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An analysis of the ILO's role in organising informal workers as a means to enforce and
safeguard labour rights.

BALGIISA SHEIK AHMED

Doctor of Philosophy

ASTON UNIVERSITY

September 2019

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Thesis Summary

Aston University

An analysis of the ILO's role in organising informal workers as a means to enforce and safeguard labour rights.

Balgiisa Sheik Ahmed

MPhil/PhD Law

2019

This thesis conducts an examination of the International Labour Organisation (ILO) to determine how it can best address the global issue of informality, particularly with regard to the lack of sufficient labour rights available to such workers when compared to those in the formal economy. The chapters argue that by adopting a more effective means to utilise its social dialogue tools, the organisation's tripartite structure will better represent the interests of those in the informal economy through the direct involvement of marginalised workers – predominantly vulnerable women. This, in turn, will allow the ILO to regain its legitimacy as a tripartite organisation representing states, employers and workers with a mandate to set, enforce and promote labour standards. The thesis aims to look at the multifaceted problem that is informality, including the gender dimension, the barriers to the current understanding and enforcement of freedom of association and collective bargaining rights and how the ILO's current focus on economic and development goals at times overlooks the classic purpose of international labour law – the empowerment of workers. Later chapters examine the barriers to empowering informal workers within the ILO, barriers such as the oversimplification of the relationship between workers' organisations and the informal economy; the perception of informal workers as being incapable of organising without the aid of those in the formal economy; and the organisation's focus on the ambitious but ultimately flawed Recommendation No. 204. The examples set by grassroots informal workers organisations may be used to improve the higher-level representation at ILO and provide a lesson for those aiming to organise in a time of renewed importance for the role of labour organisations yet global decline and resistance.

INTERNATIONAL LABOUR LAW – ILO – INFORMAL ECONOMY – LABOUR LAW
ENFORCEMENT – WORKER ORGANISATIONS

Dedication

For the people who shouted down the voice of doubt in my head; your stubbornness made this happen. I thank you for being louder.

For my family. Thank you for your prayers, your patience and the provisions.

And to Hibo. A promise is a promise.

Acknowledgement

I would like to thank my supervisor, Dr. David Salmons for being so incredibly supportive, patient and kind throughout the last few years. I cannot express how grateful I am for your guidance and understanding as a supervisor.

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Treaties & Declarations

- The Constitution of the International Labour Organisation (ILO), (adopted 1 April 1919, Part XIII of the Treaty of Versailles, 28 June 1919)
- Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR)
- Declaration of Philadelphia (Declaration concerning the aims and purposes of the International Labour Organisation) (adopted at the 26th session of the ILO, Philadelphia, 10 May 1944)
- International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171
- International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNGA Res 2200A (XXI)
- ILO Declaration on Social Justice for a Fair Globalisation (adopted at the 97th session of the ILO, Geneva 10 June 2008)
- The ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up 1998 (adopted at the 86th session of the ILO, Geneva 10 June 1998)
- United Nation General Assembly Resolution: Transforming our world: the 2030 Agenda for Sustainable Development (adopted at 70th session of the UN General Assembly, Geneva, 25 September 2015) A/Res/70/1

List of ILO Conventions

- ILO Convention C001: Hours of Work (Industry) Convention (Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the week) (1ST ILC Session Geneva 13 June 1919)
- ILO Convention C029: Forced Labour Convention (Convention concerning Forced or Compulsory Labour) (14th ILC Session 28 June 1923)
- ILO Convention C047: Forty-Hour Week Convention (Convention concerning the reduction of Hours of work to Forty a Week) (19th ILC Session Geneva 22 June 1935)
- ILO Convention C081: Labour Inspection Convention (Convention concerning Labour Inspection the Industry and Commerce) (No. 81) (30th ILC Session Geneva 11 July 1947)
- ILO Convention C087: Freedom of Association and Protection of the Right to Organise Convention (Convention concerning Freedom of Association and Protection of the Right to Organise) (31st ILC Session Geneva 17 June 1948)
- ILO Convention C098: Right to Organise and Collective Bargaining Convention (Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively) (32nd ILC Session Geneva 1 July 1949)

- ILO Convention C100: Equal Remuneration Convention (Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value) (34th ILC Session Geneva 23 May 1953)
- ILO Convention C105: Abolition of Forced Labour Convention (Convention concerning the Abolition of Forced Labour) (40th ILC Session Geneva 17 January 1957)
- ILO Convention C111: Discrimination (Employment and Occupation) Convention (Convention concerning Discrimination in Respect of Employment and Occupation) (42nd ILC Session Geneva 25 June 1958)
- ILO Convention C135: The Workers' Representatives Convention (Convention concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking) (56th ILC Session 23 June Geneva 1971)
- ILO Convention C138: Minimum Age Convention (Convention concerning Minimum Age for Admission to Employment) (58th ILC Session Geneva 26 June 1973)
- ILO Convention C144: Tripartite Consultation (International Labour Standards) Convention (Convention concerning Tripartite Consultations to Promote the Implementation of International Labour Standards) (61st ILC Session Geneva 16 May 1976)
- ILO Convention C150: Labour Administration Convention (Convention concerning Labour Administration: Role, Functions and Organisation) (64th ILC Session Geneva 26 June 1978)
- ILO Convention C154: Collective Bargaining Convention (Convention concerning the Promotion of Collective Bargaining) (67th ILC Session Geneva 03 June 1981)
- ILO Convention C177: Home Work Convention (Convention concerning Home Work) (83rd ILC Session Geneva 20 June 1996)
- ILO Convention C182: Worst Forms of Child Labour Convention, 1999 (No. 182) (83rd ILC session Geneva 20 Jun 1996)
- ILO Convention C183: Maternity Protection Convention (Convention concerning the revision of the Maternity Protection Convention (revised) (88th ILC Session Geneva 15 June 2000)
- ILO Convention C189: Domestic Workers Convention (Convention concerning decent work for domestic workers) (100th ILC Session Geneva 16 June 2011)

List of ILO Recommendations

- ILO Recommendation R020: Labour Inspection Recommendation (Recommendation Concerning the General Principles for the Organization of Systems of Inspection to Secure the Enforcement of the Laws and Regulations for the Protection of the Workers) (5th ILC Session Geneva 29 November 1923)

- ILO Recommendation R081: Labour Inspection Recommendation (Recommendation concerning Labour Inspection) (30th ILC Session Geneva 11 July 1947)
- ILO Recommendation R091: The Collective Agreements Recommendation (Recommendation concerning Collective Agreements) (34th ILC Session Geneva 29 June 1952)
- ILO Recommendation R092: the Voluntary Conciliation and Arbitration Recommendation (Recommendation concerning Voluntary Conciliation and Arbitration) (34th ILC Session Geneva 29 June 1951)
- ILO Recommendation R111: Discrimination (Employment and Occupation) Recommendation (Recommendation concerning Discrimination in Respect of Employment and Occupation) (42nd ILC Session Geneva 25 June 1958)
- ILO Recommendation R113: Consultation (Industrial and National Levels) Recommendation (Recommendation concerning Consultation and Cooperation between Public Authorities and Employers' and Workers' Organisations at the Industrial and National Levels) (44th ILC Session 20 June 1960)
- ILO Recommendation R149: the Rural Workers' Organisations Recommendation (Recommendation concerning Organisations of Rural Workers and Their Role in Economic and Social Development) (60th ILC Session Geneva 23 June 1975)
- ILO Recommendation R152 - Tripartite Consultation (Activities of the International Labour Organisation) Recommendation (Recommendation concerning Tripartite Consultations to Promote the Implementation of International Labour Standards and National Action relating to the Activities of the International Labour Organisation) (61st ILC Session Geneva 21 June 1976)
- ILO Recommendation R158: Labour Administration Recommendation (Recommendation concerning Labour Administration: Role, Functions and Organisation) (64th ILC Session Geneva 26 June 1978)
- ILO Recommendation R163: Collective Bargaining Recommendation (Recommendation concerning the Promotion of Collective Bargaining) (67th ILC Session Geneva 19 June 1981)
- ILO Recommendation R201: Domestic Workers Recommendation (Recommendation concerning Decent work for Domestic Workers) (100th ILC Session Geneva 16 June 2011)
- ILO Recommendation R204: Transition from the Informal to the Formal Economy Recommendation (Recommendation concerning the transition from the informal to the formal economy) (104th ILC Session Geneva 12 June 2015)

List of Abbreviations

ACTRAV – Bureau for Worker’s Activities (ILO)/Bureau des Activites pour les Travailleurs

ACT/EMP

CFA – Committee on Freedom of Association (ILO)

CEACR – Committee of Experts of the Application of Conventions and Recommendations (ILO)

COSATU - Congress of South African Trade Unions

FENETRAD – National Federation of Domestic Workers

IE – Informal Economy

ILO – International Labour Organisation

ILC – International Labour Conference

ILS – International Labour Standards

ITUC – International Trade Union Confederation

MoLSA – Ministry of Labour and Social Affairs (Somaliland)

NGO – Non-Governmental Organisations

DWA – Decent Work Agenda

DWCP – Decent Work Country Programme

SEED – Small Enterprise Development

SLLC – Sierra Leone Labour Congress

SMEs – Small & Medium Enterprises

TNC – Transnational Corporations

WED – Women’s Entrepreneurship Development (ILO)

WEDGE – Women’s Entrepreneurship Development and Gender Equality

WIEGO – Women in Informal Employment: Globalizing and Organizing

UN – United Nations

UNDP – United Nations Development Programme

Chapter One: Introduction & Context of Research

1.1. Thesis overview

For the last two decades, observers of labour law across the board have been calling into question whether we are quickly approaching the demise of the discipline in the face of globalisation and the modern realities of the world of work.¹ The International Labour Organisation (ILO) whose very role and mandate is to set, promote and enforce labour standards globally has not escaped similar existential questions. Since 1919, the organisation has been adopting a variety of strategies to answer the question of what its role will be in this new world of declining workers' organisations, uncertain employment relationships and resistance to the enforcement of international labour standards. With 2019 marking the ILO's centenary, the milestone moment is somewhat marred by its most prominent problem – the millions of workers still out of reach of the organisation's efforts. This thesis, therefore, aims not to add to the fears and speculation, but to take seriously the concerns that gave rise to the question of whether or not the ILO is still fit for its purpose. Here, we aim to join the organisation in its soul-searching exercise and hopefully contribute solutions to help it move into its next century with far greater confidence.

This introductory chapter is divided into two parts. The first few sections aim to outline this thesis, its central arguments and methodology briefly. It is designed to give the reader an indication of the research as it stands, the conclusions reached, and how this contributes to the existing body of academic literature. The first half provides a

¹ Alan Hyde, 'The idea of the Idea of Labour Law: A parable' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law*. (Oxford University Press 2011)

justification for this research and a summary of the chapters that make up the thesis as a whole and the second half of this chapter will offer the reader the necessary information needed to paint a more thorough picture of where the International Labour Organisation fits into the modern labour law landscape. Overall, this will provide the context for the research, sufficiently setting the scene for the rest of the thesis.

1.1.2. The Core Issues Being Investigated

This thesis intends to examine the effectiveness of the International Labour Organisation (ILO) as the international agency for enforcing labour standards. Today, the increase in an informal workforce globally has 'challenged the legitimacy of the ILO tripartite structure', made up of states, workers' and employers'.² At its core, this research is a critique of the ILO which aims to discuss why the organisation's current approach to bringing informal workers under the protection of internationally set labour standards fails to successfully address a significant barrier to lasting improvement. This barrier is the organisation's unrepresentative tripartite structure which no longer reflects the ILO's founding ideals of social justice based on workers' representation at every level of policymaking. While a largely unrepresented informal economy continues to exist, there will be no reality to the delegates involved in the ILO tripartite structure as being the 'most representatives of employers and of work people', rendering the policies made by the organisation ineffective.³

Over the last few decades, there has been an increasing labour force working outside the scope of government legislation, where social security and protection is absent in favour of labour flexibility. Since the 1970s, when the significant contribution

² Laurence Helfer 'Understanding Change in International Organizations: Globalization and Innovation in the ILO' (2006) 59(3) Vanderbilt LR 649 670

³ Bob Hepple *Labour Laws and Global Trade* (Hart 2005) 81

of this informal work to national economies was recognised; academics, governments and international institutions have been working toward improving their understanding of the concept.⁴ The informal economy's presence is particularly large in developing countries with underdeveloped labour administrations and weak enforcement of labour laws.

According to 2013 statistics by the non-profit organisation *Women in Informal Employment: Globalizing and Organizing* (WIEGO) (in collaboration with the ILO), the informal workforce in some regions of the world (such as countries in South Asia and Africa), makes up to 82 percent of the labour force.⁵ It was only in 2018 when the ILO published its first-ever global estimates on the size of the informal economy, finding it employs nearly 61 percent of the global workforce.⁶ The fact that informality is so prevalent yet the specific numbers not fully known until recently shows the significance of this issue. Both the vagueness and complexity of informality will be addressed thoroughly in Chapter Two.

In the simplest terms, 'informal economy' describes all economic activity and employment-like relationships not covered by the law and often lacking the arrangements traditionally associated with formal work.⁷ It is crucial to understand the informal economy is also associated with a lack of job security and social protection, increased exploitation, poverty and more importantly, invisibility in terms of power and representation. Today, nearly 400 million people are living in what would be considered extreme poverty despite technically being 'in work', with poverty reduction stalled since

⁴ Niels-Hugo Blunch, Sudharshan Canagarajah, Dhushyanth Raju 'The Informal Sector Revisited: A Synthesis Across Space and Time' (2001) The World Bank Social Protection Discussion Paper No. 0119 1, 4 <<http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0119.pdf>> accessed 30 March 2015

⁵ ILO and WIEGO, *Women and Men in the Informal Economy: A statistical picture*. (2nd edn, ILO, 2013)

⁶ ILO, *Women and men in the informal economy: A statistical picture*. (3rd edn, ILO 2018)

⁷ International Labour Conference, (90th Session) Report VI: Decent work and the informal economy (ILO Geneva 2002) 2 <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/---reloff/documents/meetingdocument/wcms_078849.pdf> accessed 14 June 2015

2013.⁸ This thesis specifically focuses on the lack of organisation and involvement of informal actors in labour issues. It will be argued that it is the absence of informal voices at all levels that prevents ILO policies surrounding informality from being effective in ensuring significant and lasting change in the condition of labour on the ground.

One often-cited barrier to organising informal workers is the complex nature of the informal economy, specifically in developing countries where a dispersed undocumented and frequently female labour force has a strong presence in both urban and rural areas.⁹ The informal economy is a 'multi-situation syndrome characterised by non-uniformity in the nature, characteristics and conditions of jobs'.¹⁰ For simplification purposes, it can be viewed as comprising of two types of informal activity – enterprises and employment. Informal firms can be anything from micro-enterprises to small and medium enterprises.¹¹ They lack full registration and employ workers below certain thresholds which allows them to fall outside the scope of labour legislation. These enterprises are often unincorporated with no separate legal personality for the business and can be small household run firms.¹² On the other hand, informal employment is used to describe jobs – categorised as non-wage or wage employment. Non-wage workers can be own-account workers (self-employed, owners of informal enterprises), informal employers with one or more employees, unpaid contributing family members and members of informal producer cooperatives. Wage workers are those who hold informal

⁸ ILO, 'Global employment Trends 2014: Working Poverty Reduction Stalled' (ILO, Geneva, 21 January 2014) <http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_234030/lang-en/index.htm> accessed 30 April 2014

⁹ Naila Kabeer, Kirsty Milward and Ratna Sudarshan 'Organising women workers in the informal economy' (2013) 21 (2) Gender and Development 249, 250

¹⁰ Tripti Singh, Anvita Gupta and Geetika 'Women Working in Informal Sector in India: A saga of Lopsided Utilization of Human Capital' 4 (International conference on economic and finance research, Singapore, 2011) 534, 534 <<http://www.ipedr.com/vol4/106-M00051.pdf>> accessed 18 November 2017

¹¹ Ralf Hussmanns 'Statistical definition of informal employment: Guidelines endorsed by the Seventeenth International Conference of Labour Statisticians 2003' (7th Meeting of Delhi group, New Delhi, February 2004) 1, 1

¹² A. Sivananthiran and C.S. Venkata Ratnam (eds) *Informal Economy: The Growing Challenge For Labour Administration* (ILO 2005) 1, 23

jobs with employers.¹³ The complicated nature of the concept of informality has created limitations for statisticians when it comes to collecting and translating data which is why the ILO's research is often limited to defining and conceptualising informality instead of looking at informal actors as people with experiences and capabilities. Nonetheless, the ILO's strength lies in this area as the organisations' research capacity is impressive. This is why the focus of this thesis will not be solely empirical and reliant on data collection but a discussion of ideas.

Due to the complex, interrelated nature of the informal economy, this research will draw from ILO material as well as the work of academics from a variety of disciplines such as law, economics, politics and sociology. Here we will look at research aiming to conceptualise informality, the causal theories, its links to the formal sector and its legislative difficulties (e.g. Husmanns, Kanbur, Chen and LaHovary) but also looks into research which brings to light informal actors' experiences and efforts of self-organising in the informal economy (e.g. Lindell, Kabeer, Mitullah, Roy, Meagher, Bonner and Spooner). This research will show how vital studies on informal experiences are, and it will do so by pointing out the spaces in ILO policies (as well as the policymaking process which would have most benefitted from such knowledge). This is especially important if the ILO is to fulfil its constitutional obligation of representing the interests of all parties in its tripartite structure and effectively ensure the transition from informality to formality its set out achieve.¹⁴

The informal economy is a catch-all phrase and differentiating between informal firms, workers and employment relationships is vital when considering their organising. The complexity of the informal economy, with its layers, diversity and overlapping is

¹³ ILO, 'Statistical Update On Employment In The Informal Economy' *Department Of Statistics Presentation* (June 2011 Geneva) 1, 12 <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/presentation/wcms_157467.pdf> accessed 17 November 2017

¹⁴ ILO Recommendation R204: Transition from the Informal to the Formal Economy Recommendation (Recommendation concerning the transition from the informal to the formal economy) (104th ILC Session Geneva 12 June 2015)

acknowledged by the ILO.¹⁵ It takes into consideration the different degrees of informality, instead of establishing an artificial and clean formal-informal divide.¹⁶ This thesis however argues, the organisation's approach to informality is often contradictory, it acknowledges 'the conceptual difficulties arising from the considerable diversity' present in the informal economy but at the same time it fails to find an appropriate way to incorporate these different voices into the policy making process.¹⁷ One of the policy approaches of the organisation that is criticised throughout this research is the ILO's faith in organising informal workers through already established formal sector organisations.¹⁸

1.1.3. Key Research Aspects

The complex nature of informal relationships has given rise to a debate in formal trade unions of whether or not informal workers can be considered workers in the first place.¹⁹ This is one of the issues which leads to the exclusion of informal actors from workers' organisations and employers' associations in the formal sector, which is also where the workers' and employers' constituency for the ILO tripartite structure is drawn from.²⁰

¹⁵ International Labour Conference of Labour Statisticians, (15th Session) Resolutions concerning the international classifications of status in employment (ILO Geneva January 1993) 1 <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/normativeinstrument/wcms_087562.pdf> accessed 20 June 2014

¹⁶ Jeemol Unni, 'Gender and informality in the labour market in South Asia' (2001) 36(26) Economic and Political Weekly 2360 2361

¹⁷ International Labour Conference, (90th session) 'Resolution concerning decent work and the informal economy' (ILO Geneva 2002) 1, 3 <<http://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/pr-25res.pdf>> accessed 30 June 2015

¹⁸ International Labour Conference, (103rd session) Report V(1): Transitioning from the informal to the formal economy (ILO Geneva 2014) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_218128.pdf> accessed 14 March 2015

¹⁹ Christine Bonner and Dave Spooner, 'Organizing Labour in the Informal Economy: Institutional Forms of Organisation and Relationships' (2011) 44(1) Labour Capital and Society 126; Christine Bonner and Dave Spooner 'Organizing in the Informal Economy: A Challenge for Trade Unions' (2011) 2 (11) International Politics and Society 87; For an analysis of the ILO's definition of employment relationships see Chapter Four in 'The ILO Notion of the Worker and the Scope of the Employment Relationship' in Nicola Countouris, *Changing Law of the Employment Relationship: Comparative Analyses in the European Context* (Ashgate Publishing Ltd 2007)

²⁰ Ibid

Furthermore, there is a gender dimension to this exclusion which despite the ILO's gender equality initiatives, continues to pose a problem.²¹

This research will take into consideration the issues which contribute to the exclusion of informal workers from trade unions. Overall, the dwindling unionisation of the labour force globally combined with the exclusionary practices of unions raises concerns regarding the legitimacy of the tripartite structure, where the formal workers' constituents involved fail to fully reflect the world's labour force.

