hand, and trade and labour law, on the other. The Global Commission on International Migration, the International Organisation for Migration, the ILO and the World Bank have all called for the expansion of legal migration through temporary and circular migration programmes. With the exception of the OECD,<sup>92</sup> which has introduced a note of caution that temporary migration ‘does not appear to be a foundation upon which one can construct a solid migration policy’, there is an ‘emerging global consensus on the need to expand legal opportunities for migration to potential migrants, especially the low-skilled workers, from developing countries’.<sup>93</sup>

The ILO is taking some steps towards recognising the increasing importance of international migration in challenging the boundaries of labour law. At the 92nd Session of the International Labour Conference in 2004, it adopted a resolution on a ‘*Fair Deal for Migrant Workers in the Global Economy*’, which noted the need for ‘a rights-based international regime for managing migration’ that rests ‘on a framework of principles of good governance developed and implemented by the international community’.<sup>94</sup> Instead of a convention, the Conference opted for a non-binding multi-lateral framework for a rights-based approach to labour migration that takes account of national labour market needs. In 2005, the ILO Tripartite Meeting of Experts adopted the *ILO Multilateral Framework on Labour*

<sup>89</sup> International Labour Conference, 99th Session, *Decent Work for Domestic Workers: Report IV(1)* (Geneva, International Labour Office, 2009), available at: [www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_104700.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_104700.pdf). For discussion see Albin, above n 68.

<sup>90</sup> *Domestic Workers Convention 2011* (ILO C189).

<sup>91</sup> *Ibid.*, at Art 15(1).

<sup>92</sup> Martin, above n 63, at 20.

<sup>93</sup> Wickramasekara, above n 61, at 1256.

<sup>94</sup> International Labour Conference, 92nd Session, *Towards a Fair Deal for Migrant Workers in the Global Economy: Report VI* (Geneva, International Labour Office, 2004) 139.

*Migration: Nonbinding principles and guidelines for a rights-based approach to migration*, which was authorised by the ILO's Governing Body in 2006.<sup>95</sup> Its goal is to create a virtuous circle of migration for sending and receiving countries that also benefits migrant workers by fostering co-operation and consultation among and between the tripartite constituents of the ILO within the broader commitment of promoting decent work for all.

However, at the same time that the ILO and other United Nations institutions are attempting to secure human, including labour, rights for migrant workers, other transnational and international institutions are trying to subsume labour under the category of services. This is the logic of the GATS,<sup>96</sup> and it can also be discerned in the controversial negotiations that resulted in the services directive in the European Union and in a series of European Court of Justice decisions that limit the ability of host countries to regulate the employment conditions of workers who are posted temporarily in another member state in order to perform services.<sup>97</sup> The boundaries between trade, labour, and immigration laws are increasingly blurred, as 'multiple international legal regimes—in human rights law, refugee law, labor law, trade law and criminal law—address, to some degree, the rights and privileges that should be accorded to aliens working within the territories of states parties'.<sup>98</sup>

By contrast, the boundary between competition law, on the one hand, and labour law, on the other, creates real problems for devising mechanisms to promote collective organisation and action for individuals who are engaged in commercialised work arrangements.<sup>99</sup> Less controversial, although still the exception rather than the rule, are regulations that are designed to improve the terms and conditions of small contractors such as franchisors<sup>100</sup>

<sup>95</sup> International Labour Organization, *ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration* (Geneva, International Labour Organization, 2006) 61.

<sup>96</sup> Kelsey, above n 7.

<sup>97</sup> Bercusson, B, 'The Trade Union Movement and the European Union: Judgment Day' (2007) 13 *European Law Journal* 279, 279–80; Syrpis, P and Novitz, T, 'Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation' (2008) 33 *European Law Review* 411, 416–18; Ashiagbor, D, 'Collective Labour Rights and the European Social Model' (2009) 3 *Law and Ethics of Human Rights* 223.

<sup>98</sup> Thomas, C, 'Convergences and Divergences in International Legal Norms on Migrant Labor' (2011) 32 *Comparative Labor Law and Policy Journal* 405, 405.

<sup>99</sup> McCrystal, S, 'Regulating Collective Rights in Bargaining: Employees, Self-Employed Persons and Small Businesses' in C Arup *et al* (eds), *Labour Law and Labour Market Regulation* (Sydney, Federation Press, 2006); McCrystal, S, 'Collective Bargaining by Independent Contractors: Challenges from Labour Law' (2007) 20 *Australian Journal of Labour Law* 1; McCrystal, above n 56.