The ILO's task of ensuring the promotion of and respect for labour standards is demanding because 'international law lacks the built-in enforcement tools found in national legal systems'.²² Furthermore, every state is at a different economic and political stage of development, meaning the ILO needs to customise its policies to different needs.²³ Over the last few decades, the organisation narrowed its mandate in order to 'reduce the pace and improve the quality of ILO law making', ensure the flexibility of the organisation, universality of the core standards and centralisation of enforcement and monitoring mechanisms.²⁴ The introduction of the Declaration on Fundamental Principles and Rights at Work 1998 as well as the Decent Work Agenda placed particular emphasis on ensuring respect and promotion of fundamental rights for all workers including those operating outside the protection of labour law.²⁵ Furthermore, the later adoption of Recommendation No. 204 on concerning the Transition from the Informal to the Formal Economy 2015 made this focus on informality even more explicit.

²¹ Naila Kabeer, Ratna Sudarshan and Kirsty Milward, (eds), *Organizing Women Workers in the Informal Economy: Beyond the Weapons of the Weak* (Zed Books 2013) 102

²² Helfer (n 2) 676

²³ ILO, Decent Work Country Programmes (ILO, Geneva 2018) <<https://www.ilo.org/asia/decentwork/dwcp/lang--en/index.htm>> accessed 09 August 2014

²⁴ Helfer (n 2) 707

²⁵ International Labour Conference, (90th Session) Report VI: Decent work and the informal economy (ILO Geneva 2002) <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/---reloff/documents/meetingdocument/wcms_078849.pdf> accessed 14 June 2015; Declaration of Philadelphia (Declaration concerning the aims and purposes of the International Labour Organisation) (adopted at the 26th session of the ILO, Philadelphia, 10 May 1944) Hereafter *The 1998 Declaration*

However, despite this opening up of its activities in order to encompass all workers, there is still an uneven focus when it comes to addressing weak administrative structures and lack of true worker representation. The decent work integrated strategy may appear to be wide in its coverage but ultimately is weakened by the social dialogue pillar all the other objectives depend upon. Additionally, the organisation's renewed mandate still promotes a somewhat narrow interpretation of the principle of freedom of association which continues to favour the exercise of this right in a specific form – the traditional trade union and collective bargaining route. This research argues for a return to and redefining of the principles of social justice present in the organisation's founding mandate which promotes empowerment, democracy and inclusivity rather than a narrow and redundant understanding of the concept of freedom of association and collective bargaining which takes the form of formal trade unions.

Despite the words in their titles, the ILO's Declaration on Social Justice for a Fair Globalization 2008 and ILO Recommendation No. 204 concerning the Transition from the Informal to the Formal Economy 2015 both spend little time looking at what 'social justice' and 'transitioning from informal to formal economy' mean. The 2008 Declaration fails to properly define the ILO's vision for social justice and is in fact a statement regarding the operationalisation of the Decent Work Agenda committing to an approach which continues to be conceptually vague as well as ineffective in empowering and involving informal workers in labour policy making.²⁶ Furthermore, Recommendation No. 204 does little to unpack the ILO's entrenched normative position on concepts such as labour organisations and social dialogue and continues to exclude informal workers by treating them as workers that need to be absorbed by trade unions in the formal sector. This is why this research advocates looking to first extract a stronger normative foundation for labour law in general, a discipline which is currently under attack and

²⁶ILO Declaration on Social Justice for a Fair Globalisation (adopted at the 97th session of the ILO, Geneva 10 June 2008) Hereafter *The ILO Declaration on Social Justice* or *The 2008 Declaration*

needs defending. It will be shown how expanding the normative foundation of labour law can bring the defence and clarify the ILO needs to better support its mission beyond statements of intent.

1.1.4. Approach to research & aims

There is significant research which focuses on the relationship between states and the ILO and the organisation's enforcement capabilities. The ILO has managed to attract praise for how it seeks to balance conflicting interests and demands through a mixture of legally binding and non-binding approaches but it has also attracted criticisms regarding 'the credibility of member states' commitment to cooperate'.²⁷ Helfer, Banks Langille, Maupain and Hepple are but a few of those researchers engaging in this discussion which starts at the top and looks into the effectiveness of international labour law and the ILO's approach on how it aims to solve labour problems on the ground. There is also, as we have briefly discussed, literature that looks into the organisation efforts regarding informal actors on the ground.²⁸ This research focusses on the experiences of marginalised informal workers, their interactions and alliances with other social actors (including formal organisation) and their relationship with the state. There is, however, (at the time of writing this thesis) no research that provides a specific analysis on the strengths and shortcomings of ILO Recommendation No. 204 which deals with the issue of informality directly.

²⁷ Helfer (n 2) 675

²⁸ For examples see work by Lindell, Kabeer, Meagher (Ilda Lindell, *Africa's Informal Workers: Collective Agency, Alliances and Transnational Organizing in Urban Africa* (Africa Now) (Zed books 2010); Naila Kabeer, Kirsty Milward and Ratna Sudarshan 'Organising women workers in the informal economy' (2013) 21 (2) Gender and Development 249; Kate Meagher, 'Culture, Agency and power: Theoretical reflections on Informal economic networks and political process' DIIS Working Papers/2009

The research undertaken here however, aims to bring together both aspects of these different bodies of literature, which may span across several disciplines.²⁹ It aims to review the ILO's mandate, its role and structure; in light of its approach to, and perception of, not just the informal economy as a concept, but the activities and needs of the actors in it. We do this whilst being critical of viewing the organisation's effectiveness through the lens of traditional actors such as formal trade unions or employers' organisations, offering instead a perspective aware of more marginalised views. In later chapters, this thesis will introduce new analysis which deeply examines ILO Recommendation No. 204 beginning with its drafting process and ending with its adoption and the impact of its content; as well as a case study on Somaliland that sheds light on the unique labour law situation in a region of the world where ILO activities are no longer in operation.

This work aims to provide a broad analysis of the ILO's approach to dealing with informality and the organising of informal actors and will end with a list of proposals and recommendations. It aims to investigate the importance of learning from self-organising initiatives in the informal economy, especially ones which showcase informal workers as actors with organising capabilities, able to collectively demand their rights and influence positive changes in their working conditions. The ILO's role needs to be concerned with safeguarding an environment where this collective action is possible and involvement in the labour policy process is guaranteed. 'Institutional inertia' is not the reason for the ILO's challenges promoting labour standards, nor is it being argued here that the organisation is obsolete and unable to deal with 21st century problems.³⁰ Its effectiveness however, has to be called into question regardless of how diligent the organisation's work has been. Its membership since its founding days has grown from 29 member states to 187, which explains why enforcement and the make-up of its

²⁹ The literature reviewed includes legal, political, economic and philosophical work as well as international development, urban planning, human geography and politics

³⁰ Helfer (n 2) 653 655

tripartite structure are being called into question now.³¹ Many of the countries that have the greatest issue with informality did not exist at the birth of the century and were still under colonial rule when the ILO was founded.³² This is why this research will predominantly draw from examples of informality in developing countries but will not be limited to just the Global South. Here we will show a global picture on organising, representation and informality with the ILO at the centre.

1.2. Chapter Summaries

The thesis shall aim to commit to the following structure:

Chapter One & Chapter Two deal with the evolution of the ILO as an organisation, its mission and modern struggles of ensuring the respect for and promotion of labour rights globally. Together they aim to function as an introduction, setting the scene by defining the issue of informality, examining areas of specific legislative difficulty for international labour and the conflicting theories on labour market regulation which impact the enforcement of international labour standards. The chapters shall limit themselves to providing the reader with an understanding of the concept of informality and the labour issues it gives rise to insofar as to support the later chapters arguments as to why only the effective organisation and political involvement of informal workers can provide the remedy to labour injustices. It cannot claim to cover specific issues of

³¹ ILO, Alphabetical list of ILO member countries 187 countries (ILO 2019) <<https://www.ilo.org/public/english/standards/relm/country.htm>> accessed 20 January 2019; See Appendix: *List of the 29 Founding Members of the ILO*, 10 <https://www.ilo.org/public/libdoc/ilo/1976/76B09_929.pdf#page=10> accessed 20 January 2019

³² "In sub-Saharan Africa (including Southern Africa), 89 per cent of employment is informal" ILO, *Women and men in the informal economy: a statistical picture* (3rd edn, International Labour Office 2018) 10

informality or provide a detailed chronological historical account of the ILO. Instead it will be a summary of ideas which will further outline the space this research occupies and its significance.

Chapter Three continues to develop this context and in the opening sections revisits some of the themes of **Chapter One and Two**. The chapter then goes on to discuss how the existential issues of the ILO are rooted in a greater concern about the normative state of labour law, its purpose and relevance today. This chapter is about reconciling normative ideas of labour so that a coherent one that fits the modern world can emerge. This is important because with a stronger justification for labour law in general comes clearer better formulated goals that can be the basis for the ILO's mandate and approach to dealing with the issues outlined in **Chapters One and Two**. This stronger normative foundation for labour law will be rooted in Senian one based on human freedom and human capabilities, as articulated first by Langille discussing the works of Amartya Sen.

Where **Chapter Three** ends on the general philosophical justifications of labour, **Chapter Four** begins with a more specific discussion of where this justification for labour can be found. Through an examination of factors that influence the ILO's mandate provide an in depth understanding how it can define 'social justice' to mean more than the vaguely aspirational notion it currently is. It will be argued that a definition grounded in Sen's Capabilities Approach can provide a theoretical model which compliments the organisation's normative function of involving multiple social actors in the labour standard setting process. It will also be shown that despite its appeal, looking to human rights law to justify and strengthen labour law cannot sufficiently protect it from criticisms.

Chapter Five examines the issue of organising workers internationally. Globalisation has 'changed the original model upon which tripartism was based on: representation at the international level of national economic interest'.³³ Trade unions

³³ Gerry Rodgers, Lee Swepston, Eddy Lee and Jasmien van Daele, *The International Labour Organization and the quest for social justice, 1919-2009* (ILO 2009) 18

have always struggled with finding ‘satisfactory global models for international membership’ but now due to an increasing informal economy ‘there are new actors operating outside national frameworks and increasingly diverse forms of voice and representation’ which deserve more attention.³⁴ This chapter will analyse these forms of representation and aim to establish a more inclusive and effective model for organising workers internationally based on the research of previous chapters. It will show how one of the barriers to organising workers the ILO fails to properly examine is its own fixation on the formal sector trade unions as the most effective avenue to organise informal actors through. This in turn then weakens the ILO’s tripartite structure, making it unrepresentative, therefore opening up the organisation to criticism surrounding its legitimacy. This chapter recognises that empowerment starts with reflecting on the widely held assumptions regarding informal workers and formal workers, their relationship, differing and at time opposing interests, and the role workers’ organisations play in this complex situation. Workers’ are not a monolith however categorising them is arbitrary if there is no recognition of the multifaceted nature of the relationship between informal and formal economy. **Chapter Five** therefore takes the view that the answer to organising informal workers cannot be left in the hands of already established trade unions.

Chapter Six follows on from what was set up in the last chapter about assumptions, tackling head-on the ILO’s current approach and how it frames informal workers. Whilst this approach focusses on the goal of transitioning the informal economy into the formal economy, the language surrounding the policy points to an ‘absorption strategy that is too simplistic to be effective. The ILO’s tripartite structure reflects the interest of formal workers, favours them and old approaches to organising. There are new, grassroots informal led approaches which have shown successes. In March 2013, at the 317th session of the Conference the Governing body selected facilitating the

³⁴ Ibid

transition from informal to formal economy to be on the agenda of 103rd International Labour Conference 2014.³⁵ The outcome of these discussions are critiqued in this chapter. This chapter will also deal with the outcome of the 104th Session of the Conference held in 2015 and the adoption of the Recommendation No. 204 on the Transition from the Informal to the Formal Economy.

Chapter Seven and **Chapter Eight** are the concluding chapters. These chapters reflect on the content of the thesis, once again emphasising how by rethinking our understanding of what labour law is for (the empowerment of workers), the ILO can extract a more meaningful approach to achieving decent work objectives, establish a more inclusive and representative tripartite structure, and gain renewed legitimacy and defences against criticisms. However, this can only be done by embracing the essence of its mandate and becoming an international labour organisation undaunted by the idea of 'labour' – its movements and its politics rather than fixated on less contentious and more aspirational development objectives.

Furthermore, **Chapter Seven** will consist of concluding remarks and recommendations but also future research. These recommendations will show that this thesis is not limited to informing readers of the current situation but aims to impact policy-making. There will be a brief case study on Somaliland, bringing to light the informal economy situation in an under researched region of the world in the east of Africa. This place was chosen because informality is prevalent while a culture of social dialogue involving multiple actors is absent. Furthermore, weak labour administration and complex political situation means the proliferation of labour standards from the top down is difficult. It will be shown how lessons learned from successful informal lead initiatives in different parts of the world can provide the ILO with vital insight on why its focus needs

³⁵ ILO Governing Body (319th Session) Agenda of the International Labour Conference (2015 and beyond)' (Geneva October 2013) GB.319/INS/2 <http://ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_222513.pdf> accessed 30 January 2016

to be on delivering the rights necessary to mobilise the workers on the ground, as well as ensure they have capability to exercise these rights.

1.3. Setting the Scene: The ILO, A Changing Role In A Changing World

The International Labour Organisation (ILO) came into existence a century ago and since then it has been 'promoting social justice and internationally recognized human and labour rights'.³⁶ However, its ability to fulfil that mission and sufficiently protect workers' rights has often come under question. We are living in an era of social, political and economic interdependency where the 'globalization of trade, capital movements and economic activities' and technological advancement has influenced changes in the working situation of millions.³⁷ The emergence and growth of an informal economy means a significant number of workers globally are outside the ambit of formal labour regulation. The debate on how to ensure effective enforcement of labour standards, and what the ILO's role should be, is a complex one impacting many overlapping policy areas. This chapter aims to paint a general picture of the situation the ILO is facing, give an overview of the organisation's history and the academic literature concerning its possible future path.

This next half of the chapter shall begin by evaluating the ILO's mission and main approaches for promoting international labour standards, then briefly outline the dominant theories regarding larger issues such as state compliance with international law and the impact of labour regulation on the economy under the influence of globalisation. This will be followed by an overview of the main labour challenges the

³⁶ILO, 'Mission and Objectives' (ILO Geneva 2014) <<http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm>> accessed 20 January 2014; Jean-Michel Servais *International Labour Organization* (Kluwer Law International 2011) 204

³⁷ Ibid 206

organisation faces, particularly in the form of a large informal economy and unprotected workers in Chapter Two.

By setting the scene and explaining the challenges of regulating a modern world of work and the barriers to an effective ILO response, we are also outlining the space this research aims to occupy, its significance and the purpose of the questions it raises. One such question was best articulated by Maupain asking; How can an organisation founded on 20th century ideals approach the 21st century challenges and maintain its legitimacy in the face of overwhelming questions regarding the purpose and beneficiaries of labour law?³⁸

Overall, the rest of this chapter serves to highlight problems that will become the foundation of the arguments the rest of the thesis aims to make with regards to the ILO's approach to modern labour issues. It will briefly touch upon many different themes but save the detail for the rest of the thesis where the context set out in the first two introductory chapters will be used to ask how an analysis of the ILO's current role in organising informal workers can legitimise it as an organisation and fulfil its mandate to enforce and safeguard labour standards.

1.4. The International Labour Organisation: Founding ideals, Multiple Reaffirmations, and a Renewed Crisis.

1.4.1. Founding Principles & Mandate

³⁸ Francis Maupain, *The Future of the International Labour Organization* (Hart, 2013)

Since this thesis focusses on the International Labour Organisation, it is significant to offer historical context for a more comprehensive understanding of the ways in which the organisation executes its mission today. During the founding years of the organisation there was 'a substratum of ideological conviction' which inspired faith in the agency from an international community hoping to see the end of an era of political, economic and social instability through remedying the social consequences of industrialisation and war. It was the end of World War I and the signing of the Treaty of Versailles in 1919 that pronounced the birth of these ambitious ideas as well as the ILO, the organisation meant to fulfil the promise of a more equitable and peaceful future. The establishment of this new world order concerned with economic and social cooperation after a period of intense strife and change marked what we would recognise as the standards of international relations today.

Part XIII of the Treaty of Versailles (Articles 387 – 427) became the original ILO constitution, an early declaration of social justice, commitment to international labour standards, cooperation and economic planning that continues to ground the organisation a hundred years later.³⁹ Over the years the organisation amended the document, eventually adopting a separate instrument that withstood the dissolution of League of Nations and the other bodies that came out of the Treaty of Versailles. However, the most significant restatement of the ILO's mission came in 1944 with the Declaration of Philadelphia which outlined the function and goals of the organisation as well as reaffirming a commitment to rights of workers.⁴⁰

The ILO constitution sets up a permanent organisation concerned with labour issues consisting of a General Conference of Representatives of the Members; a governing body consisting of fifty-six persons (twenty-eight representing governments,

³⁹ The Constitution of the International Labour Organisation (ILO), (adopted 1 April 1919, Part XIII of the Treaty of Versailles, 28 June 1919)

⁴⁰ The 1944 Declaration (n 25)

fourteen representing employers and fourteen representing workers) and an international Labour Office controlled by the governing body (See Appendix I for a diagram of the ILO Tripartite Structure).⁴¹ The executive of the ILO, its governing body 'take decisions on ILO policy, decide the agenda of the International Labour Conference, adopt the draft Programme and Budget of the Organization for submission to the Conference, and elect the Director-General.'⁴² The International Labour Conference in essence functions as the ILO's parliament, which meets annually to bring together the tripartite partners of the ILO member states. This is where ILO policies are established and adopted after deliberation and votes.⁴³ The notion of tripartism – the cooperation between governments, employers' and workers' organisation – underpins the entire existence of the ILO, representing its unique structure as well as its philosophy.⁴⁴

Article I (d) provides:

'the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.'⁴⁵

Although many of the institutions that came out of the Treaty of Versailles as well as the covenant of peace turned out to be short-lived, the International Labour Organisation, founded in this turbulent time, remains a hundred years later. The world it inhabits however, has changed drastically and an existential dread has crept into view. While the tripartism of the ILO continues to exist in the 21st century and its composition unchanged, the will and the strength of its partners has weakened considerably and the

⁴¹ Article 2 of the ILO Constitution and Article 7 of the ILO constitution (n 39)

⁴² The ILO Constitution (n 39)

⁴³ ILO, 'The Standing Orders of the International Labour Conference' (ILO, June 2018) <https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:3088520:NO> accessed 18 June 2018

⁴⁴ Maupain (n 38); Claire La Hovary 'A Challenging Ménage à Trois? Tripartism in the International Labour Organization' (2015) 12 International Organizations Law Review 204-236.

⁴⁵ Article 2 of the 1944 Declaration (n 25)

upcoming sections will show the ways in which the ILO structure no longer accurately reflects empirical realities of the world of work and why this a concern for an agency that depends on the legitimacy gained from ‘representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare’.⁴⁶

1.4.2. Institutional Renewal of Goals

It is important to recognise that the early members of the ILO had a set of ideals which remain unchanged.⁴⁷ The words of the first ILO Director General, Albert Thomas written in 1921 set out the ILO mission ‘to establish everywhere humane conditions of labour; to institute and apply a system of International Labour Legislation, subject to reservations imposed by the sovereignty of each State and the conditions prevailing therein.’⁴⁸ He states that the member States of the organisation were ‘inspired both by considerations of humanity and by fear of unfair competition, undertook to secure better and, as far as possible, equal conditions for all the workers of the world by the adoption of uniform Draft Conventions or Recommendations.’⁴⁹

In 2008 the ILO’s ninth Director-General, facing an entirely different world to his predecessors wrote of the organisation’s post – Global Financial Crash direction as that which ‘builds on the values and principles embodied in the ILO Constitution and

⁴⁶ Art 1 (d) of the 1944 Declaration (n 25)

⁴⁷ Jasmien Van Daele, ‘Engineering Social Peace: Networks, Ideas, And the Founding of the International Labour Organization’ (2005) 50(3) *International Review of Social History* 435; Anthony Evelyn Alcock, *The history of the international labour organisation* (Palgrave Macmillan UK 1971); Maupain (n 38)

⁴⁸ Albert Thomas, ‘The International Labour Organization: Its Origins, Development and Future’ (1996) 135 *International Labour Review* 261 261; James T. Shotwell (ed), *The Origins of the International Labor Organization, 2 vols* (Columbia University Press 1934)

⁴⁹ Thomas (n 48) 262

reinforces them to meet the challenges of the 21st century'.⁵⁰ This shows a continued commitment to the dual social and economic mission the ILO began with back in 1919.

While ILO's articles of faith appear to remain intact, Tosstorff argues that the 'accounts of the founding of the international labour organisation usually emphasize the role of social-reformist intellectuals and politicians' over the actual initiators the international labour movement at the time.⁵¹ He points out the significant pressure trade-union federations put on governments to ensure the inclusion of a 'social-policy programme' in the Treaty of Versailles.⁵² Therefore, 'the creation of the ILO as part of the postwar order....emerged from the confluence of these various factors' – the trade unionists efforts and the support of social-reformist intellectuals.⁵³ For the trade unions, the political climate and treaty 'marked a change from the way in which they had perceived themselves before 1914: they were no longer content to limit themselves to the exchange of information, but wanted to become international players'.⁵⁴

The establishment of the ILO offered workers' organisations this opportunity to shape policies and the idea of three different players (governments, workers, employers) being able to come together back then in the early 20th century, amidst the social, economic and political turmoil of the time suggests the role played by the labour movement at the time is a significant one. During the late 19th and early 20th century workers movements were moving forward to change the landscape of work, remedying the ills of industrialisation through organising and wielding their political power to pressure governments and employers. It is an amplification and internationalisation of

⁵⁰ Preface ILO Declaration on Social Justice 2008 (n 26)

⁵¹ Reiner Tosstorff, 'The International Trade-Union Movement and the Founding of the International Labour Organization' (2005) 50(3) *International Review of Social History* 399

⁵² *Ibid*

⁵³ *Ibid*

⁵⁴ *Ibid* 400

this organising power which led to the first international labour convention, a limitation on excessive working hours.⁵⁵

However, Tosstorff writes:

‘Altogether it is important to emphasize that the actual form of the ILO was merely a pale reflection of the demands and expectations that the trade-union movement had formulated during World War I. Rather than “content”, the ILO offered only “form”.’⁵⁶

Through an eventual alignment of ideas and a more equal involvement of all partners this situation was remedied to a degree that the trade union movement could accept at the time (even if their expectations would never be fully met).⁵⁷ However, this delicate balance is not always assured and there are times the effective equilibrium is challenged by a difference in expectations between the partners of the ILO. The tension between the workers’ group and employers’ group in 2012, at the 101st session of the International Labour Conference, best encapsulates the complexity of the relationships between the tripartite partners. The arguments led to a breakdown of talks with regards to an acceptance of the right to strike and freedom of association. The International Trade Union Confederation (ITUC) spoke of the 2012 issue as marking ‘the first time that the Employers’ Group flatly refused to discuss the application of an entire area of law, based on its own, unique beliefs as to legitimacy of the Committee of Experts’ observations’.⁵⁸

Writers such as Trebilcock point to the issue of consensus or the absence of it as impacting the organisation’s system of adopting conventions and supervision.⁵⁹ However this antagonism between two partners highlights a deeper issue than a going

⁵⁵ ILO Convention C001: Hours of Work (Industry) Convention (Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the week) (1st ILC Session Geneva 13 June 1919)

⁵⁶ Tosstorff (n 51) 432

⁵⁷ Ibid

⁵⁸ International Trade Union Confederation (ITUC) *The Right To Strike and the ILO: The Legal Foundations* (ITUC 2014) 5

⁵⁹ Anne Trebilcock, ‘Setting The Record Straight About International Labor Standard Setting (2010) 31 (101) Comparative Labor Law and Policy Journal 101

through the motions of dialectics, but a fundamental difference in values which the ILO was founded. The ILO's tripartite structure sets it apart from any other UN agency allowing it to work directly with governments, employers and workers' to coordinate change on a local, national and international level.⁶⁰ However, criticisms concerning the effectiveness of the organisation application of tripartism has institutional ramifications. This tension surrounding the issue of freedom of association and collective bargaining (which will be revisited many times in this thesis) is viewed as an existential issue, linked directly the voice, representation and therefore the influence of workers.

The workers movements role in the founding of the ILO is a significant one that cannot be overlooked and as Article 1(d) of the ILO constitution outlines, its mission as well as its structure depends on the equal involvement of its three partners. It is therefore fair to assert that any significant weakening of workers organisations over the years since the founding of the ILO plays a key role on the overall enforcement of labour standards. This is not to say it is the only factor, but the absence of the counterforce which drove the early activities of the ILO in the production of labour conventions cannot be overlooked when discussing the upcoming issues of the ILO explored in the sections below.

The demands of workers heavily factored into the key principles adopted by the ILO in the first restatement of their principles and goals, the Declaration of Philadelphia 1944.⁶¹ This 1944 Declaration adopted at the 26th session of the ILO was annexed into the constitution and in its preamble contains the single most important principle to the ILO – 'labour is not a commodity'. This maxim expresses the necessity of human dignity and respect in the world of work not seeing labour in economic value but as an extension of the human being. The establishment of this view underpins principles such as freedom of associations and the right to collective bargaining, respecting the agency and

⁶⁰ La Hovary (n 44)2

⁶¹ Declaration concerning the aims and purposes of the International Labour Organisation, adopted at the 26th session of the ILO, Philadelphia, 10 May 1944

needs of the worker and control over their terms of labour. Following the Declaration of Philadelphia these rights were written in conventions; The Freedom of Association and Protection of the Right to Organise Convention (1948) No 87 and The Right to Organise and Collective Bargaining Convention No 98 (1949).⁶²

Duffy argues that 'if the Philadelphia Declaration had been taken literally by those who voted for it, the ILO would have developed into the master agency among the specialized international bodies'. Yet in 1946, at the end of another war, the international labour organisation found itself as the specialised agency of a newer, younger organisation – The United Nations.

Servais notes that historically, the ILO has always come face to face with crisis from the economic depression of the 1930s and more recent one of 2008 and each crisis has reinvigorated the organisation.⁶³ While the 2008 Global Financial Crisis placed an incredible amount of pressure on states' to focus on economic recovery, it placed a similar pressure on the mandate of the ILO.⁶⁴ The crisis threatens to push labour law to back of states' list of priorities.

This research aims to examine why today after countless reaffirmations in the form of Declarations and Agendas the ILO's legitimacy is still under questioning. The organisation's ambition once saw it being on the 'same plane as the UN as the economic counterpart of that world political body' yet today despite its work it is nowhere near as celebrated or known.⁶⁵ Its centenary events are not at the forefront of public consciousness. When Maupain describes the organisations origins, he states that

⁶² ILO Convention C098: Right to Organise and Collective Bargaining Convention (Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively) (32nd ILC Session Geneva 1 July 1949); ILO Convention C087: Freedom of Association and Protection of the Right to Organise Convention (Convention concerning Freedom of Association and Protection of the Right to Organise) (31st ILC Session Geneva 17 June 1948) Hereafter Convention No. 98 and No. 87

⁶³ Servais (n 36)

⁶⁴ OECD, 'Joint press release on the global economic crisis' (Berlin, 5th February 2009) <www.oecd.org/document/32/0,3343,en_2649_34487_42124384_1_1_1_1,00.html> accessed 12 July 2012

⁶⁵ Norman F. Duffy, 'Organizational Growth and Goal Structure: The Case of the ILO' (1972) 26 (3) International Organization 479 482

‘concerns about the organisation’s future are not a matter of its ability to survive as such, but more a question of its ability stay true to its purpose’.⁶⁶ The constant restatements are undertaken with a view to put to rest the existentialism surrounding the ILO in a rapidly changing world which is why the rest of this chapter is dedicated to outlining these issues and why they exist.

1.4.3. The Task of Maintaining Institutional Relevancy in a Modern World

The world has changed considerably since 1919. Technological advancements created new employment opportunities but also rendered old industries obsolete and impacted our understanding of the employment relationship and job security; the workforce is far more diverse and female than it used to be; while the end of colonialism has led to the rise of new economies and new international players in the form of business and other non-governmental organisations. Faced with this new globalised world, the ILO maintains the position that in addressing the global conditions of work, the impact of factors such as employment policy and good governance cannot be ignored.⁶⁷ Former ILO Director-General Juan Somavia states in the preface of *The Declaration on Social Justice for a Fair Globalization* 2008 that this is why throughout the ILO documents, there is a constant reframing and updating of its labour mission to reflect the changes in the modern world of work.⁶⁸ The document ‘reflects an ILO confident in the relevance of its vision and mandate, as well as fully committed to assume its contemporary

⁶⁶ Maupain (n 38) 2

⁶⁷ ILO, *Global Employment Agenda* (International Labour Office 2003); ILO, *Guide on employment policy and international labour standards* (International Labour Office 2013)

⁶⁸ ILO Constitution Preamble (n 39); The 1998 Declaration (n 25); International Labour Conference (90th Session) (n 25); ILO, *Declaration on Social Justice* 2008 (n 26)

responsibilities'.⁶⁹ The following sections aims to outline the contemporary challenges and responsibilities of the ILO as well as the organisations approach and shortcomings.

1.4.4. The ILO's enforcement and supervisory mechanisms

The ILO is often criticised for being an agency with the enforcement powers of a 'toothless tiger' implying it has no real capacity to enforce labour standards.⁷⁰ This is because the organisation primarily relies on the voluntary ratification of legally binding conventions by states. Despite having the powers to take action against non-complaint states after ratification, the appropriate article in the constitution, Article 33, is legally ambiguous, failing to clearly specify what this action ought to be. Instead Article 33 states 'the governing body may recommend to the conference such actions as it may deem wise and expedient to secure compliance therewith'.⁷¹ It is difficult to determine what 'wise and expedient' action for securing compliance is, the article is rarely used impacting its value. For example, before the extreme forced labour situation in Burma in 2000, Article 33 had never been invoked against a state.⁷² Furthermore, the ILO's supervisory mechanisms Articles 22 and 19(5) which demands annual reports from states regarding the ways they are ensuring labour standards are being upheld domestically, is criticised for having very little influence on compliance and the reports do not account for the 'invisible' informal economy of workers outside the ambit of labour

⁶⁹ ILO Declaration on Social Justice 2008 (n 26) 3

⁷⁰ Kimberly Ann Elliott & Richard B. Freeman 'Can Labor Standards improve under globalization' (2003) Institute for International economics 93 102
<http://www.piie.com/publications/chapters_preview/338/5iie3322.pdf> accessed 23 March 2015

⁷¹ Article 33 of the ILO constitution (n 39)

⁷² ILO, 'ILO Governing Body opens the way for unprecedented action against forced labour in Myanmar' (*ILO press release*, 17 November 2000)

<http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_007918/lang--en/index.htm>
accessed 30 July 2014

law.⁷³ The ILO's complaints procedure under article 24 is arguably also ineffective since figures show that less than a third of complaints from workers have made it to the ILO general body.⁷⁴ It is important to put workers in a position where they are able to properly 'direct world attention to unfair labor practices and employment policies'.⁷⁵ Currently this is not the case for many formal workers and nearly all informal workers, showing a need for reform. The ILO's social dialogue model 'becomes a fiction if independent trade unions or employers' organisations, at national level are weak or non-existent'.⁷⁶

Although critics may call voluntary ratification a 'strategy to sell workers' human rights' and a way to 'bypass direct engagement with states'.⁷⁷ This 'non-accusatory style' means there is less resistance to standards.⁷⁸ Unfortunately this is not always the case. Over the years there have been repeats calls made by six union federations in Korea for the South Korean government to ratify key ILO conventions on freedom of association and the right to organise and collective bargaining.⁷⁹ The ILO has urged ratification of these conventions in 2013 but failed to persuade the South Korean government who maintained the conventions provisions did not accord with domestic laws.⁸⁰ In 2019 after continued pressure from employers groups, the South Korean Ministry of employment and Labor has made a similar argument, stating the 'core conventions represent a contentious issue' and the country's national assembly has yet

⁷³ Edward Weisband, 'Discursive Multilateralism: Global Benchmarks, Shame and Learning in the ILO Labour Standards Monitoring Regime' (2000) 44 *International Studies Quarterly* 646, 665

⁷⁴ Hepple, (n 3)48

⁷⁵ Brian A. Langille 'Core labour rights – the true story (Reply to Alston) (2005) 16(3) *Eur J. Intl L* 409 413

⁷⁶ Hepple (n 3) 53

⁷⁷ Susan Kneebone 'The Governance of Labor Migration in Southeast Asia' (2010) 16 *Global Governance* 383 387

⁷⁸ Kari Tapiola and Lee Swepston 'The ILO and the Impact Of Labor Standards: Working on the Ground After an ILO Commission Of Inquiry' (2010) 21 *Stan. L. & Pol'y Rev.* 513 526

⁷⁹ UNI Global Union 'UNI Calls for Korea To Immediately Ratify Core ILO Conventions 87 & 98' (*UNI Global, News*, 9 April 2019) <https://www.uniglobalunion.org/news/uni-calls-korea-immediately-ratify-core-ilo-conventions-87-98> accessed 20 May 2019

⁸⁰ Hankyoreh News 'South Korea set to ratify four key ILO Conventions' (*International*, 12 November 2017)<http://english.hani.co.kr/arti/english_edition/e_international/820059.html> accessed 20 May 2019

to consent to ratification.⁸¹ This move, however, has been criticised as an excuse to delay or prevent ratification.

According to the South Korean unions and unions across the globe, these labour standards are ‘fundamental’ due to their status as enabling rights which set the groundwork for other standards. Convention No. 87, Freedom of Association and Protection of the Right to Organise Convention, 1948 and Convention No. 98, Right to Organise and Collective Bargaining Convention, 1949 (No. 98) are linked to workers improving their own social and economic condition through their involvement in conversations about labour. The fundamental status of these standards, however, was not always a given and at one point in 1998 the ILO prematurely believed it had found the solution to the ratification issues we are still witnessing in 2019.

In 1998, the ILO’s issues with ratification and enforcement of conventions inspired a different approach and the organisation decided to focus on the universal promotion of ‘core’ labour standards.⁸² This led to the creation of the Declaration on Fundamental Principles and Rights at Work and its Follow-up. This document does not depend on legal ratification but applies to all states by virtue of membership. It contains and promotes the ‘four freedoms’ which are considered to be fundamental rights worthy of universal respect.⁸³ The Declaration led to the incorporation of ‘core labour standards into a host of international public and private binding documents’ with stronger enforcement powers and remedies than the ILO has.⁸⁴ The core standards are freedom of association and effective recognition of the right to collective bargaining, the elimination of all forms of compulsory labour, the effective abolition of child labour and

⁸¹ Hankyoreh News, ‘S. Korean labor community intensifies demands for ILO core conventions to be ratified first and legislated later’ (*International*, 14 April 2019) <http://english.hani.co.kr/arti/english_edition/e_international/889992.html> accessed 20 May 2019

⁸² Hilary Kellerson. ‘The ILO Declaration of 1998 on fundamental principles and rights: A challenge for the future’ (1998) 137 (2) *International Labour Review* 223

⁸³ Article 2 of the 1998 Declaration (n 25)

⁸⁴ Marley S. Weiss ‘International Labor and Employment Law: From Periphery to Core’ (2009-2010) 25 *A.B.A. J. Lab. & Emp. L.* 487 496

the elimination of discrimination in respect of employment and occupation.⁸⁵ It has been welcomed by some as a 'step to international constitutional law' showing 'common vision of necessary social dimensions of progress'.⁸⁶ Others are more sceptical of its worth and feel the soft law approach undermines the existing supervisory approach and 'legitimizes the use of a regressive terminology'.⁸⁷

Despite this move towards universality, the 'soft' wording, rationale behind the selection of the four freedoms and its failure to include effective monitoring and enforcement mechanisms are still the three most cited criticisms of the Declaration. It is unclear why those specific freedoms were chosen above all other rights to be promoted as 'fundamental' as this inadvertently downplays the significance of other rights. Compa argues that these freedoms should not have been chosen over standards such as minimum wage, reasonable working hours and safety regulations.⁸⁸ According to Alston, the choice made demonstrates a 'pragmatic political selection' rather than any 'economic, philosophical and legal' reasoning on the part of the ILO.⁸⁹ These rights are arguably easier to enforce and cheaper than the rights Compa suggests are more beneficial. The Declaration does little to inspire genuine commitment to labour rights, as it lacks an obligatory tone and 'legitimizes the use of a regressive terminology' which relies on 'good faith' as enforcement.⁹⁰ Furthermore, these four freedoms are already in some form or another expressed in international documents with more influence over states.⁹¹

⁸⁵ Article 2 The 1998 Declaration (n 25)

⁸⁶ Francis Maupain, 'The Liberalization of International Trade and the Universal Recognition of Workers' Fundamental Rights: The New ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up', in Linos-Alexander Sicilianos & Maria Gavouneli (eds) *Scientific and technological development and human rights* (Sakkoulas 2001) 35 45

⁸⁷ Philip Alston, 'Core Labour Standards and the Transformation of the International Labour Rights Regime' (2004) 15 Eur. J. Int. L. 483

⁸⁸ Lance Compa 'Core labour rights: promise and peril' (2002) 9(3) International Union rights 20 20-21

⁸⁹ Alston (n 87) 485

⁹⁰ Ibid 476

⁹¹ Article 2 of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR); Articles 6-8 of the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNGA Res 2200A (XXI) (ICESCR); Article 3, 8 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

There are, of course, advocates for The Declaration's 'non-accusatory style' of promoting rights, arguing it 'presents a method for revitalizing, standard-setting and monitoring' which 'connects ILO law with the ILO's real world agenda'.⁹² Maupain praises the ILO's change in direction as being a positive move to bring necessary uniformity to global labour standards.⁹³ Furthermore, Langille's response to Alston's criticism of the ILO's approach accuses Alston and those of a similar opinion of 'presenting the case for a much romanticized status quo' which prevents them from seeing it as its – 'a model aiming to rescue the ILO from its current marginalized status' trying to 'cure its internal confusion'.⁹⁴

The literature concerning international labour laws shows a clear division between those who are unconvinced by the ILO's change in direction and those who think it is a positive step towards reaffirming the ILO's legitimacy as an institution.⁹⁵ Some suggest the labour rights cause would benefit from linking labour standards to trade agreements, creating effective sanctions to discourage violations.⁹⁶ This social clause argument centres on the claim that 'a hollow façade of labour rights' is not enough, but a stronger legally enforceable framework required.⁹⁷

However, despite the lack of legal remedies and 'teeth', the ILO can be seen to be playing a necessary 'game of moral persuasion' pressuring states to adhere to labour standards.⁹⁸ The Declaration provides a flexible framework which can be adopted into domestic legislation and more importantly, captures activity of transnational corporations who are encouraged to use the document as a guideline and adopt these standards in

⁹² Tapiola and Sweptson (n78) 526; Langille (n 75) 437

⁹³ Francis Maupain, 'Revitalization not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights' (2005) 16 *European Journal of International Law* 439 443

⁹⁴ Langille (n 75) 410, 436

⁹⁵ Brian A. Langille, 'What is International Labor Law For?' (2009) 3(1) *Law & Ethics of Human Rights* 47

⁹⁶ Steve Charnovitz 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 *Intl Labour Rev* 565; Andrew Guzman 'Trade, labour, legitimacy' (2003) 91(3) *California LR* 885 886

⁹⁷ Alston (n 87) 520

⁹⁸ Langille (n 75) 414

the form of private codes of conduct.⁹⁹ Furthermore, freedom of association is an enabling right, which workers can use to ‘direct world attention to unfair labor practices’ in countries that have not ratified conventions.¹⁰⁰

1.5. The Gritty task of Global Governance & Influencing States

An examination of the organisation shows how much the ILO relies on the transparency and cooperation of governments. The extent of its capacity to influence sovereign, self-serving states is debatable. International law does have an influence on states’ policy making decisions but there are different theories regarding the *why* and the *how*.¹⁰¹ This discussion is crucial since an understanding of the decision-making processes of states combined with an evaluation of the ILO’s current approaches to enforcing labour standards can help determine the optimal governance model the organisation should adopt.¹⁰²