<sup>100</sup> Riley, J, 'Regulating Unequal Work Relationships for Fairness and Efficiency: A Study of Business Format Franchising' in C Arup *et al* (eds), *Labour Law and Labour Market Regulation* (Sydney, Federation Press, 2006); Riley, J, 'A Blurred Boundary between Entrepreneurship and Servitude: Regulating Business Format Franchising in Australia' in this collection.

or self-employed workers.<sup>101</sup> More promising are various forms of supply chain regulation that operate within and across jurisdictions.<sup>102</sup> But, while there are examples of innovative forms of regulation that target commercialised work arrangements at the national and subnational levels, the ILO has continued to take a conservative approach in developing instruments that address the problems of workers who fall outside a formal employment relationship.<sup>103</sup>

The major problem with relying on international labour standards as a way of improving the working conditions and living standards of workers who fall outside the traditional boundaries of labour law is the failure of nation states both to ratify and to enforce international standards. Since tying labour standards to trade regimes has proved to be politically infeasible because many developing countries consider it to be a form of trade protection, voluntary co-operative codes of conduct have been regarded as an important form of 'soft' regulation.<sup>104</sup> There is a great deal of debate about the effectiveness of these codes in guaranteeing labour standards, and whether they can be considered a form of responsive regulation or simply window-dressing.<sup>105</sup>

Historically, effective labour standards have depended on workers' collective self-organisation. Trade unions have been the most widespread and durable vehicle for workers' self-organisation, and one of their explicit goals has been to regulate the labour market. However, trade union strength is

<sup>101</sup> Fudge, J, 'A Canadian Perspective on the Scope of Employment Standards, Labour Rights, and Social Protection: The Good, the Bad, and the Ugly' (2010) 31 *Comparative Labor Law & Policy Journal* 101; Sanchez Torres, E, 'The Spanish Law on Dependent Self-Employed Workers: A New Evolution in Labor Law' (2010) 31 *Comparative Labor Law & Policy Journal* 231; Landa Zapirain, J-P, 'Regulation of Dependent Self-Employed Workers in Spain: A Regulatory Framework for Informal Work?' in this collection.

<sup>102</sup> Weil, above n 54; Johnstone, R, 'Regulating Occupational Health and Safety in a Changing Labour Market' in C Arup *et al* (eds), *Labour Law and Labour Market Regulation* (Sydney, Federation Press, 2006); Nossar, I, 'Cross-Jurisdictional Regulation of Commercial Contracts for Work Beyond the Traditional Relationship' in C Arup *et al* (eds), *Labour Law and Labour Market Regulation* (Sydney, Federation Press, 2006); Rawling, M, 'A Generic Model of Regulating Supply Chain Outsourcing' in C Arup *et al* (eds), *Labour Law and Labour Market Regulation* (Sydney, Federation Press, 2006); Johnson, above n 55.

<sup>103</sup> Fudge, J, 'Self-Employment, Women, and Precarious Work: The Scope of Labour Protection' in J Fudge and R Owens (eds), *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Oxford, Hart Publishing, 2006); Fudge, J, 'The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection' in G Davidov and B Langille (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford, Hart Publishing, 2006); Hyde, A, 'Legal Responsibility for Labour Conditions Down the Production Chain' in this collection.

<sup>104</sup> Kolben, K, 'The New Politics of Linkage: India's Opposition to the Workers' Rights Clause' (2006) 13 *Indian Journal of Labor Studies* 225.

<sup>105</sup> Trebilcock and Howse, above n 53, at 563–6; Kolben, K, 'Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes' (2007) 48 *Harvard International Law Journal* 203; Madhav, R, 'Corporate Codes of Conduct in the Garment Sector in Bangalore' in this collection.

dependent on specific forms of employment, workplaces, types of firms, and political support.<sup>106</sup> The increase in self-employed workers has resulted in the establishment of different types of organisation to represent them. These organisations exhibit a range of different logics of action and they mobilise different work-related identities.<sup>107</sup> Similarly, informal workers in developing economies have adopted a range of different organisational forms, from co-operatives to traditional trade unions, to represent their interests.<sup>108</sup> Whether, and the extent to which, these organisations can secure labour standards and protect workers is an open question.

### THE STRUCTURE OF THE BOOK

The Chapters in this collection are organised thematically, and each of the four Parts that follow corresponds to one of the themes discussed earlier in this introductory Chapter. The three Chapters in Part I focus on informal work, beginning with Kamala Sankaran's discussion of how processes of informalisation in India have eroded workers' protections and led to a deterioration in their living standards. She examines the feasibility of treating workers employed in these flexible forms of production as employees of the main enterprise, and considers the ILO's recommendation on the employment relationship from this vantage.<sup>109</sup> Sankaran's discussion of processes of informalisation in India is followed by a case study of informal subsistence workers in one city in India. In 'Transform or Perish: Conceptions of Work in Recycling', Poornima Chikarmane and Lakshmi Narayanan explore attempts by subsistence waste pickers in Pune to organise in order to improve the terms and conditions of their work. They describe how these informal workers adopted two organisational forms, a traditional trade union structure and a co-operative, in order to assert their demands for decent work.<sup>110</sup> The final Chapter in this Part, by Richard Johnstone, examines occupational health and safety regulation in developing countries, where workers disproportionately suffer from work-related death, injury, and ill-health. His Chapter questions the utility of borrowing regulatory models for occupational health and safety from developed countries for labour markets in developing countries that have a significant amount of informal employment and that depend upon transnational supply and

<sup>106</sup> Silver, B, *Forces of Labor: Workers' Movements and Globalization since 1870* (New York, Cambridge University Press, 2003).