The social clause argument versus the moral persuasion argument ongoing in the international labour law community is a small part of a wider conversation in the about international relations. There are two main competing styles of governance ‘management’ and ‘enforcement’.¹⁰³ The literature on state compliance with international law has several ‘explanatory pathways’ regarding the influence of international

⁹⁹ Daniel Aguirre ‘Corporate social responsibility and human rights law in Africa’ (2005) 5 Afr Hum Rts LJ 239 251

¹⁰⁰ Christopher R. Coxson ‘The 1998 ILO Declaration on Fundamental Principles and Rights at Work: Promoting Labor Law Reforms Through the ILO as an Alternative to Imposing Coercive Trade Sanctions’ (1998-1999) 17 Dick. J. Int’l L. 469 500

¹⁰¹ Harold H. Koh ‘Why Do Nations Obey International Law?’ (1997) 106 Yale L.J. 2599; Brett Frischman, ‘A Dynamic Institutional Theory of International Law’ (2003) 51 (3) Buffalo Law Review 679 680

¹⁰² Anthony Clark Arend, ‘Do Legal Rules Matter? International Law and International Politics’ (1998) 38 Virginia Journal of International Law 107

¹⁰³ Kevin Banks ‘Trade, Labor and International Governance: An Inquiry into the Potential Effectiveness of the New International Labor Law’ (2011) 32 Berkeley J. Emp. & Lab. L. 33

organisations.¹⁰⁴ The Rational Instrumentalist School suggests nation-states' interests are formed wholly outside the direct influence of international organisations and are instead based on a rational assessment of how policies will best serve the state.¹⁰⁵ Here, the problem of enforcement is often 'conceptualized as a collaboration game' with the institution's aim being to find a way to ensure cooperation between states facing a 'Prisoner's Dilemma' – caught between their rational self-interests (i.e. political and economic goals) and uncertainty regarding the strategic decisions of other states.¹⁰⁶ Effective governance therefore would rely on the ILO 'reducing the value of short term gains' the non-compliance of labour standards can offer states, through means such as sanctions or economic incentives.¹⁰⁷ It has been argued, however, that the Stag Hunt Game theory is more reflective of the international labour law problem and universal enforcement of labour standards therefore, requires the ILO to provide assurance to states that they will not be alone in their commitment.¹⁰⁸ The Constructivists School takes the view that states' interests are partly constructed and influenced by international norms therefore proactive attempts at influencing state policy by increasing the legitimacy of international norms is more effective.¹⁰⁹

Although Game theory is used to study states' decisions and evaluate the collective action problem of international law, it does not consider the 'determinants of power' which is arguably the most important factor influencing the actions of states.¹¹⁰ The question remains which approach to governance is best; the traditional 'adjudication

¹⁰⁴ Koh (n 101) 2632

¹⁰⁵ Niels Petersen, 'How Rational is International Law?' (2009) 20 EJIL 1247

¹⁰⁶ Laurence Helfer 'Monitoring compliance with unratified treaties: The ILO Experience' 71 Law and Contemporary Problems 193, 215

¹⁰⁷ Banks (n 103) 76

¹⁰⁸ Alan Hyde, 'A Game Theory Account And Defence Of International Labour Standards – A Preliminary Look At The Problem' in John D.R. Craig, S. Michael Lynk (eds) *Globalization And The Future Of Labour Law* (Cambridge University Press 2006) 143

¹⁰⁹ Banks (n 103) 76

¹¹⁰ Hector Correa, 'Game Theory as an Instrument for the Analysis of International Relations' (2001) 14 (2) 189 <<http://www.ritsumei.ac.jp/acd/cg/ir/college/bulletin/vol14-2/14-2hector.pdf>> accessed 13 March 2014

and sanctions based constitutionalism' model of enforceable legal obligations, or the 'sunshine and moral suasion' model?¹¹¹

The traditional 'Adjudication and Sanctions-Based Constitutionalism' model relies on using threats as incentive for compliance.¹¹² Human rights and labour rights activists argue this is the most committed, serious approach reflecting the importance of labour standards through trade links. However, labour is a complex area to legislate in, interlinking issues such as human rights and economic policy.¹¹³ This is why sanctions are unlikely to create lasting consensus.¹¹⁴ It will be met with resistance, divide the world and alienate developing nations who generally have a higher rate of labour violations due to weaker labour administrations.¹¹⁵

An alternative approach involves using techniques such as public shaming, persuasion to shed light on labour rights infringements and encourage compliance. This 'Sunshine and Moral suasion' model depends on strong cooperation from governments and civil society at large.¹¹⁶ Despite aiming to gain a more genuine commitment from states, it is slow, unreliable and indicates a lack of power. Furthermore there is no real evidence of these 'enabling conditions that all channels of influence upon SMS model relies' such as expectation of states to care about international reputation and bend to pressure.¹¹⁷ This is why the Declaration has been criticised for expecting this level of normative commitment. However it could be argued, change has to start somewhere and if in the future standards are to become universal norms, we need to start talking about them like that now. The Declaration is attempting to set up the right conditions.

There is no easy solution to this enforcement dilemma since the political and economic capabilities of states differ, so do their responses to the governance

¹¹¹ Banks (n 103) 51

¹¹² Ibid 130

¹¹³ Ibid

¹¹⁴ Ibid 135

¹¹⁵ Ibid 54

¹¹⁶ Ibid 65

¹¹⁷ Ibid 91

models.¹¹⁸ This brings us to a hybrid theory of influence, where it is important to address both internal and external pressures and rational interests.¹¹⁹ There are two more governance models identified by Kevin Banks the 'Developmental Cooperation' approach and the 'Leveraged Deliberative Cooperation' approach.¹²⁰ The first focuses on technical assistance and seeks to persuade states by showing them the benefits labour rights can bring to their economic development. It allows states to 'pursue their self-interest through the construction of social policies' persuading them to support human freedom as a means to construct 'just and durable societies and their goal'.¹²¹ The problem however is convincing states this is a long term strategy when they are more interested in immediate economic payoffs. Since the aim of the ILO is to change how we think about labour standards, Banks argues a 'Leveraged Deliberative Cooperation' model focusing both on positive economic incentives and cooperation is best suited.¹²² By avoiding the 'command and control models of regulation' it is arguably the best approach to raising standards without the trade-labour link.¹²³ It manages to draw from all the strengths of other governance models yet is less divisive when compared. It relies on economic leverage, strong transparent monitoring system and cooperation and dialogue for lasting change.

1.5.1. Globalisation, Deregulation, and the 'Race to the Bottom'

¹¹⁸ Stephen DeLoach, Jayoti Das and Lindsey Conley, 'Power and Politics and international Labor Standards' (2006) *International Advances in Economic Research* 12(1) 51 52

¹¹⁹ Kevin Banks (n 103) 35

¹²⁰ *Ibid* 69

¹²¹ Langille (n 95) 61, 76

¹²² *Ibid* 58

¹²³ Banks (n 103) 58

In an age of global unemployment and poverty, international agendas promoting human and economic development have gained universal institutional support.¹²⁴ However, it is debatable whether the consensus surrounding these aspirational goals is sincere or if the pledges to tackle the consequences of globalisation are even remotely achievable.¹²⁵ The International Labour Organisation has been at the heart of international development for years, despite in actuality being a specialised UN agency concerned primarily with the promotion of workers' rights and labour standards. This is due to the interdependent nature of economic and social policies.

Globalisation has provided consumer goods, free trade and growing wealth, technological innovation but it has also resulted in growth of precarious work, changing employment relationships and industrial relations.¹²⁶ On the impact of industrialisation and globalisation on workers, Marx wrote 'when machinery seizes on an industry by degrees, it produces chronic misery among the operatives who compete with it. Where the transition is rapid, the effect is acute and felt by great masses'.¹²⁷ Marx wrote about how 'the English cotton machinery produced an effect in India' and the export of cheap labour to developing countries impacts workers in the west. These words were written in the early years of industrialisation and globalisation hold true today where the economic interdependence of states has led workers in one part of the world acutely aware of perceived 'competition' from the other side. Furthermore, industrialisation as

¹²⁴ ILO, 'Concept Note on the post-2015 development agenda Jobs and livelihoods at the heart of the post-2015 development agenda' (ILO Geneva, 2015) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/statement/wcms_205641.pdf> accessed 4 January 2016; United Nation General Assembly Resolution: Transforming our world: the 2030 Agenda for Sustainable Development (adopted at 70th session of the UN General Assembly, Geneva, 25 September 2015) A/Res/70/1

¹²⁵ Sam Jones 'A new era, a new plan: can the UN's sustainable development goals succeed?' The Guardian (September 24th 2015) <<https://www.theguardian.com/world/2015/sep/24/un-sustainable-development-goals-succeed-poverty>> accessed 25 September 2015; Andrew Jack 'Experts divided over value of UN sustainable development goals Financial Times (September 15th 2015)<<https://www.ft.com/content/1ac2384c-57bf-11e5-9846-de406ccb37f2>> accessed September 25 2015

¹²⁶ ILO Declaration on Social Justice 2008 (n 26)

¹²⁷ Karl Marx, *Capital: Critique of political economy* (1867) Volume I. Part VI Wages <https://www.marxists.org/archive/marx/works/1867-c1/ch19.htm#n5> <accessed 19 November 2017>

one of the factors that gave rise to real differences between workers and their working conditions locally, nationally and internationally, broadly dividing them into those protected by labour laws and those outside it – the informal economy and the formal economy.

Tomlins argues all contemporary legal thought has had to concede to globalisation and the neoliberal economic direction of policymakers.¹²⁸ Modern economics and effects of globalisation resulted in states being under pressure to compromise on labour standards in favour of economic gains. It is commonly viewed by states (due to changing trends in economic literature since the 1980s) that cutting labour costs and government interference with businesses will facilitate competition and efficiency of enterprises.¹²⁹ The ILO mission involves 'stakeholders realising 'social progress goes hand in hand with economic progress', and preventing the strategic decline in labour standards or 'race to the bottom'.¹³⁰ Over the years, states have been restructuring to encourage labour market liberalisation; believing rigid labour regulations would interfere with the efficiency and growth of their economies and place them at a competitive disadvantage globally. Data however shows that 'domestic aspects' are in fact 'more important determinants of labor market institution and deregulation processes'.¹³¹ Furthermore, contrary to states' assumptions, empirical evidence shows labour standards actually attract foreign investors.¹³² However, as it will be shown later, not all reasons for failing to enforce labour standards are strategic; often states simply do not have the resources to effectively implement standards.¹³³

¹²⁸ Christopher Tomlins, 'The Presence and Absence of Legal Mind: A Commentary on Duncan Kennedy's Three Globalizations of Law and Legal Thought, 1850–2000' (2015) 78 (1) Law & Contemporary Problems 1 15

¹²⁹ Ibid

¹³⁰ Servais (n 36)

¹³¹ Niklas Potrafke, 'Labor market deregulation and globalization: empirical evidence from OECD countries,' (2010) 146(3) Review of World Economics 545

¹³² Kevin Banks, 'The Impact of Globalization on Labour Standards-A Second Look at the Evidence' (2004) 29 Queen's LJ 533 537

¹³³ Juanita Elias 'International labour standards, codes of conduct and gender issues: A review of recent debates and controversies' (2003) 3 Non-St. Actors & Int'l L. 283 284

While the ILO maintains states cannot trade in social protection policies for economic growth, states continue to hold the belief that policies that restrict economic growth also prevent job creation.¹³⁴ This demonstrates how the issue of informality is one that requires legislating in many areas. Causal theories about the informal economy identify its existence and growth to be an economic response to labour regulation by domestic enterprises who adjust their 'activity to move out of the ambit of the regulation'.¹³⁵ One such early explanation of informality can be found in the works of Castells and Portes, rooted in the markets and the idea of cutting costs.¹³⁶ The informal economy is composed of more than just small traders and the poor, and is no longer viewed as it was in the 1970s, as a temporary phenomenon but instead the result of globalisation and the structure of the modern labour market.¹³⁷ By the 1980s, theories started to see the cost of abiding by labour regulations as encouraging the exit of enterprises from the formal sector either due to voluntary reasons or barriers.¹³⁸ This theory fits with the trend of economic liberalisation in developing countries; however, labour market deregulation 'is a multi-faceted concept that cannot be captured by single economic indicators such as trade openness and foreign direct investment'.¹³⁹

ILO member states that are considered 'developing' or 'economies in transition' are often at a crossroads, its government willing to stimulate growth and showing signs of concern about weak labour administration.¹⁴⁰ Through publishing its research on

¹³⁴ Alakh Sharma 'Flexibility, employment and labour market reforms' (Economic and Political Weekly, 27 May 2006) 2783 <<http://www.globalcitizen.net/Data/Pages/1638/Papers/2009033119148705.pdf>> accessed 15 March 2014

¹³⁵ Ravi Kanbur 'Conceptualizing informality: Regulation and enforcement' (2009) 52 (1) Indian Journal of Labour Economics 1 5 <<http://www.arts.cornell.edu/poverty/kanbur/ConceptualizingInformality.pdf>> accessed 29 December 2017

¹³⁶ Alejandro Portes, Manuel Castells and Lauren Benton (eds) *The informal Economy: Studies in Advanced and Less Developed Countries* (John Hopkins University Press 1989) 15

¹³⁷ See Castells for the Structurist School. Manuel Castells, *Rise of the Network society: Volume 1* (2nd edn Blackwell 2000) 140

¹³⁸ Colin C. Williams, 'Tackling employment in the informal economy: a critical evaluation of the neo-liberal policy approach' (2014) 38(1) Economic and Industrial Democracy 1 on Voluntarist school vs. Legalist school; William F. Maloney, "Informality Revisited" (2004) 32(7) World Development 1159 1173

¹³⁹ Potrafke, (n 131) 546

¹⁴⁰ Definition of developing countries see United Nations, *World economic Situation and Prospects* (United Nations, Department of Economic and Social Affairs, 2019)

challenging areas such as informal economy, the ILO can influence states with limited information and policy capabilities, dispel misconceptions on the role of labour law plays in economic growth, and promote labour standards as the cure for social and economic issues.¹⁴¹ Analysis of all evidence of non-compliance can help determine the necessary remedies. The ILO's has done volumes of research and yet not enough lessons are adopted by states. The organisation is not without any 'channels of influence' but all depends on how its tools are utilised.¹⁴² This means examining the barriers to effective consensus on the issue of international labour law.

1.5.2. Labour standards as 'moral boundaries' – a tax on economic goals?

It is difficult to get consensus on many aspects of international labour law – from 'how much labour regulation is enough labour regulation?' to 'what should the content and remit of labour law be?' The truth is that the answer is in part dependent on which economic school of thought one subscribes to and how it determines the relationship between the law and the economy should be expressed.¹⁴³ Neoclassical economics, a dominant theory, promotes the 'efficient allocation and full utilization of labor'.¹⁴⁴ The priorities of economic policy therefore should be the maximisation of wealth, efficient production, flexibility to respond to changes in the market and freedom.¹⁴⁵ Advocates of neoclassical economics claim 'the bulk of the empirical evidence on the relationship

https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2019_BOOK-web.pdf accessed 20 February 2019

¹⁴¹International Labour Conference, (90th Session) Report VI: Decent work and the informal economy (ILO Geneva 2002) <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/---reloff/documents/meetingdocument/wcms_078849.pdf> accessed 14 June 2015; ILO Declaration on Social Justice 2008 (n 26) 141

¹⁴² Ibid 140

¹⁴³ Bruce E. Kaufman, 'Labor Law and Employment Regulation: Neoclassical and Institutional perspective' Andrew Young School of Policy Studies Research Paper No. 08-27/2008 73

¹⁴⁴ Ibid 9

¹⁴⁵ Milton Friedman, *Capitalism and Freedom*, (University of Chicago Press 1962) 5

between labor market regulation and economic growth also supports their minimalist position' on labour standards.¹⁴⁶

Through its Decent Work Agenda the ILO 'created a market boundary based on the notion of decency' as a means to combat this economic perspective of labour.¹⁴⁷ The problem is that under this dominant view of economics, there is no room for metaphysical concepts such as 'decency' and 'dignity' which feature in ILO documents.¹⁴⁸ It is argued strong labour regulation make enterprises less efficient and negatively effects employment since employers will just hire fewer fulltime workers to avoid the costs.¹⁴⁹ This then contributes to the growth of the informal economy. However, in the face of such economic based criticisms, it is necessary for the ILO and labour law in general to have a stronger normative foundation to justice the constraints placed on the market.

The ILO perspective however recognises that 'labor markets and the employment relationship deal with a uniquely human commodity' which requires 'a more complex, interdisciplinary, and social-oriented theory to adequately understand' rather than focussing on just efficiency.¹⁵⁰ For this reason, we cannot be value-free when making economic policies which impact the way people live and work.¹⁵¹ Despite the Decent Work Agenda's focus on decent work as an objective, Biermans' appraisal of the Agenda calls into the question the effectiveness of the framework as a moral market boundary. He claims that 'general opposition against the idea of decency as an evaluative concept' will continue making it difficult to implement.¹⁵² Labour standards are at the core 'convictions and ideas' that with great difficulty are 'translated into the realm

¹⁴⁶ Kaufman (n 143) 26

¹⁴⁷ Maarten Biermans, *Decency and the market: The ILO's Decent Work Agenda as a moral market boundary* (Universiteit van Amsterdam 2012) 53

¹⁴⁸ Ibid 58

¹⁴⁹ Kaufman (n 143) 16

¹⁵⁰ Kaufman (n 143) 28

¹⁵¹ John B. Davis, 'The Normative Significance of the Individual in Economics'. In Betsy Jane Clary, Wilfred Dolfsma, Deborah M. Figart (Ed.), *Ethics and the Market: Insights from Social Economics (Advances in Social Economics)* (London Routledge 2006) 69

¹⁵² Biermans (n 147) 220

of markets and economic policy'.¹⁵³ This can cause conflict when enforcing labour standards, yet at the same time it is undeniable that 'employment levels, social peace and political stability' crucial to a country's long term economic success are tied to the way it treats its workers.¹⁵⁴ These ambitions and shortcomings of the Decent Work Agenda will be discussed in more detail in Chapter Two. Furthermore, Chapter Three and Four will be ask whether or not there is an idea of labour law out there that can inform the ILO and support its mandate more effectively. If there is a significant moral component to labour law – should labour rights fall under the purview of human rights to be better protected? Or are labour rights human rights already using slightly different terms, for example where Article 23 (1) of the Universal Declaration of Human Rights (1948) makes reference to the right to 'just and favourable conditions of work' the ILO makes reference to Decent Work.¹⁵⁵

1.6. Outside the Box I: Past power players and the problem of precarious work

During the negotiations of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up 1998, the employer vice chair outlined a criteria of limitations on the new declaration including; no new legal obligations, no imposing of new reporting or compliance obligations on member states 'of conventions that they have not freely ratified and does not impose on countries that have not ratified the fundamental conventions the supervisory mechanism that apply to ratified conventions'.¹⁵⁶ He goes on to say that:

¹⁵³ Ibid 185

¹⁵⁴ Servais (n 36)

¹⁵⁵ Article 23 of the Universal Declaration of Human Rights (1948)

¹⁵⁶ Mr. Potter, Employers Vice Chair at the International Labour Conference, (86th Session) Provisional Record of Proceedings: Report of the Committee on the Declaration of Principles, Submission,

'The principles and rights of the Declaration therefore **only encompass the essence, that is, the goals, objectives and aims of the fundamental Conventions**. The concept of principles concerning rights under the Declaration is broader than the detailed principles applied by the Committee on Freedom of Association. In this Declaration we are concerned about whether member States are working towards achieving the policy objectives and goals of the fundamental Conventions. The test is whether there is a pervasive failure of policy to meet the goals, policies and objectives of the fundamental Conventions. **This is something very different from meeting the detailed legal obligations that come with ratification**' (emphasis added).¹⁵⁷

It does not come as a surprise then that critics of the document such as Alston and Heenan call the 1998 Declaration a 'nebulous, open-ended, and essentially self-defined and self-evaluated system of so-called core labor standards' and 'a coherent, valid, and potentially relatively effective system of international labor standards has been more or less sidelined in exchange for a system that is deeply flawed'.¹⁵⁸ When faced with insight on the negotiation process for the 1998 declaration and parameters set out to limit the document, it is easy to simply agree with Alston and Heenan's statement, with the impulse to feel cynical about the direction the organisation has taken over the years to a more soft law approach.

However, what this thesis wishes to focus on is what these limitations on the reach of the 1998 Declaration tells us about the tripartite structure of the ILO, namely that there is a need for a strong balance between the three parties. There are two significant points which can be drawn from the criteria of limitations requested by the employers group during the negotiations of the 1998 Declaration. The first is that, despite outward consensus on the issue of fundamental rights and a proclaimed commitment to social justice and other tenets of the ILO's constitution, commitment to the actualisation of said goals are not the same.¹⁵⁹ Putting aside what is left on the

Discussion and Adoption (ILO Geneva June 1998)
<https://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-decd.htm> accessed June 2015

¹⁵⁷ Ibid

¹⁵⁸ Philip Alston and James Heenan, 'Shrinking The International Labor Code: An Unintended Consequence Of The 1998 ILO Declaration on Fundamental Principles And Rights At Work' (2004) 36 New York University Journal Of International Law and Politics 32-33

¹⁵⁹ International Labour Conference, (86th Session) Provisional Record of Proceedings. The same Employers group (in fact the same chairperson prefaced the criteria for limitations with these words;

cutting floor of the negotiation room and having failed to make it into declarations, conventions and recommendations, it is also important to be critical of what makes it in and the reality of how far it is universally accepted and practiced. The issue of a growing informal economy of unprotected workers undertaking precarious work despite the adoption of the Decent Work Agenda highlights this disparity.

This brings us to the second and arguably more significant point – the important role of the countervailing force of the workers' group. Workers voices within the ILO serve to represent the heart of the ILO's mission and it is efforts of the workers movement nearly a hundred years ago that helped birth an international agency for upholding labour standards. It is the efforts of workers' movements that pushed through its first conventions and as it was shown in this chapter it can only be the strength of workers that ensures states are held accountable and comply to conventions and recommendations they have ratified. The workers then that make up the ILO's tripartite structure, a structure which sets it apart from others and brings it legitimacy, need to have not only stronger voices but voices representative of the global workforce. This cannot be done without addressing the fact most of the worlds workers today are in the overlooked informal economy.

"the Declaration in paragraph 3 simply embodies the principles concerning fundamental rights contained in the fundamental Conventions. These are commitments that nations take on by virtue of their membership in the ILO. With "social justice" as the declared central tenet of the ILO in its Constitution, the Declaration is a universal recognition of fundamental human decency below which no civilized nation in the ILO should fall in this increasingly interconnected world."; Ibid

Chapter Two: The ILO - Engaging with the Informal Economy – A change in Strategy?

2.1. Informality: Composition, Cause, Characteristics & Challenges

One of the most significant and complex issues of labour law is the predominant informal economy, characterised often by unregulated work, lack of social protection and an absence of formal contracts. The key word however is 'often', and as it will be shown below, defining informality is far more nuanced and not limited to those three aspects mentioned. Therefore, this chapter follows on from the introduction as a means to introduce, define and understand the multifaceted issue of informality for the context of the rest of thesis.

Although informality is far more prevalent in developing countries due to the link between levels of socio economic development and informality, it is not an indication of development of an economy and it can exist all over the globe.¹ Furthermore, one often overlooked issue of the informality is in fact the unprotected employment in the formal sector and job insecurity of workers outside the informal economy.² These workers are not always considered part of the informal economy because their employment situation has fewer of the characteristics usually associated with informality; however, their employment situation is more precarious than formal workers and prone to change. It is this aspect that makes the division between formal and informal employment less distinct and its challenge far greater. Myths surrounding the informal economy are many

¹ ILO, *Women and men in the informal economy: a statistical picture* (3rd edn, International Labour Office 2018)

² John B. Davis, 'The Normative Significance of the Individual in Economics'. In Betsy Jane Clary, Wilfred Dolfsma and Deborah M. Figart (eds), *Ethics and the Market: Insights from Social Economics (Advances in Social Economics)* (London Routledge, 2006) 1

and it is the job of this chapter to paint a clearer picture of this issue. This is done by showing its magnitude and factors contributing to its growth; its composition and characteristics, including the social and economic indicators; the causal theories and challenges to labour law it can present. The chapter ends by looking at the current policy direction of the ILO, its Decent Work Agenda and commenting on its successes and criticisms.

2.2. The Informal Economy: Composition

Informality is a global issue and found in nearly every country, however it is more prevalent in certain regions of the world, particularly the Global South where it plays a larger role. As part of the follow-up plan of action in supporting the implementation of Recommendation No. 204 Concerning the Transition from Informal to the Formal Economy 2015, the ILO published several reports to measure informality. The 2018 report on *Women and Men in the informal economy*, is the first global statistical picture of the situation where the operational criteria to measuring informal employment is considered extensive.³ According to this report, the informal economy represents 61.2 percent of global employment.⁴ While 51.9 percent of this can be found in the informal sector, 6.7 percent of this number accounts for insecure employment in the formal sector.⁶ In the Global South, the number making up the informal economy on average is as high as 85.5 percent, with certain regions reaching over 90 percent. Furthermore, it is emerging and developing economies that represent 93 percent of the world's

³ ILO 2018 (n 1)

⁴ Ibid 13

⁵ Joann Vanek et al, 'Statistics on the Informal Economy: Definitions, Regional Estimates and Challenges' WIEGO Working Paper No. 2/2014

⁶ And 2.5 percent in households ILO 2018 (n 1) 16

informal employment, where more than two thirds are informally employed when compared to the one fifth of the developed countries.⁷

Age profiles show that informality is higher amongst young and older people, showing them to be the most vulnerable groups to informal employment (77.1 and 77.9 percent respectively).⁸ Other factors impacting the likelihood of informal employment include; education, location and industry sector (with most informal employment being rural and in agriculture). Gender is also a significant factor and although there are more men globally employed informally, the trends shown in lower and lower middle-income countries is that there are higher numbers of women in informal employment and women are more likely to be in vulnerable informal work than men.⁹ The statistics in this instance are impacted by countries such as China and Russia who have large working populations but are also patriarchal and richer.¹⁰ In Africa, statistics for women show 89.7 percent of all employed women are in informal employment.¹¹ There are more men than women in general participating in the labour market but when women do participate, there are greater barriers preventing them from gaining formal employment.¹² The type of employment available to women is also a significant factor, namely the vulnerability attached to it.¹³ More than half the countries which were included in the 2018 report show that women in informal employment exceed the share of men.¹⁴ Certain segments of the informal economy are nearly wholly female, for example contributing family workers are almost always women.¹⁵ Women are also often employees in informal jobs

⁷ Ibid 15

⁸ Share of formal employment in total employment by age16 (percentages, 2016) Ibid 19

⁹ ILO 2018 (n 1) 20

¹⁰ Ibid

¹¹ Ibid

¹² Ibid

¹³ ILO 2018 (n 1) 21

¹⁴ "more than 90 per cent of sub-Saharan African countries, 89 per cent of countries from Southern Asia and almost 75 percent of Latin American countries" ILO 2018 (n 1) 21

¹⁵ "This proportion is more than three times higher among women in informal employment compared to men. This status, particularly vulnerable, represents 28.1 per cent of women in informal employment compared to 8.7 per cent for men. More than 30 per cent of women in informal employment in low- and lower-middle income countries are contributing family workers, usually considered as unpaid." – ILO 2018 (n 1) 21

(57.4 percent) whilst men are more likely to be own account workers and employers in the informal economy.¹⁶ Overall, statistics show own account workers and contributing family workers make up the highest percentage of informality.¹⁷

2.2.1. Causal Theories

As a recent development in the modern world, there was much debate surrounding the informal economy's existence, growth and situation of those who work there. Ravi Kanbur identified four possible economic responses enterprises have to labour regulation. Option one is to 'stay within the ambit of the regulation and comply', this comprises of what we call the formal sector. The second option is to 'stay within the ambit of the regulation but not comply' – this is the category illegal market activity falls under. A third option is to 'adjust activity to move out of the ambit of the regulation' and finally, there are those who were 'outside the ambit of the regulation in the first place'.¹⁸ The last two responses make up the informal economy and the distinction is necessary for a more accurate analysis.

Early discussions during the 1970's limited themselves to viewing the informal economy as a 'survival' tactic of the poor, a temporary phenomenon unrelated and marginal to the formal sector.¹⁹ This 'dualist' school viewed the growth of informal work

¹⁶ Ibid 22

¹⁷ Ibid 17 "Globally, the vast majority of economic units¹³ are informal (80.9 per cent). Informality is even higher in units in Africa (92.4 per cent) and the Arab States (90.8 per cent). The share of economic units in the informal sector for emerging and developing countries (82.5 per cent) is quite similar to the global level while fewer economic units are informal in developed countries (55.7 per cent) in relative terms"

¹⁸ Ravi Kanbur 'Conceptualizing informality: Regulation and enforcement' (2009) 52 (1) Indian Journal of Labour Economics 1 5 <<http://www.arts.cornell.edu/poverty/kanbur/ConceptualizingInformality.pdf>> accessed 29 December 2017

¹⁹ ILO, 'Employment, incomes and equality: A Strategy for increasing for increasing productive employment in Kenya' (ILO Geneva 1972) 1 <http://www.ilo.org/public/libdoc/ilo/1972/72B09_608_engl.pdf> accessed 01 July 2015

as related to factors such as economic hardship, the slowing rate of job creation in the formal sector coupled with an expanding population– leaving poorer workers with few options but to seek income elsewhere.²⁰ The informal economy was thought to be limited to ‘petty traders’ and the ‘working poor’.²¹ However, with no sign of decline and a wider range of workers than just the working poor, later theories sought to explain informality by looking at the natural structures of the labour market. The structivist theory views informality as a natural by-product of capitalism, encouraged by globalisation and the additional competitive pressures of transnational corporations (TNCs) – resulting in an influx of small informal enterprises working at lower costs and producing cheaper products.²²

During the 1980’s and 1990’s theories began looking at connecting government regulation to informality. These views fit in with state economies’ general trend towards liberalisation at that time. The legalist school blames strict labour regulations and the cost of formalisation acting as barriers to the formal sector. This leads to employers and workers falling outside the scope of labour laws or simply struggling to follow the rules.²³ The voluntarist school on the other hand, concentrates on informal employers’ choice to work outside the legal framework, expressing it as ‘rational’ business decisions to cut costs or in the case of workers attain flexible employment.²⁴

The problem with these causal theories is that one theory cannot explain all aspects of the informal economy. The WIEGO network, using their research into informality devised a holistic framework (based on the World Bank’s) taking into account all aspects of informality. By viewing causal theories as depending on or resulting in

²⁰ Women in Informal Employment: Globalizing and Organizing (WIEGO), ‘History and Debates’ <<http://wiego.org/informal-economy/history-debates>> accessed 13 March 2014

²¹ ILO (1972) (n 19) 7, 9

²² Manuel Castells, *Rise of the Network society: Volume 1* (2nd edn Blackwell 2000) 140; Women in Informal Employment: Globalizing and Organizing (WIEGO), ‘History and Debates’ <<http://wiego.org/informal-economy/history-debates>> accessed 13 March 2014

²³ Women in Informal Employment: Globalizing and Organizing (WIEGO) ‘The informal economy debate: four dominant schools of thought’ <<http://wiego.org/informal-economy/informal-economy-debate-four-dominant-schools-thought>> accessed 13 March 2014

²⁴ William F. Maloney, “Informality Revisited” (2004) 32(7) World Development 1159 1173

‘exclusion, exit, exploitation or entry barriers’ there can be a combination of reasons for the existence of the informal economy.²⁵ For example, entrepreneurs may have exited the formal sector voluntarily taking advantage of the benefits, but factors such entry barriers keep them operating informally. Economic downturns result in more workers having to find new means of income, in turn contributing to the expansion of the informal economy since there will be fewer formal jobs. However, it is globalisation and competitive pressures which sustain the informal economy, as well as increasing the exploitation of vulnerable workers. Moreover, this approach allows for a more accurate examination of the degree of control or vulnerability of those in the informal economy.²⁶ The ILO’s Decent Work Agenda aims to reduce the negative consequences of informality such as vulnerability and exploitation by tackling the underlying reasons preventing workers and employers from staying in the formal sector.

2.2.2. Characteristics and Conceptualisation

The difficulty with defining the informal economy is that depending on whether it is viewed from a legal, sociological or economic perspective the focus changes. Many terms such as ‘informal’ ‘unorganised’ ‘non-standard’ have been used to describe it. This is a metaphoric elephant of a concept and was built over years because, whilst its characteristics are easier to agree upon, policy makers, statisticians and academics have struggled with it due to its size, interlinked and heterogeneous nature.

In 2002, at the 90th session of the International Labour Conference the ILO adopted a wide definition of ‘informal economy’, ascribing the term to describe all

²⁵ Women in Informal Employment: Globalizing and Organizing (WIEGO) ‘Holistic Framework’<http://wiego.org/informal-economy/wiego-network-holistic-framework> accessed 13 March 2014

²⁶ Ibid

economic activity and employment-like relationships not covered by law and often lacking the arrangements traditionally associated with formal work.²⁷ This is the definition of informality the thesis will work with. There are different ways an enterprise or worker ends up being deemed 'informal', their work may vary but the characteristics of how labour is undertaken is generally the same – ease of entry, small scale operations, family owned, use of 'indigenous resources' and 'skills acquired outside formal schooling system' in an 'unregulated and competitive market' setting.²⁸

The expression 'informal sector' was first used by Keith Hart when describing small scale informal economic activities in Ghana.²⁹ This is the earliest conception of the informal economy and the ILO's first reports used the phrase 'informal sector', limiting themselves to focussing only on the legal status of employment, not its link to the formal sector and concluding it to be a temporary phenomenon and marginal in terms of size and productive significance.³⁰

The term 'sector' is now considered by the ILO as 'an inadequate, if not misleading, term'.³¹ It fails to paint a realistic picture of the actual composition of the informal economy not counting for the different industries, self-employed workers and unpaid family workers as well as being vague on the conditions of work.³² Furthermore, referring to the informal economy as the 'unorganised sector' is also inaccurate because whilst it is free from traditional legal framework it is organised in its own way.

The ILO now uses the phrase 'informal economy' as opposed to 'sector' because it implies layers, diversity and overlapping.³³ It considers the fact jobs may have different

²⁷ International Labour Conference, (90th Session) Report VI: Decent work and the informal economy (ILO Geneva 2002) 1, 2 <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/---reloff/documents/meetingdocument/wcms_078849.pdf> accessed 14 June 2015

²⁸ Jeemol Unni, 'Gender and informality in the labour market in South Asia' (2001) 36(26) Economic and Political Weekly 2360 2361

²⁹ Keith Hart 'Informal Income Opportunities and Urban Employment in Ghana' (1973) 11 (1) The journal of Modern African Studies 62

³⁰ Paul E. Bangasser 'The ILO and the informal sector: an institutional history' (2000) Employment paper 2000/9 1, 8

³¹ International Labour Conference (90th Session) (n 27)

³² Jeemol Unni (n 28) 2362

³³ International Labour Conference of Labour Statisticians, (15th Session) Resolutions concerning the international classifications of status in employment (ILO Geneva January 1993) 1

degrees of informality and focuses less on trying to keep separate the informal and formal economy.³⁴ However, the term informal economy can also ‘downplay the linkages, grey areas and interdependencies between formal and informal activities’ and the ILO has on numerous occasions stated the importance of taking into account ‘the conceptual difficulties arising from this considerable diversity’.³⁵ The organisation considers the term ‘informal sector’ to be an enterprise based term used to describe informal firms comprising anything from micro-enterprises to small and medium enterprises.³⁶ They lack full registration and employ workers below certain thresholds which allows them to fall outside the scope of labour legislation. These enterprises are often unincorporated with no separate legal personality for the business and can be small household run firms.³⁷ On the other hand, informal employment is used to describe jobs – categorised as non-wage or wage employment. Non-wage workers are own account workers (self-employed, owners of informal enterprises), informal employers with one or more employees, unpaid contributing family members and members of informal producer cooperatives. Wage workers are those who hold informal jobs with employers.³⁸ The complicated nature of the concept creates limitations for statisticians when it comes to collecting and translating data. The informal economy is a catch-all phrase and differentiating between informal firms, workers and employment relationships is vital.

In 2010 the ILO published a manual to standardise informal definitions and provide states with a guide to collecting data at country level.³⁹ Despite the fact the

<http://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/normativeinstrument/wcms_087562.pdf> accessed 20 June 2014

³⁴ Unni (n 28) 2360 2361

³⁵ International Labour Conference, (90th session) ‘Resolution concerning decent work and the informal economy’ (ILO Geneva 2002) 1, 3
<<http://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/pr-25res.pdf>> accessed 30 June 2015

³⁶ Ralf Hussmanns ‘Statistical definition of informal employment: Guidelines endorsed by the Seventeenth International Conference of Labour Statisticians 2003’ (7th Meeting of Delhi group, New Delhi, February 2004) 1, 1

³⁷ A. Sivananthiran and C.S. Venkata Ratnam (eds) *Informal Economy: The Growing Challenge For Labour Administration* (ILO 2005) 1, 23

³⁸ ILO, ‘Statistical Update (n 13) 1, 12

³⁹ ILO, *Measuring Informality: a Statistical Manual on the informal sector and informal employment* (ILO 2010)

organisation has made several attempts to set an international statistical standard it is still difficult to determine the best methodology to undertake.⁴⁰ This is because the informal economy is a 'multi-situation syndrome characterised by non-uniformity in the nature, characteristics and conditions of jobs'.⁴¹ In order to remedy labour violations caused by non-compliance of labour standards in the informal economy, first a working understanding of it is required. The dispersed, undocumented labour force is not limited to a particular geographical setting – with a strong presence in both urban and rural areas. It is like statisticians are dealing with puzzle pieces that change shape and size depending on where and how they are viewed, thus making a 'one policy will do' approach impossible.

2.3. The Decent Work Agenda: Ambitions & Shortcomings

In 1999, the ILO took on a social justice mission aimed at extending decent and productive work to all men and women across the globe.⁴² This policy framework focussed on four strategic objectives – recognition and respect for labour standards and fundamental principles guaranteed for all workers; creating opportunities for decent employment and income; the extension of effective social protection coverage to those without it and strengthening and promoting the tripartite approach to social dialogue. The four pillars of Decent Work are considered 'inseparable, interrelated and mutually

⁴⁰ International Labour Conference of Labour Statisticians (17th Session) Eighty years of ILO statistical standard setting (ILO Geneva November 2003) <<http://www.ilo.org/public/english/bureau/stat/download/articles/2004-1.pdf>> accessed 20 August 2014

⁴¹ Tripti Singh, Anvita Gupta and Geetika 'Women Working in Informal Sector in India: A saga of Lopsided Utilization of Human Capital' 4 (International conference on economic and finance research, Singapore, 2011) 534, 534 <<http://www.ipedr.com/vol4/106-M00051.pdf>> accessed 18 November 2017

⁴² International Labour Conference, (87th Session) Report of the Director-General: Decent Work: Report of Director-General (ILO Geneva June 1999) <<https://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm>> accessed 12 June 2015

supportive' with gender equality at its heart.⁴³ This is a global agenda with the ILO coordinating work on an international, national and local level together with employers, workers, governments and NGOs.