<sup>107</sup> D'Amours, M, 'The Logic of Collective Action of Self-Employed Workers' Associations' (2010) 65 *Relations Industrielles* 257.

<sup>108</sup> Selcuk, FU, 'Labour Organisations in the Informal Sector' (2004) 3 *South-East Europe Review* 93.

<sup>109</sup> Sankaran, above n 28.

<sup>110</sup> Chikarmane and Narayanan, above n 30.

commodity chains. Johnstone begins to map out some of the possible regulatory approaches that might be taken to effectively regulate occupational health and safety in developing countries.<sup>111</sup>

The six Chapters included in Part II probe the gap between employment law and commercial law, a regulatory space into which increasing numbers of workers fall. These Chapters begin with work arrangements that deviate the greatest from traditional norms of employment and traditional techniques of employment and labour regulation. Alan Hyde's Chapter examines the process of commercialisation from a broader, economic perspective, and considers how this process plays out in the United States as well as in global labour markets.<sup>112</sup> Based upon an economic perspective that treats different forms of contracts as interchangeable, Hyde attempts to synthesise a workable concept of responsibility for labour conditions, under which purchasers of those services could realise efficiency gains from freedom of contract, while remaining legally responsible for violations of labour standards or human rights.

Hyde's Chapter is followed by three Chapters from Australia that look at regulatory devices rooted in commercial law. Australia is distinctive amongst Anglo-common law countries in offering a variety of mechanisms that either promote collective representation or secure decent labour standards. All three Chapters are case studies of different groups of workers operating in distinct commercially based regulatory regimes. The Chapter by Joellen Riley examines the regulation of franchise operators.<sup>113</sup> This group of workers experience contractual arrangements more closely resembling dependent employment than 'entrepreneurial business ownership', a situation Riley coins 'entrepreneurial servitude'. She evaluates the capacity of codes to ensure decent work for this group of 'entrepreneurs'. Brendan Johnson examines a range of regulatory regimes affecting truck owner drivers in light of a 2008 report by the Australian National Transport Commission that suggested existing regulation in the transport industry has failed to correct market failures that lead to unsafe and dangerous driving practices.<sup>114</sup> He concludes that these different commercial regimes for regulating this practice of subcontracting fail to address the inequality in bargaining power. The third case study, by Shae McCrystal, examines the impact of competition laws on the ability of independent contractors to engage in collective bargaining through a case study of contractor workers in the Australian postal industry.<sup>115</sup> In particular, McCrystal examines the

<sup>111</sup> Johnstone, R, 'Informal Sectors and New Industries: the Complexities of Regulating Occupational Health and Safety in Developing Countries' in this collection.

<sup>112</sup> Hyde, above n 103.

<sup>113</sup> Riley, 'A Blurred Boundary between Entrepreneurship and Servitude', above n 100.

<sup>114</sup> Johnson, above n 55.

<sup>115</sup> McCrystal, above n 56.

response of competition regulators to arguments by contractor workers about the pro-competitive effects of collective bargaining. Together, these Chapters demonstrate the challenges of regulating labour from within commercial law as each Chapter highlights a key regulatory failing of the models under evaluation. These failures include the continued litigation over contractual disputes involving franchisees (Riley), the failure of the market in the transport sector to produce 'safe rates' of pay for owner drivers (Johnson) and competition based solutions producing outcomes which fail to correct workers' imbalance of bargaining power (McCrystal).

The last two Chapters in Part II explore the question of how to classify and treat for regulatory purposes workers who do not fit easily into the categories of employee or entrepreneur. Juan-Pablo Landa Zapirain examines the new regulatory regime applying to self-employed workers in Spain, drawing parallels with other European attempts to regulate such workers.<sup>116</sup> This Chapter effectively demonstrates the difficulties (both legal and practical) of implementing a regime designed to facilitate freedom of contract while also providing protection for the workers susceptible to exploitation. The Chapter by Guy Davidov proposes more widespread recognition of an intermediate category of workers, between employees and independent contractors, commonly called 'dependent contractors'.<sup>117</sup> Davidov argues that the identification of such a group would allow workers who are economically dependent, but not legally subordinate, to be protected by labour law regulation that is appropriate to their working arrangements and enacted for that purpose, while at the same time to be excluded from other legislation designed to protect legally subordinate workers.