The significance of the Decent Work Agenda is that, by extending rights to all workers, it no longer allows labour laws to legitimise the exclusion of millions of informal workers.⁴⁴ The ILO is seeking to remedy the unequal level of protection provided by national labour laws which depend upon employment arrangements which are absent in the informal economy. The gender dimension of decent work programs ensures the ILO's addresses any gender biases which prevent women from having the same work opportunities. The Decent Work Agenda refers to the concepts of freedom and human dignity found in the ILO's constitution.⁴⁵ Furthermore, mention of 'decent living' can be found in article 7 of ICESCR 1966.⁴⁶

The ILO aims to remedy what it calls 'decent work deficits' in terms of work quality, productivity, adequate remuneration and legal protection.⁴⁷ It has identified several 'essential securities' which it aims to make available to all workers. These securities, through effective national policies aim to ensure employment opportunities, protection against dismissal and access to adequate social security, compliance with health and safety measures, reasonable working hours, opportunities for training and skills development, fair remuneration for quality work and most importantly promoting workers' entitlement to organise and participate in social dialogue in order to secure their other rights.⁴⁸

⁴³ ILO, 'ILO Declaration on Social Justice for a Fair Globalization, Director-General's announcement' (ILO Geneva 2008) 1, 7
<http://www.ilo.org/public/english/bureau/dgo/download/dg_announce_en.pdf> accessed 23 July 2014

⁴⁴ Bob Hepple, *Labour Laws and Global Trade* (Hart 2005) 66

⁴⁵ Annex II(a) Declaration of Philadelphia (Declaration concerning the aims and purposes of the International Labour Organisation) (adopted at the 26th session of the ILO, Philadelphia, 10 May 1944)

⁴⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

⁴⁷ International Labour Conference (90th Session) (n 27) 2, 4

⁴⁸ Ibid 3

According to the ILO their labour standards are not confined just to the formal sector and it insists 'there should not be a lower level of application of core labour standards for informal workers' or for it to depend upon a 'clear employer-employee relationship'.⁴⁹ However, whilst the language of certain conventions can be read in such a broad manner, others are narrower. With the exception of the 1998 Declaration, there is little evidence before the Decent Work Agenda of the ILO actively attempting to bring informal workers under its supervisory framework.⁵⁰ Despite the ILO claiming the Decent Work Agenda is 'a solid international basis for extending rights to the informal economy' it will become apparent at a later stage of this chapter there are difficulties transplanting the framework into national labour standards.⁵¹

Social security coverage is an area of concern for informal workers, with no coverage for unemployment, maternity, injury or old age. In order to deliver this, Decent Work programs require the strength of workers organisation in the informal economy to be utilised, national and local governments to coordinate their efforts and improve the situation of small informal enterprise operators since their security in turn will improve the situation of workers. Delivering enabling policies to create a fair and positive business environment needs the involvement of all parties.⁵² It is clear there is a need for simultaneous efforts in more than one area, for example, reforms in property laws – intellectual and land – will allow employers to increase the value of their enterprises, whilst mobilising informal workers' savings to set up self-contributing social security schemes empowers workers and shares the burden.⁵³ The ILO aims to deal with the causes and not just the symptoms of informal economy through a multifaceted strategy.⁵⁴ Furthermore, it is necessary to keep in mind the positive aspects of the

⁴⁹ Ibid 40

⁵⁰ Ibid 47

⁵¹ Ibid 47

⁵² Ibid 76, 95, 88

⁵³ Ibid 112, 116

⁵⁴ Ibid 120

informal economy such as its job creation, flexibility and its economic significance whilst remembering it also perpetuates inequality and poverty.⁵⁵

Pillars one and two of the Decent Work Agenda require strong foundations, their obligations cannot be downplayed and it is vital that if the ILO is committed to Decent Work agenda, it needs to encourage the ratification of Labour Administration Convention (no 150) 1978 as it lays the necessary foundations for enforcement of all labour standards.⁵⁶ Out of 187 member states less than half have ratified this convention, making it clear the ILO needs to work on different ways of strengthening national ministries. Not all states have the means to extend labour rights to all workers and need aid to ensure good governance.⁵⁷ It is also important to 'enhance legal literacy so that informal workers understand and are better able to claim their rights'.⁵⁸

Decent Work Country Programs (DWCP) are tailored to each nation taking into account its developmental stage. These detailed programs aim to reduce informality by putting in place the right institutional tools.⁵⁹ The ILO begins with a review of existing labour legislation, measures its effectiveness then decides how to best extend laws to all workers.⁶⁰ Next, the deficits in terms of decent work are identified and how the Decent Work framework can cure these issues. It is bad governance which excludes informal workers from reaping the benefit of globalisation.⁶¹

The Decent Work Agenda involves setting up task teams, advisory groups, focussing on formulating detailed frameworks to lay out technical support, budgeting and assigning

⁵⁵ International Labour Conference, (78th Session) Report of the Director-General: The dilemma of the informal sector (ILO Geneva June 1991) 58 <<https://www.wiego.org/publications/dilemma-informal-sector-report-director-general>> accessed June 2015

⁵⁶ ILO Convention C150: Labour Administration Convention (Convention concerning Labour Administration: Role, Functions and Organisation) (64th ILC Session Geneva 26 June 1978)

⁵⁷ A. Sivananthiran and C.S. Venkata Ratnam (eds) *Informal Economy: The Growing Challenge For Labour Administration* (ILO 2005) 1, 17

⁵⁸ Ibid 1, 13

⁵⁹ International Labour Conference, (87th Session) Report of the Director-General: Decent Work: Report of Director-General (ILO Geneva June 1999) 37 <<https://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm>> accessed 12 June 2015

⁶⁰ ILC 90th session (n 27) 49

⁶¹ Jose Luis Daza 'Informal Economy, Undeclared Work and Labour Administration' Dialogue Paper No. 9 (2005) 1 <http://www.ilo.org/public/libdoc/ilo/2005/105B09_108_engl.pdf> accessed 4 April 2016

responsibilities.⁶² The ILO is efficient at providing the technical support aspects but it is 'political process' that needs improving ensuring participation of workers in social dialogue.⁶³ The entire legitimacy of the approach depends on the involvement of all stakeholders. It needs to be addressed that the ILO policymaking process relies on a tripartite structure that has vested interest in the formal economy.⁶⁴

Through the Decent Work agenda the ILO seeks to re-establish itself as the right international agency for defining universal labour standards, refocusing on development, poverty reduction and gender equality.⁶⁵ The ambitious and extensive nature of the agenda can make it difficult to enforce, yet the magnitude of informal economy means such an integrated broad approach is necessary. However specific focussed ground-level strategies are important, linking Decent Work, informality to problem areas such as child labour.⁶⁶ Without a focussed mission the ILO Decent Work agenda will continue being accused of relying on 'trite generalisations on rights' without moving a 'towards a realistic socio-economic floor'.⁶⁷

2.4 Outside the Box II – The ILO's Approach to Informality⁶⁸

An area of specific legislative difficulties is deciding how labour laws will reach those who work in home-based enterprises or as domestic workers. Formal sector

⁶² ILO Governing body, (285th Session) Effect to be given to resolutions adopted by the International Labour Conference at its 90th Session (2002) (Geneva November 2002) GB.285/7/1 2 <<http://www.ilo.org/public/english/standards/relm/gb/docs/gb285/pdf/gb-7-1.pdf> > accessed 30 June 2016

⁶³ Hepple (n 44) 66

⁶⁴ Ibid

⁶⁵ International Labour Conference (92nd Session) Report of the Director-General Report I(B): Organising social justice: Global Report under the Follow-Up to the ILO Declaration of Fundamental Principles and Rights at Work (ILO Geneva 2004) 1, 16 <https://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/-publ/documents/publication/wcms_publ_9221130304_en.pdf > accessed 29 August 2014

⁶⁶ A. Sivananthiran and C.S. Venkata Ratnam (n 57) 1, 32

⁶⁷ Hepple (n 44) 65

⁶⁸ Guy Davidov 'The (Changing?) Idea of Labour Law' (2007) 146 International Labour Review 311

characteristics associated with traditional work such as contracts and employer supervision are lacking here.⁶⁹ Home workers, often women, work away from direct supervision, selling their services like independent contractors. Domestic workers provide services to a specific household(s) they have been informally employed by. Statistics on both groups of workers are hard to compile because of this and the nature of work challenges the formulation and enforcement of laws.⁷⁰ Furthermore, Blackett argues a 'complex mix of neo-liberal policies discouraging labour protection generally and the persistence of an untenable separation of the home and workplace specifically' prevent governments from taking effective action.⁷¹ The fact home-based workers agree 'to work away from supervision of employer' is another reason given for legislative apathy.⁷² Until the home is recognised as a possible place of work and labour policies consider gender dimensions, these female informal workers cannot benefit from protection.⁷³

It is important to note that the ILO is willing to look outside the traditional employment boundaries. Under the Home Work Convention, 1996 (No. 177) there no is longer a 'control test' for employment relationship and just economic dependency has to be shown.⁷⁴ However, this contentious convention is criticised for not promoting fully equal treatment of home workers and other workers – just 'comparable' benefits.⁷⁵ The Decent Work Agenda seeks to do more than that and yet only ten member states ratified the Home Work convention.⁷⁶ Furthermore, the ILO Convention Concerning Decent

⁶⁹ Kamala Sankaran 'The ILO, Women and Work: Evolving labor standards to advance women's status in the informal economy' (2001-2002) 3 Geo. J. Gender & L. 851

⁷⁰ Martha Chen 'Recognizing Domestic Workers, Regulating Domestic Work: Conceptual, Measurement, and Regulatory Challenges' (2011) 23 Can. J. Women & L 167

⁷¹ Adelle Blackett 'Regulating Decent Work for Domestic Workers' (2011) 23 Can. J. Women & L. 1, 15

⁷² Sankaran (n 69) 856

⁷³ Adelle Blackett 'Regulating Decent Work for Domestic Workers' (2011) 23 Can. J. Women & L. 1, 17

⁷⁴ ILO Convention C189: Domestic Workers Convention (Convention concerning decent work for domestic workers) (100th ILC Session Geneva 16 June 2011; Sankaran (n 69) 863

⁷⁵ Sankaran (n 69) 866

⁷⁶ ILO Convention C177: Home Work Convention (Convention concerning Home Work) (83rd ILC Session Geneva 20 June 1996)

Work for Domestic Workers (No. 189) 2011 also has yet to receive wide spread ratification.⁷⁷ For example, India which has a significant number of domestic workers has not ratified the convention but it also has a history of domestic worker bills which have yet to be enacted.⁷⁸

There is wide spread devaluation of women's work and 'the idea of the home as a private and natural place of feminine labours and affect' is what the Decent Work agenda will have to counter.⁷⁹ The ILO recognises that gender stereotypes can result in 'a form of paternalism that is thought to justify domestic workers being asked to work harder and longer'.⁸⁰ This can hinder workers' career progression, fair remuneration, social protection and their human security and dignity.

A transformative strategy is required, working to organise domestic and home-based workers and giving them a voice.⁸¹ This way governments can avoid complex regulatory systems being transposed from factories into private residences but instead rely on workers themselves to bring about lasting change.⁸² Barriers to unionisation of workers need to be broken down, from changing societal perspectives to educating and empowering these workers.⁸³ WIEGO since 1997 has been trying to shine a light onto the invisible women of the informal economy. Grass root organisations such as HomeNet are steps towards promoting representation for these women who work from home. Their research on such workers is valuable and it is vital for ILO to build on the work of such organisations, supporting their work on the ground whilst progressing to

⁷⁷ ILO (n 74)

⁷⁸ N. Neetha Rajni Palriwala 'The Absence of State Law: Domestic Workers in India' (2011) 23(1) Can J. Women & Law 97 115

⁷⁹ Ibid 119

⁸⁰ International Labour Conference, (99th Session) Report IV(1): Decent Work for Domestic Workers (ILO Geneva 2010)
<http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_104700.pdf> accessed 12 August 2015

⁸¹ Blackett (n 71) 40

⁸² Ibid 19

⁸³ Martha Chen 'Recognizing Domestic Workers, Regulating Domestic Work: Conceptual, Measurement, and Regulatory Challenges' (2011) 23 Can. J. Women & L 167, 180

change government attitudes at the top. This approach is at the centre of this research, arguing for more engagement with informal economy beyond the current paternalist approach.

2.5. Conclusion: A Case for Re-aligning Goals with New Realities

This chapter, and the last, just scratch the surface of international labour laws and in terms of laying out the complex web of issues surrounding the enforcement of labour standard. In doing so, it provides a jump off point for the rest of the book. Currently, the Decent Work Agenda is at the forefront of the ILO's mission, extending rights to workers even when traditional employment arrangements are absent.⁸⁴ The policy framework contains a wide range of 'essential securities' from social security and health and safety measures to promoting workers' participation in social dialogue to secure other rights.⁸⁵ Juan Somavia, former Director-General of the ILO, stated that the fact fundamental rights are separated from the conventions and ratification process allows for the ILO to deliver technical support to and address decent work deficits of more states.⁸⁶

The question remains – can global consensus on labour standards realistically be achieved? Theoretical constructs aimed at understanding the decision-making of states are limited and cannot fully explain how best to ensure cooperation and long-term investment in collective goals.⁸⁷ In order to be effective, the ILO needs to 'alter the

⁸⁴International Labour Conference, (87th Session) Report of the Director-General: Decent Work: Report of Director-General (ILO Geneva June 1999) 3 <<https://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm>> accessed 12 June 2015

⁸⁵ ILO (90th Session) (n 27) 4

⁸⁶International Labour Conference, (89th Session) Report of the Director-General: Reducing the decent work deficit: A global challenge (ILO Geneva June 2001) 7 <<http://www.ilo.org/public/english/standards/relm/ilc/ilc89/rep-i-a.htm>> accessed 18 June 2015

⁸⁷ Hector Correa, 'Game Theory as an Instrument for the Analysis of International Relations' (2001) 14 (2) 189 <<http://www.ritsumei.ac.jp/acd/cg/ir/college/bulletin/vol14-2/14-2hector.pdf>> accessed 13 March 2014

economic payoffs of labour standards compliance'.⁸⁸ Furthermore, addressing the internal domestic struggles of labour administrations is also an important factor to consider. Decent Work Country Programs are specifically tailored to the economic needs and political make up of states.

The ILO, regardless of what critics say about its institutional legitimacy, is an organisation with a long history dedicated to improving the lives of and protecting workers all over the globe. Its tripartite structure places it in the unique position to ensure meaningful dialogue between all stakeholders – governments, employers and workers. Although the ILO does not 'exert sufficient economic or other leverage over its members to bring about compliance with core labour standards' there are other channels of influence open to it.⁸⁹ For example, using its reputation, the ILO can indirectly influence 'regional bilateral trade-related labour clauses and its advice on labour standards is value'.⁹⁰ The WTO has restated, on several occasions, its belief in the ILO as the 'competent body to set and deal' with labour standards and it is crucial to send that message of credibility to states, workers and employers.⁹¹ There are many studies presenting the different cases against imposing core labour standards through international trade policy.⁹² Yet not everyone is convinced the promotional approach to labour standards represented by The Declaration is suitable.⁹³ The only thing that can be agreed on is that the ILO's success ultimately depends on the way the organisation utilises the tools at its disposal. Banks argues that 'complex visions of social justice' need more than one approach to gain global support successfully.⁹⁴ The Declaration,

⁸⁸ Kevin Banks 'Trade, Labor and International Governance: An Inquiry into the Potential Effectiveness of the New International Labor Law' (2011) 32 Berkeley J. Emp. & Lab. L. 33, 136

⁸⁹ Ibid 90

⁹⁰ Ibid 140

⁹¹ Jean-Michel Servais *International Labour Organization* (Kluwer Law International 2011) 207

⁹² Keith E. Maskus 'Should Core Labor Standards be Imposed through International Trade Policy' Policy Research Working Paper No. 1817/1997 69 <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.196.1296&rep=rep1&type=pdf>> accessed 15 March 2017

⁹³ Philip Alston, 'Core Labour Standards and the Transformation of the International Labour Rights Regime' (2004) 15 European Journal of International Law 457

⁹⁴ Banks (n 88) 51

conventions and Decent Work agenda if coordinated accordingly can work. Different governance models make different assumptions about the interests of states and what influences compliance with labour standards. There is no one right approach and what is needed is to engage with states interests through a consistent, sustainable strategy adapting to balance all needs. Despite having the means, the ILO is struggling with the application of such strategies.

Returning to the ratification concerns in South Korea mentioned earlier in this thesis, it is important to note that the employers groups demands included 'allowing unlimited replacement workers during strikes and scrapping criminal prosecution for unfair labor actions'.⁹⁵ It is fair to assume these replacement workers would come from outside the ambit of labour law's protection – in other words informal workers. This shows the tension between not only union federations, governments, employer groups, the ILO but also informal workers. Informal economy workers make up 10 percent of South Korea's country's workforce, having doubled from a million to two million in less than a decade. In the case of the South Korean labour dispute between unions and employers groups, UNI Global Union's General Secretary called for the rights and work conditions in the informal economy to be considered as well as those of formal workers.⁹⁶ Yet the tension between the groups of workers cannot be understated since the demands of the employers groups are dependent upon the existence of less protected workers to undermine efforts to uphold freedom of association and collective bargaining rights.

This is why this research aims to approach the issue of labour law enforcement from an alternative, often overlooked angle – the direct engagement of the informal economy and how it can bring legitimacy and strength to an agency under attack by modern empirical realities. Although the ILO sets its agenda using a unique tripartite governing body, a structure involving the deliberation of labour issues between

⁹⁵ see Chapter One of this thesis

⁹⁶ Ibid

government, employers' and workers' representatives, it is still currently lacking significant involvement from those representing the interests of the informal economy. Furthermore, this is the case even in matters directly concerning informal workers such as its recent recommendation on the transition from informal to formal economy aimed at tackling the issue.⁹⁷ The next chapter will engage with the ideas of labour law which in its simplest form is justified by the characteristics (subordination and dependency) of the employment relationship.⁹⁸

The upcoming chapters will argue that, by adopting a more effective means to utilise its social dialogue tools, the organisation's tripartite structure will better represent the interests of those informal economy through the direct involvement of marginalised workers – predominantly vulnerable women. The thesis aims to look at the multifaceted problem that is informality, including the gender dimension, the barriers to the current understanding and enforcement of freedom of association and collective bargaining rights and how the ILO's current focus on economic and development goals at times overlooks the classic purpose of international labour law – the empowerment of workers. Later chapters examine the barriers to empowering informal workers within the ILO, barriers such as the oversimplification of the relationship between workers' organisations and the informal economy; the perception of informal workers as being incapable of organising without the aid of those in the formal economy; and the organisation's focus on an ambitious but ultimately oversaturated social justice mandate. The examples set by grassroots informal workers organisations may be used to improve the top representation of ILO and provide a lesson for those aiming to organise in a time of renewed importance for the role of labour organisations yet global decline and resistance.

⁹⁷ ILO Recommendation R204: Transition from the Informal to the Formal Economy Recommendation (Recommendation concerning the transition from the informal to the formal economy) (104th ILC Session Geneva 12 June 2015)

⁹⁸ Guy Davidov 'Re-matching laws with their purpose' in Guy Davidov and Brian Langille (eds) *The idea of labour law* (Oxford University Press 2011) 118

Chapter Three: The Purpose of Labour Law - The revisiting, re-imagining and remaking of foundational ideas

3.1. Introducing Labour Law's Dilemma

This chapter aims to review the normative idea of labour law making up the ILO's foundation and as expressed by its defining principle – 'labour is not a commodity'.¹ It will be argued that although there appear to be many possible visions of social justice and labour law approaches born out of this principle, the ILO's commitment should be to that which best promotes the agency of workers within the world of work. Throughout this chapter this view will be used to critique several core theories of labour law, including the traditional 'non-commodification of labour' approach, the constitutional function approach, and the capabilities and human development approach.

The ideas in this chapter, however, aim to supplement the views put forward by Langille as influenced by the writings of Sen on the significance of 'freedom', 'agency' and 'capabilities' rather than 'functionings' when it comes to constituting labour law narratives.² A further author of note in later chapters is Blackett who advocates for renewed and expansive approach to labour law based on bringing forward the workers'

¹ Declaration of Philadelphia (Declaration concerning the aims and purposes of the International Labour Organisation) (adopted at the 26th session of the ILO, Philadelphia, 10 May 1944) Preamble

² Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law*. (Oxford University Press 2011); Brian Langille, 'Labour Law's Backpages' in Guy Davidov and Brian Langille (eds) *The Boundaries And Frontiers Of Labour Law* (2006 Hart Publishing); Brian Langille, 'Human Freedom and Human Capital: Re-imagining Labour Law for Development in Tonia Novitz and David Mangan (eds) *The Role of Labour Standards In Development: From Theory To Sustainable Practice?* (Oxford University Press 2011); Amartya Sen, *Development as Freedom* (Knopf 1999); Amartya Sen, *Inequality Re-examined* (Clarendon Press 1992); Amartya Sen 'Development as Capability Expansion', in K. Griffin and J. Knight (eds), *Human Development and the International Development Strategy for the 1990s* (Macmillan 1990); Amartya Sen, *Commodities and Capabilities* (Elsevier Science Publishers 1985); Amartya Sen, 'Human Capital and Human Capability' (1997) 25 World Development 1959; Amartya 'Democracy as a Universal Value', (1999) 10(3) Journal of Democracy 3; Amartya Sen, 'A Decade of Human Development' (2000) 1(1) Journal of Human Development 1469; Amartya Sen, 'Work and rights' (2000) 139(2) International Labour Review 119; Amartya Sen 'Human Rights and Capabilities' (2005) 6(2) Journal of Human Development 151

experiences centred on the idea of 'emancipation' rather than transplanting models found in the developed countries onto the developing world.³ It is a view that links social justice to citizenship, democracy and representation which takes into consideration the realities of the world of work but is not necessarily based on the traditional idea of workers' movement and unions which are absent from the industrial history of developing countries. In order to do this, later chapters will confront the ways in which the ILO's narrative of labour law continues to be rooted in an 'industrial and western based' understanding of freedom of association and collective bargaining and why this cannot work when addressing the issue of informality in developing countries, unless it is re-thought and redefined for a wider context.

Chapter One outlined several empirical realities facing the ILO and impacting the organisation's ability to effectively enforce and promote labour rights in the changing world of work. Many of those realities will be presented in this chapter as part of the argument for a new stronger narrative for labour law that can enhance the ILO's legitimacy and refocus its mandate to address an issue as wide and complex as bringing labour rights to those in the informal economy.

Essentially, this chapter reconciles various normative ideas of labour law so that a more grounded, coherent one that fits the subject's modern challenges can emerge. It does not aim to provide a definitive answer or reinvent the wheel but seeks to build on work by other academics and extract a strong yet simple enough justification for labour law in general that can bear better formulated goals. These goals can be the basis for the ILO's mandate and approach to dealing with issues of wide spread informality outlined in chapter one.

³ Adelle Blackett 'Emancipation in the Idea of Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) 420; Adelle Blackett, 'Decolonizing Labour Law: A Few Comments' (2016) 92 *Bulletin Of Comparative Labour Relations* 89; Adelle Blackett and Christian Levesque (eds), *Social Regionalism in a Global Economy* (Routledge 2011)

3.2. Expanding Labour Law's Boundaries: Assessing the Appeal

State resistance to the enforcement of international labour law; globalisation and the 'race to the bottom' through the increasing deregulation of the labour market; a continued decrease in the membership and power of traditional workers' organisations and unions; the growth of the informal economy and subsequently the increase in the number of working poor outside the protection of labour law. These are but a few of the many crises labour law as a discipline faces in today's world; and all of which have led to worries regarding its future state. Labour lawyers have responded to these challenges in different ways, some such as Alan Hyde are more pessimistic than others regarding the field's pre-occupation with its 'ideas'.⁴ Others such as Guy Davidov, doubled down on the relevance and importance of protecting the traditional boundaries of labour law and finding the answers through elaborating on tried and proven concepts rather than search for a new account that may harm the original goals of labour law.⁵ In his view, we must stick to the simple yet sufficient idea of addressing the inequality of bargaining power between worker and employer.⁶

Whilst the extensiveness of the 'crisis of faith' in labour law is being debated, this chapter argues that the ILO's position is evidently threatened by the weaknesses in the foundational justification for labour law in a world of changing realities.⁷ It is maintained

⁴ Alan Hyde, 'The idea of the Idea of Labour Law: A parable' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law*. (Oxford University Press 2011) 88

⁵ Guy Davidov, 'Re-matching Labour Laws with their Purpose' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law*. (OUP 2011) 179-189

⁶ Ibid; see also Guy Davidov, 'Who Is A Worker?' 2005) 34 *Industrial Law Journal* 57; Guy Davidov, 'The Reports Of My Death Are Greatly Exaggerated: 'Employee' As a Viable (Though Overly-Used) Legal Concept' in Guy Davidov and Brian Langille (eds) *Boundaries And Frontiers Of Labour Law: Goals And Means In The Regulation Of Work* (Hart Publishing 2006) 133-152; Guy Davidov, 'The Three Axes Of Employment Relationships: A Characterization Of Workers In Need Of Protection' (2002) 52 *University Of Toronto Law Journal* 357; Guy Davidov, 'Collective Bargaining Law: Purpose and Scope' (2004) 20 *International Journal Of Comparative Labour Law and Industrial Relations* 81; Guy Davidov 'The (Changing?) Idea of Labour Law' (2007) 146 *International Labour Review* 311

⁷ Hyde (n4) 97; Keith Ewing, 'The Death of Labour Law?' (1988) 8 *Oxford Journal of Legal Studies* 293; Dennis M. Davis, 'Death of a Labour Lawyer?' in Joanna Conaghan, Richard Michael Fischl and Karl Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford University Press 2002)159

here that the success of the Organisation's goals depends on a clearer normative understanding of what those goals should be. This will not only guide the ILO better than the previous attempts at re-affirmation of goals have (such as the 1998 Declaration and 2008 Declaration) but the activity of normative refocusing also strengthens the Organisation's capacity to fulfil its undertakings (many of them currently are just aspirational aims in the form of the Decent Work Agenda).⁸

It is therefore significant that, before arguments are made about the need for a new narrative, we must establish what this traditional narrative of labour law is by identifying its scope, content, and goals. Only then can we begin to understand the appeal and hold it had for so long. This is before ultimately rejecting this traditional narrative in parts as well as the propositions of writers such as Manfred Weiss who argue the original assumptions are still best suited for its job and in need of just an extension of scope and adaptation to new realities, rather than complete reinvention or overhaul.⁹

3.3. Confronting the traditional (ILO) Idea of Labour Law

In this section, we will analyse what is meant by the foundational principles of labour law 1) 'labour is not a commodity' and 2) 'there exists an inequality of bargaining power between employers and employees'. These two ideas are at the core of the ILO mandate and generally accepted assumptions in the field of labour law. It will be argued that although they remain relevant, on their own they do not answer the valuable question of

⁸ International Labour Conference, (90th Session) Report VI: Decent work and the informal economy (ILO Geneva 2002) Annex II(c) Declaration of Philadelphia (Declaration concerning the aims and purposes of the International Labour Organisation) (adopted at the 26th session of the ILO, Philadelphia, 10 May 1944); The ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up 1998 (adopted at the 86th session of the ILO, Geneva 10 June 1998); ILO Declaration on Social Justice for a Fair Globalisation (adopted at the 97th session of the ILO, Geneva 10 June 2008)

⁹ Manfred Weiss, 'Re-inventing Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law*. (Oxford University Press 2011) 56

why workers should be protected.¹⁰ This is not to say that the ideas of decency, human dignity, or even the idea of the non-commodification of labour have no value whatsoever. It is that, as it stands, without re-interpretation, strengthening and ultimately better application, labour law's goals will be ineffectively defended from ideological attack from pro-market perspectives as well as the reality of their real-world shortcomings (as identified in full in Chapter One and Two) in terms of application.

The idea that labour law is 'an offspring of social and political action of the working class movement' is a common one that has historical precedent.¹¹ Labour law always focussed on what was seen as a collective issue; the idea of collective bargaining, freedom of association are all enshrined in its 'constituting narrative' and by extension the constitution of the ILO.¹² However, the historical context of labour as being about 'class and movement' is no longer prevalent in this world as showcased by the dwindling power of unions, reimagining of the traditional employer-employee relationship and the emergence of a large, unregulated and unprotected informal workforce.¹³ The question asked now is what happens to 'labour after labour', a question put by Arthurs, that will be posed here in order to legitimise the role of the ILO.¹⁴

Historically, the ILO's, single most important principle guiding all its work is the idea 'labour is not a commodity'.¹⁵ It written in the Preamble of the Declaration of Philadelphia which expresses and reaffirms the organisation's founding aims and purposes – creating policy which views labour as an extension of the human being rather than reducing it to

¹⁰ Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) 101

¹¹ Horacio Spector 'Philosophical foundations of labor law' (2006) 33 Florida State University Law Review 1119

¹² Brian Langille, 'Labour Law's Backpages' in Guy Davidov and Brian Langille (eds) *The Boundaries And Frontiers Of Labour Law* (2006 Hart Publishing); The Constitution of the International Labour Organisation (ILO), (adopted 1 April 1919, Part XIII of the Treaty of Versailles, 28 June 1919)

¹³ Harry Arthurs 'Labour Law after Labour' Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law*. (OUP 2011) 13; Please refer back to Chapter One for a more detailed overview of the modern challenges to enforcing labour standards.

¹⁴ Ibid

¹⁵ For the historical origins of the idea of 'labour is not a commodity' before the ILO's creation please see Stein Evju 'Labour Is Not A Commodity: Reappraising The Origins Of The Maxim' (2013) 4 (3) European Labour LJ 222

just its economic value.¹⁶ Unpacking this principle further, the ILO's constitution and elsewhere contain provisions which make reference to promoting human dignity and respect in the world of work, stating that the existence of 'injustice, hardship and privation' and unfair 'conditions of labour' pose a threat to economic prosperity, peace and stability.¹⁷ The interconnecting of economic development and social justice is made very explicit with the organisation assertion that economic prosperity can be fulfilled 'only if it is based upon social justice'.¹⁸

The maxim 'labour is not a commodity' can be in one form or another found throughout the field of labour law as the antithesis and rejection of the classical liberal economic perspective that labour is in fact a commodity.¹⁹ This classic idea wrongly separates labour from the labourer which, as Marx puts it, cannot be done as labour has no value or is able to exist apart from the labourer.²⁰ This brings us to the idea of power and relationships, setting up the second notion or assumption justifying the existence and goals of labour law – the unequal power dynamic within the employment relationship. This suggests the relationship between employer and employees as being one between 'a bearer of power and one who is not a bearer of power', with labour law positioning itself as a 'countervailing force to counteract the inequality of bargaining power' which is inherent and must be inherent in the employment relationship.²¹

These two separate but interlinked concepts are for many labour lawyers best expressed in the works of Kahn-Freund and Sinzheimer.²² Kahn-Freund viewed labour

¹⁶ The Declaration of Philadelphia Annex I (a) 1944

¹⁷ ILO, 'ILO Declaration on Social Justice for a Fair Globalization, Director-General's announcement' (2008, Geneva) <http://www.ilo.org/public/english/bureau/dgo/download/dg_announce_en.pdf> accessed 23 July 2014

¹⁸ ILO, Constitution of the International Labour Organisation 1919, Preamble

¹⁹ Adam Smith, *The Wealth of Nations: Books I-III* (Penguin Classics 1982) 167

²⁰ Karl Marx, *Capital: Critique of political economy* (1867) Volume I. Part VI Wages "That which comes directly face to face with the possessor of money on the market, is in fact not labour, but the labourer. What the latter sells is his labour-power. As soon as his labour actually begins, it has already ceased to belong to him; it can therefore no longer be sold by him. Labour is the substance, and the immanent measure of value, but has itself no value." - <<https://www.marxists.org/archive/marx/works/1867-c1/ch19.htm#n5>> accessed 19 November 2017

²¹ Paul Davies and Mark Freedland, *Kahn Freund's Labour* (3rd edn Stevens 1983) 18.

²² Dukes, Weiss, Freedland and Davies even to an extent Fudge, Vosko, Deki

law as this countervailing force, a remedy to the inequalities of bargaining power in the form of state intervention to further protection of workers.²³ Labour law begins with looking at the employment relationship and accepting these propositions as true, then expands on that – ‘to a treatment of the legal and institutional feature of the system’.²⁴ This can be in the form of limiting the power of employers by labour regulations that put constraints on the freedom of contract (for example, the state applying minimum wage requirements) or increasing the power of workers for effective opportunity to self-regulate (freedom of association and collective bargaining rights and other rights protecting or promoting social dialogue and industrial action).²⁵

At their core, these two ideas are taken as justification for a certain ‘justice’ or fairness for the workers disadvantaged by their position. The idea that labour law’s goal is a social justice one is expressed throughout ILO documents and the organisation articulates this normative vision of labour law.²⁶ Albert Thomas, the organisation’s first Director, stated that ‘economic and social questions are indissolubly linked and economic reconstruction can only be sound and enduring if it is based on social justice’.²⁷ Furthermore, the opening words of the organisation’s 1919 Constitution captures the idea that peace and stability necessary for a climate of economic prosperity can be fulfilled ‘only if it is based upon social justice’.²⁸ In its constitution, the ILO set out a mission of combating the deficit in social justice – the existence of ‘injustice, hardship

²³ “The main object of labour law has always been, and I venture to say 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. Most of what we call protective legislation...and indeed most labour legislation altogether must be seen in this context” Otto Kahn-Freund, *Labour and the Law* (Stevens 1972) 8.

²⁴ Richard Mitchell, ‘Where Are We Going In Labour Law? Some Thoughts On A Field Of Scholarship And Policy In Process Of Change’ (2010) 4 *Australian Journal of Labour Law* 45

²⁵ Manfred Weiss (n 9) 45

²⁶ Brian Langille, ‘Labour Law is not a Commodity’ (1998) 19 *The Industrial Law Journal* 1002

²⁷ ILO, ‘Giving Youth A Better Start – Furthering social justice’ *World of Work Magazine* no. 74 (15th May 2012) 2

²⁸ ILO Constitution 1919 Preamble

and privation' and unfair 'conditions of labour' which threaten political and economic stability.²⁹

Duffy states that this conviction in the early years of the organisation lead to a 'commitment to the principle of progressive social action which tended to force ILO members to accept the derivative principle of joint action'.³⁰ This concept of progressive social action was centred around the idea of involving workers', employers and government in tackling labour issues – starting at home by working with each other and continuing to do so on the international platform by working with their counterparts from across the globe. Thomas saw the central purpose of the ILO as introducing 'universal, social and industrial democracy'.³¹ This is why the concept of social justice for the ILO, defined as bringing equity, dignity and decency to the world of work in the form of respect for fundamental workers' rights involves the organisation having a recognition of the principle of freedom of association at its centre.³² In its first significant restatement, The Declaration of Philadelphia 1944, the organisation reiterates this point, setting out the importance of tripartism and recognising workers and employers as necessary partners in 'the war against want' 'enjoying equal status with those of governments' and the 'involvement of workers and employers in free discussion and democratic decision with a view to the promotion of common welfare'.³³ This restatement cemented the organisation's commitment to social dialogue as a tool, with freedom of association as a fundamental principle and 'the foundation of a model of participatory democracy, based on free debate among independent actors'.³⁴ It will be argued throughout this thesis that the freedom of association rights in reality mean very little to informal actors if the capabilities to join or set up organisations for collective action is not there.

²⁹ Ibid

³⁰ Norman F. Duffy, 'Organizational Growth and Goal Structure: The Case of the ILO' (1972) 26 ((3) International Organization 479, 481

³¹ Duffy (n 30) 480

³² ILO Constitution Preamble

³³ Ibid I d

³⁴ Gerry Rodgers, Eddy Lee, Lee Swepston,, *The International Labour Organization and the Quest for Social Justice, 1919-2009* (ILO, 2009) 1, 7

Furthermore, the term has become a buzzword meaning trade unions, rather than rights in the wider context, which promotes exercise of the right to organise in a particular way (collective bargaining) and workers' organisations taking specific forms i.e. the traditional trade unions.³⁵ This research will aim to provide a reinterpretation of the term to be more inclusive of the different forms of organising as evident in the informal economy.³⁶ This reinterpretation will be essential if these enabling rights are to be as universal as the ILO intends for them to be.

More recently, in 2008, the organisation formally adopted its declaration on Social Justice for a Fair Globalization³⁷ This declaration was pushed as a much needed 'powerful reaffirmation of ILO values' emphasising the key role of the 'tripartite Organization in helping to achieve progress and social justice in the context of globalization'.³⁸ However, in reality, the Declaration limited itself to the operationalisation and execution of the Decent Work objectives, instead of taking a hard look at where this thesis believes the real social justice deficit lies – in the representation of informal interest and voices in all tripartite settings.³⁹ For example, despite all its mention of social justice, the ILO's Decent Work campaign in practice is not centred around ensuring an environment suitable for the exercise of the collective bargaining rights of informal workers and providing the resources and education needed to involve all actors in the policy making process.

In addition to these shortcomings, these approaches have also opened the ILO up to criticisms of the normative claims being vague, aspirational slogans; inconsistent

³⁵ See Chapter Four and Five of thesis for more details on the significance of redefining the term.

³⁶ See Chapter Six of thesis for examples of grassroots organising in the informal economy.

³⁷ ILO, 'ILO Declaration on Social Justice for a Fair Globalization, Director-General's announcement' (2008, Geneva) <http://www.ilo.org/public/english/bureau/dgo/download/dg_announce_en.pdf> accessed 23 July 2014

³⁸ ILO Declaration on Social Justice for a Fair Globalization 2008

³⁹ Francis Maupain, *The Future of the International Labour Organization* (Hart, 2013) 16; International Labour Conference, (102nd Session) Report of the Director-General 1(A): Towards the ILO Centenary: Realities, renewal and tripartite commitment (ILO Geneva 2013) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_213836.pdf> accessed 14 March 2015

in application and hard to operationalise.⁴⁰ The social justice angle has widened the scope of labour law and this has in turn impacted the identity of the ILO as organisation. Standing, for example, has contended that the organisation is slowly shifting towards a more developmental role concerned with poverty reduction strategies and funding development projects rather than the spread of its normative values, which are according to him directly based on the enforcement of fundamental human rights principles.⁴¹ It will be argued later, however, that deriving justification for labour law from a human rights foundation has its own failings.

Ultimately, it is clear that human dignity and other slogans are hard to define and on their own cannot make a strong enough basis or justification for labour law in general or the ILO's foundation in specific. This remains so even if it is accepted that these principles are as Weiss puts it, just offsets from the second foundational idea, 'inequality of bargaining power'.⁴²

3.4. Taking an Expansive View of Labour Law's Boundaries – How far is too far?

The attack on labour law often comes in the form of economic arguments against placing constraints on the market. This perspective challenges the 'labour is not a commodity' maxim by claiming despite its 'emotional appeal the assertion is misleading. Labor service is bought and sold daily'.⁴³ Furthermore, 'justice through labor law is' therefore

⁴⁰ Laurence Helfer 'Understanding Change in International Organizations: Globalization and Innovation in the ILO' (2006) 59(3) *Vanderbilt LR* 649 653; Kimberly Ann Elliott & Richard B. Freeman 'Can Labor Standards improve under globalization' (2003) *Institute for International economics* 93 102

⁴¹ Guy Standing, 'The ILO: An Agency for Globalization?' (2008) 39(3) *Development and Change* 355

⁴² Manfred Weiss (n 9)

⁴³ Alchain Armen Albert and William R. Allen, *University Economics* (3rd edn, Wadsworth 1972) 407; see also Richard Posner, 'Some Economics of Labor Law' (1984) 51 *University of Chicago Law Review* 988.

viewed as 'a cost, a constraint, a tax on market behaviour'.⁴⁴ Globalisation has encouraged competition between states to create 'legal environments that offer least protections for labor and, when feasible, they shift production to capture the resultant lower labor costs'.⁴⁵ This regulatory competition results in an overall race to the bottom where 'nations compete with each other for lower standards while labor, having lost its historic allies..., is this rendered powerless to resist'.⁴⁶ Without a stronger normative foundation, it is difficult to counteract the arguments that have led to the downward trajectory in the protection of labour rights since the 1980s. Chapter One presented the different criticisms levied against the ILO in terms of its ineffectiveness and the way operating in a globalised world has presented the organisation with new challenges. However, it was shown that ultimately these arguments made for economic liberalisation and deregulation of labour laws are flawed as 'data continues to mount undermining the race to the bottom thesis' in terms of its long term efficiency and economic benefits.⁴⁷

Still, Langille has argued the market arguments made against labour law are not based on empirical claims but normative ones.⁴⁸ Therefore, in order to effectively challenge them, labour law needs stronger normative claims that are clearer. The market perspective questions the default position, that humans in fact exists outside the market and it makes sense to ensure constraints on the market for those reasons. It reduces them to actual commodities for the sake of this type of thinking. It is important then to counter it with a normative foundation that can adequately challenge it.

Sankaran asks does labour law itself need to transform if it is to address the questions confronting informality?⁴⁹ As its been outlined in Chapter One, these 'changes

⁴⁴ Roy Adams, 'Efficiency is Not Enough' (1993) 17 Labour Studies Journal 18

⁴⁵ Katherine V.W. Stone, 'A New Labor Law for a New World Of Work: The Case For a Comparative-Transnational Approach' (2007) 28 (3) Comparative Labor LAW & Policy Journal 565, 566

⁴⁶ Ibid

⁴⁷ Brian Langille, 'What Is International Labour Law For? (2009) 3 Law and Ethics of Human Rights 47, 68

⁴⁸ Brian Langille, 'Fair Trade is Free Trade's Destiny' in Jagdish N. Bhagwati and Robert E. Hudec (eds), *Fair Trade and Harmonization* Vol 2 (MIT Press 1996) 231 244–5.