Part III focuses on care and domestic work, and the Chapters in it examine the on-going significance of institutions for obtaining decent work for care workers and the historical legacy of legal categories for contemporary regulatory strategies for care work. It begins with two Chapters that emphasise the significance of the institutional setting in which the care work is performed in influencing collective strategies and occupational identities. Using Israel as his case study, in 'The Wages of Care Workers from Structure to Agency', Guy Mundlak examines four different arrangements for delivering care work, which provides an overview of different care arrangements and the collective strategies that were used in pursuit of change.<sup>118</sup> In the next Chapter, Stéphanie Bernstein's case study of the recently created sector-based collective bargaining regime for home childcare providers in Quebec demonstrates the utility of Mundlak's typology of care arrangements in welfare states.<sup>119</sup> Bernstein illustrates the contradictory goals embedded in the regulatory

<sup>116</sup> Landa, above n 101.

<sup>117</sup> Davidov, 'Freelancers: An Intermediate Group in Labour Law?', above n 47.

<sup>118</sup> Mundlak, above n 81.

<sup>119</sup> Bernstein, above n 81.

regime. On the one hand, the regime's goal is to contain the rising costs to the state of subsidised childcare, and on the other, the regime's goal is to appease unions' demands in the political and judicial arenas for the full recognition of home childcare providers' collective bargaining rights. She concludes with reflections on its potential pitfalls and on the regime's effectiveness in eliminating deeply-ingrained gender-based discrimination in relation to care work.

The second pair of Chapters in Part III concentrate on domestic work performed in private households. Albin's Chapter begins on an historical note, as she explores the legacy of the legal category of 'domestic servant' in British labour law on the current legal treatment of domestic workers.<sup>120</sup> She proceeds to assess whether, and to what extent, the ILO's *Domestic Workers Convention 2011* (ILO C189) addresses the problems encountered by domestic workers in the British field of labour law. The final Chapter in the Part shifts attention to the developing world, and the relationship between formality and informality when it comes to domestic work. Dzodzi Tsikata describes how domestic work in Ghana has been largely informal and unregulated, and she explores the role of employment agencies in providing some predictability in the terms and conditions of domestic work.<sup>121</sup>

Part IV comprises three Chapters that look at the capacity of legal mechanisms to provide decent work. The Chapter by Roopa Madhav moves from the domestic realm of adjudicative tribunals and courts to the transnational space of voluntary codes of conduct.<sup>122</sup> She concludes that overall the move away from 'hard' law to the 'soft' law of codes of conduct as a means of protecting labour rights has created yet another forum to which workers can appeal, but provides little by way of substantial and sustainable benefits to the workers. She emphasises the continuing need for state inspection and enforcement mechanisms, as well as union organisation.

The recurring and increasing difficulty of enforcing employment and labour law suggests that any solution to the problem of the declining scope of employment protection must go beyond designing new forms of regulation to tackling the sticky and enduring problem of enforcement. Using data from the United Kingdom, Anna Pollert's Chapter demonstrates that many workers in standard employment relationships, in what is clearly a developed country, do not exercise their employment rights.<sup>123</sup> This Chapter reminds us that collective organisation and representation is essential to any form of effective regulation.

<sup>120</sup> Albin, above n 68.

<sup>121</sup> Tsikata, 'Employment Agencies and Domestic Work in Ghana', above n 74.

<sup>122</sup> Madhav, above n 105.

<sup>123</sup> Pollert, above n 45.

In 'Learning from Case Law Accounts of Marginalised Working', Lizzie Barmes questions how adjudicative tribunals and courts in the United Kingdom characterise the working arrangements, conditions, and choices of vulnerable and precarious workers.<sup>124</sup> Focusing on a recent case that went to the Court of Appeal and involved migrant workers she probes the significance of immigration status in creating a hierarchy in the labour market. She demonstrates how the abstract nature of the Court of Appeal's reasoning demonstrates little awareness of the situation of vulnerable migrant workers and little commitment to doing anything to improve it. Barmes provides a compelling account of the extent to which legal categories serve to distance adjudicators from the reality of vulnerable and precarious workers.

The goal of the collection is to provide a glimpse of the heterogeneity of contemporary work arrangements in order to challenge the traditional legal boundaries of work regulation. By broadening the field of vision, it has been necessary to shift focus away from traditional norms of employment and techniques of labour law that predominate in developed countries. This introduction has attempted to provide a framework for understanding how these different forms of work are related and a different conceptual lens for examining them. It has also sought to identify the key regulatory challenge, which is to identify and institutionalise 'innovative forms of participatory governance alive to workers' social locations', for achieving decent work.<sup>125</sup>

<sup>124</sup> Barmes, L, 'Learning from Case Law Accounts of Marginalised Working' in this collection.

<sup>125</sup> Blackett, above n 14, 309.