⁴⁹ Kamala Sankaran, 'Informal Employment and the Challenges for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law*. (Oxford University Press 2011) 223

provide an opportunity for labour law to re-imagine and position itself in a manner that is relevant and inclusive of work and employment relationships across the world'.⁵⁰ Sankaran states that 'the creation of broad inclusive legal categories and mechanism that can suitably capture the many layered qualities of the informal economy today may then reveal a multi sided and richer nature of the law and labour law'.⁵¹ However, the question then becomes, how wide should these categories be and if we broaden them too much do we risk little improvement or worse – further weakening the traditional normative account established above.

3.5. Labour Law's Crisis – More than a 'Conceptual' Problem

Today's world has further complicated the traditional 'employer-employee' dichotomy and created a renewed competition 'between individual employees at the labour market', a driving engine in the race to the bottom.⁵² The emergence of the informal economy can be used to best illustrate the changing nature of the employment relationship and our understanding of the definition of 'worker'.⁵³ The goal now of labour law cannot be to just compensate for the bargaining power inequalities between employer and employee, but look at inequality in other dimensions – the difference between formal and informal workers and their conflicting interests. Later chapters will expand on those interactions which question the effectiveness of the collectivization of workers as means to engage in industrial action when the goals of formal and informal workers often 'pit' them against each other. One suggested solution to this could be found in the work of Guy Davidov, who seeks to expand our definition of employer to fix the problem. This

⁵⁰ Sankaran (n 49) 224

⁵¹ Sankaran (n 49) 232

⁵² Weiss (n 9)

⁵³ See Chapter One of this thesis for more detail

argument will be outlined in the following section, but it will be ultimately shown that this cannot provide a sufficient moral foundation for the narrative labour law to challenge the market perspective and fails to address the real issue – it is dated and limiting.⁵⁴

Davidov would argue if one goes beyond the traditional understanding of labour law in terms of ‘inequality of bargaining power’ they risk weakening the labour law narrative. However, this does not mean he has no response to the changing reality of labour and the new problems posed. Davidov, as well as writers such as Freedland and Kountouris, aim to address the limitations of our current understanding of employment relationships, believing this to be the root of the difficulties facing labour law. Instead of expanding on the normative account of labour law, they each focus on developing a deeper understanding of the characteristics of the employment relationship. Davidov expresses the labour law problem then as being about ‘a mismatch between labour law as they are applied and their goals’ rather than a crisis.⁵⁵ Therefore, the goals of labour law remain relevant – remedying the inequality of bargaining power – however, it is the context in which is applied that has changed (the empirical realities of the world).⁵⁶

Freedland and Kountouris look to create three classifications for the employment relationship based on ‘personal work profile’ of the worker to allow more work relations to be recognised by the law; 1) ‘secure work’ (traditional formal sector workers would fall into this category), 2) ‘autonomous work’ (self employed enterprises) and 3) ‘precarious work’ (this should deal with the binary divide between ‘employment’ and ‘self-employment’ or ‘dependent employment’ and ‘independent employment’), focussing more on the context and details of such employment to decide how far protections should go.⁵⁷ Although they expand our understanding of employment relationship to

⁵⁴ Brian Langille, ‘Labour Law’s Back Pages’ in Guy Davidov and Brian Langille (eds), *The Boundaries and Frontiers of Labour Law* (Hart Publishing 2006) 13.

⁵⁵ Davidov (n 5) 179-189

⁵⁶ Ibid

⁵⁷ Mark Freedland and Nicola Koutouris, ‘The Legal Characterization of Personal Work Relations and the Idea of Labour Law’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law*. (Oxford University Press 2011) 190 201

incorporating more workers (addressing the issue of informality), it also limits itself to describing the characteristics of employment relations that justify protective regulation.⁵⁸ This does not provide a moral justification for labour law or a strong normative foundation to withstand ideological attack.

Davidov's method goes further than Freedland and Kountouris by going for 'a bottom up approach', starting with the application issue of labour law. He argues for a functional view of the idea of labour law, not completely rejecting the significance of values or the failings of the market in understanding the purpose of labour law, but instead looking at how much more 'useful' it can be to focus on the 'factual situation' regarding the relationship between employer-employee and the specific vulnerabilities of workers labour law is supposed to address.⁵⁹ Certain workers are excluded from the protection of the law because 'the use of indicia detached from their normative foundations'.⁶⁰ Courts would look at real world characteristics of the relationship, empirically, and use that as reason to apply or not apply the protection of labour law. But the characteristics of the employer/employee relationships are not what they used be. This is why protection should be based on democratic deficits and dependency, which allows those in the informal economy to fall under the scope of legal protection. Informality has been defined in the previous chapter, but it is important to restate here that what matters is not informality in 'the manner of entering the market' but rather the 'vulnerabilities' attached to it.⁶¹ The traditional ideas of the employee include, male breadwinner idea of employee, model waged work, traditional specified workplace, easily identifiable employer and employment contracts. All these features are

⁵⁸ Guy Davidov, Mark Freedland, Nicola Kountouris, 'The Subjects of Labor Law: "Employees" and Other workers' in Mathew Finkin and Guy Mundlak (eds) *Research Handbook in Comparative Labor Law* (Edward Elgar 2015)

⁵⁹ Davidov (n 5) 181

⁶⁰ Davidov (n 5) 182

⁶¹ Sankaran (n 49) 226

traditionally recognised by the scope of the law and market; however, the new reality is a 'greater visibility of varied work practices' which do not share these characteristics.⁶²

Davidov argues for the separation/distinction between 'characteristics that should trigger the application of labour laws, as normative matter' and 'characteristics of the relationship in real life'.⁶³ This, according to him, should solve issue of workers who are not in the physical proximity of their employer, home based workers, or even workers in a different country. This is by determining the true nature of the relationship, in light of the purpose of labour law (protect those in vulnerable position), when considering what employment looks like.⁶⁴ This should lead to a focus beyond simply the justification for the law and the restraints on the market, more into the territory of the power dynamic and relationship between worker employer. He points to the presence of two conditions which should determine the application of labour law; 1) democratic deficits (subordination) and 2) dependency on employer (uneven spread of risk).

Taking this approach would counteract, in a meaningful way, attempts made to evade labour laws by redefining characteristics of employment contracts or engaging in non-traditional work arrangements. The ILO differentiates between what an employment relationship is in actuality versus what it may be described as. In order to fit the scope of the labour law and at least partial application of it there needs to be just the existence of dependency. Collective bargaining rights and freedom of association will always apply because of the issue of economic and democratic deficit in the employment relationship. The ILO agrees with this understanding, justifying those rights as being elevated to fundamental status.⁶⁵

⁶² Ibid; Alan Supoite and others, *Beyond Employment: Changes In Work And The Future Of Labour Law In Europe*. (Oxford University Press 1999); Kerry Rittich, 'Feminisation And Contingency Regulating The Stakes Of Work For Women' Joanna Conaghan, Richard Michael Fischl and Karl Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford University Press 2002)

⁶³ Davidov (n 5) 182

⁶⁴ Davidov (n 5) 183; Sankaran (n 49) 229

⁶⁵ The ILO Declaration on Fundamental Principles and rights at work and its follow up 1998

Upon viewing the ILO's evolution over the years, it is clear the organisation has taken steps to do as Davidov suggests is needed – expand the category of worker to be more inclusive of those who traditionally would fall outside the scope. There is no denying that defining the informal economy, measuring it and categorising it is a complex task that the ILO has spent significant efforts on, as illustrated by the work of Ralf Hussmans.⁶⁶ Certain ILO conventions seek to cover all those engaged in work rather than define specific employment relationships also the Decent Work Agenda significantly no longer allows labour laws to legitimise the exclusion of millions of informal workers due to employment status or definitions. The ILO has been, for some time now, seeking to remedy the unequal level of protection provided by national labour laws which depend upon employment arrangements which are absent in the informal economy.⁶⁷ The Organisation is justified in the broadening of the scope of labour.

Sankaran explains that the ILO's manner of determining what constitutes a labour issue is indicative, though not determinative of what normatively should be the main concern of labour law.⁶⁸ Examples of this are the ILO's move in the 90's to promote a set of core labour standards, their focus on fundamental rights, the move towards development goals etc. Workers are defined to include not only persons employed but those engaged in the industry.⁶⁹ Reflective of issues dealt with in standard setting 'activity need not be economic activity' to be considered labour for example in the case of forced labour, where labour law does come in to protect the person without considering the person a worker in a traditional sense.⁷⁰ The ILO has set the standards for who labour law is for, the justifiable situations it comes to play in dependent on the

⁶⁶ Ralf Hussmans, 'Defining and Measuring Informal Employment' (ILO Geneva, February 2004) ILO, *Measuring Informality: a Statistical Manual on the informal sector and informal employment* (ILO 2010)

⁶⁷ Kamala Sankaran 'The ILO, Women and Work: Evolving labor standards to advance women's status in the informal economy' (2001-2002) 3 Geo. J. Gender & L. 851

⁶⁸ Sankaran (n 49) 229

⁶⁹ International Labour Conference (90th Session) 40

⁷⁰ International Labour Conference, (98th Session) Report I (B) The Cost of Coercion: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (ILO Geneva 2009) 6

power dynamic and relationship as Davidov has stated. The idea is to incorporate these standards into domestic law to match labour law to the reality. However, it is important to realise that recognition does not grant a worker status automatically or recognition for activity/work performed. There are limitations to the expansion of the scope of what a worker is (see unpaid domestic/care work etc there are boundaries of what is considered economic value without it being considered economic activity).⁷¹ Blackett criticises these limitations, especially the way employment is defined has a western bias disadvantaging the issues found in developed countries.⁷²

If labour law can be continuously criticised as an ‘unwarranted intervention in free markets’, it is important to never stop justifying it. Davidov is right in stating that the normative questions about labour law are vital as a stock-taking exercise because the only way to know labour law is doing its job is to keep appraised about what that job is. At first glance this sounds uncomplicated, if the only thing labour law should be tied to is the need for protection of vulnerabilities then we keep it attached to the normative basis rather than the things prone to change such as characteristics of work arrangements.⁷³ This way there is no need to re-invent the ‘normative wheel’ in its entirety a prospect which is appealing considering how much division it has caused.

Unfortunately, his exercise in expanding definitions has not fully fixed the problem. Davidov states regulating employment relations is where the solution lies and he focusses on the issue of application with bilateral employment relations and multiple employment relations. It may feel easy to agree when Davidov states ‘it is the unique characteristics of employment relations that justify protective regulation’.⁷⁴ However, his

⁷¹ Sankaran (n 49) 230

⁷² This will be further elaborated on in the upcoming chapters. Blackett (n 3) 420

⁷³ Nicola Kountouris, ‘Changing Law of the Employment Relationship: Comparative Analyses in the European Context’ (Ashgate Publishing Ltd 2016) 170; Guy Davidov, ‘Who Is A Worker?’ 2005) 34 *Industrial Law Journal* 57; Davidov, Freedland, Kountouris (n 58); Guy Davidov, ‘Collective Bargaining Law: Purpose And Scope’ (2004) 20 *International Journal Of Comparative Labour Law and Industrial Relations* 81;

⁷⁴ Davidov (n 5) 188

distinctions do not go far enough in addressing the basis on which they exist and his case by case basis fails to address the informal economy – formal economy question. Davidov's approach may include informal workers as falling under the protection of the law, however, despite this inclusion by the ILO's definition of the employment relationship (which similarly focusses on vulnerability and dependency) these workers are still excluded in terms of representation throughout the tripartite structure of the organisation, national labour administration and worker organisations. The formal classifications have done little to rectify the power imbalance present due to informality and does nothing to highlight their differences in needs from workers in the formal sector. Furthermore, the absence of the strong moral justification needed for labour law to withstand these challenges remains.

3.6. The Search for Significance, Not Slogans

Despite its appeal for a simplistic re-interpretation as opposed to radical overhaul of labour law, Davidov's approach's weakness is in how far it focusses on redistribution. It ends up providing a goal rather than a justification for labour law, which is what Langille rightfully insists labour law needs – legs to stand on.⁷⁵ The traditional idea of labour law framed the issue as being a conceptual problem than can be fixed by elaborating on inequality of bargaining power yet there are many difficult to answer questions that come from confining labour law to the maxims 'inequality of bargaining power' and 'labour is not a commodity'. It does not answer the why question, why is this worth protecting and constraining the market for?

⁷⁵ Langille (n 10)

With a moral justification not there, Davidov's arguments is weakened, as there is no reason to assume redistribution matters, dependency matters, relationship inequality matters. The power of the idea of 'labour is not a commodity' has been weakened by the changing realities of the world and by tying it to the idea of inequality of bargaining power.⁷⁶ Davidov, according to Langille does nothing to free himself from that incarceration, instead trying to stick to it more closely.⁷⁷ It is important to expand the thinking, for without it, one cannot expand and change one's understanding of concepts that flow from this initial idea. What concepts such as freedom of associations should mean, what organising workers should look like and ultimately what the role of the ILO should be – all concepts this thesis deals with closely. There is a domino effect in play, 'labour is not a commodity' being the brick foundation and without revisiting it – it has the potential of undoing everything that springs from it. One then risks becoming trapped by a dated understanding of 'unions' and 'workers' and 'collective bargaining rights' that achieve little except exclude informal workers; followed by a model of tripartite governance at each level (local, national and international) that does in reality not represent a majority of workers. Currently, labour lawyers keep constructing 'our normative world as a response to market ordering' but have nothing to justify the virtue of this, or a reason for it beyond a 'resistance movement' to the default system.⁷⁸ The ILO is struggling to have any meaningful rallying message other than 'social justice' and 'decent work', ideas which are supposed to have moral power but are that are not fully unpacked in what they mean in actuality. This in turn is translated in real terms by a lack of political will from states to make meaningful commitments to ensuring labour standards.

⁷⁶ Freedland captures this idea as well as Langille

⁷⁷ Langille (n 10) 107; *"If this is our moral concern then these actors and events (people negotiating contracts regarding work) are, in the nature of things, the centre of our attention. And our central categories and concepts (employee, employer, contracts of employment, and so on) are thus thrust upon us."* This is how we are held captive. Langille at 110 specifically about Davidov.

⁷⁸ Langille (n 10) 110

However, a different reading of the maxim 'labour is not a commodity', and it can not only seek to protect those lacking bargaining power in employment negotiations and the conditions of employment but approach labour law as an issue about the importance of agency. For example, the fundamental nature of collective bargaining and freedom of association rights exercises are not just to rectify inequality of bargaining power, they are both substantive and procedural in nature. Participants are therefore 'not merely recipients of the law's largesse' but in fact are touching upon what Langille correctly identifies as a much deeper issue of freedom and agency.⁷⁹ The ILO claims to promote this view of workers yet the language shows informal workers still lack agency as the organisation fails to fully commit to it.⁸⁰ It will be shown in the upcoming sections and throughout this thesis that the organisation is still trapped in the narrow scope version of labour law where there is no normativity here other than the idea of equality in bargaining. Furthermore, this brings us to the subsequent question; if the scope is so narrow how can one justify the boundaries of labour law when inequality is everywhere?

3.7. Labour Law & The ILO's Periphery – How Far Do We Go?

Labour lawyers are often concerned with boundaries of labour law, however, Arthurs asks if labour law is about addressing the imbalance of power then why is it not expanded beyond workplace to include other economic relationships where such an imbalance exists (e.g. lenders/borrowers, landlords/tenants, agribusiness/farmers) or go beyond union strategies to other modes of resistance such as voting, demonstrations, boycotts, petitions, cultural representation, consumer cooperatives.⁸¹ There is no good

⁷⁹ Ibid

⁸⁰ Kate Meagher, Culture, Agency and power: Theoretical reflections on Informal economic networks and political process' (2009, DIIS, working papers); Ilda Lindell, *Africa's Informal Workers: Collective Agency, Alliances and Transnational Organizing in Urban Africa* (Africa Now) (Zed books, 2010)

⁸¹ Arthurs (n 13) 18

answer to reject this as long as labour law remains tied to the idea of inequality which makes narrow claims about the scope. Arthur argues that labour law focussing simply on the workplace may be less complex and clearer, but ‘curtailed the explanatory power, practical efficacy and moral force of labour law’.⁸² This is apparent in how the places where labour standards would do the most good are still effective outside its scope (i.e. the existence of the informal economy).

The ILO accepts that its role has expanded since its early days, the organisation’s mandate now having far greater reach from gender equality to wider economic, social and cultural dimensions to its employment policy.⁸³ In particular, the Decent Work Agenda has led to a shift towards the ILO adopting a more developmental role concerned with poverty reduction strategies and funding development projects than the spread of its normative values, which are directly based on the enforcement of fundamental rights and principles.⁸⁴ The ILO states this policy direction is far more holistic and yet critique of it in the last chapter shows it is not without fault. The Decent Work campaign in practice is not centred around ensuring an environment suitable for the exercise of the collective bargaining rights of informal workers and providing the resources and education needed to involve all actors in the policy making process. This is because at the core the ILO has lost its understanding of the history of labour law - engagement in social and political action through organising and empowerment something which will be further explored in upcoming sections and chapters. Labour law has to be more than employment relationships; however, this section and the upcoming ones will be arguing that some expansions are less effective than others.

3.7.1. A Critique of Labour Market Perspective

⁸² Ibid

⁸³ International Labour Conference (90th Session) Report VI

⁸⁴ Guy Standing, *The ILO: An Agency for Globalization?* (2008) *Development and Change* 39(3) 355

As Arthurs accurately puts it; 'market dynamics are a more powerful determinant of decent labour standards than regulatory legislation'; 'states shape labour markets and the relation of market actors as effectively by trade, fiscal, monetary, immigration, social welfare and education policies as by labour laws'; and 'enterprise-specific, ethnic and popular cultures can reinforce or undermine indigenous systems of workplace normativity no less powerfully than legislation'.⁸⁵ Should accepting these statements as accurate, however, mean an expressive endorsement of expanding the scope of labour law? Or will that ultimately weaken the discipline as a whole?

Those advocating for the Labour Market Regulation perspective argue there is a historical precedence for a wider reading of the purpose of labour law.⁸⁶ In reality, the ILO, an organisation saddled with responsibility of promoting and enforcing labour standards globally has in its constitution, declarations and documents references to 'the regulation of the supply of labour', 'the prevention of unemployment' and the 'organisation of vocational and technical education' as goals, all of which has industrial policy at the heart.⁸⁷ The organisation is constantly pushing its periphery to include issues outside of labour due to the need for a more holistic approach to the complexity and interconnectedness of the modern world of work and its issues. It is important, therefore, to outright reject the notion that the Labour market Regulation perspective in itself is a problem, or that the marrying of industrial policy and labour law is a new idea. Industrial policy is defined as 'policies that stimulate specific economic activities and promote structural change' which has always been immensely relevant.⁸⁸ For example,

⁸⁵ Arthurs (n 13)

⁸⁶ Richard Mitchell and Christopher Arup, 'Labour Law and Labour Market Regulation', in Christopher Arup and others (eds) *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (The Federation Press 2006).

⁸⁷ John Howe 'The Broad Idea Of Labour Law: Industrial Policy, Labour Market Regulation And Decent Work' (2010) Centre For Employment An Labour Relations Law, The University Of Melbourne; David A Morse, *Origins And Evolution Of The ILO And Its Role In The Community* (Cornell University 1969)

⁸⁸ Dani Rodrik, 'Normalizing Industrial Policy' Commission On Growth and Development Working Paper No. 3/2008; Karl Aiginger, 'Industrial Policy: A Dying Breed or Re-emerging Phoenix?' (2007) 7 Journal of Industry, Competition and Trade 297

the Labour Market Regulation perspective is being used as a means of poverty reduction in developing countries where informality and poverty go hand in hand.⁸⁹

The advantages of the Labour Market Regulation perspective, according to Howe is that there will be a clarity on changing purpose of labour regulation, all the surfacing problems and new 'realities', and at the same time, there still is a commitment to the underlying idea of justice. This perspective seeks labour law to be more than just about the 'inequality of bargaining power', with it once again being criticised for being too narrow, but this time for failing to address the macro issues (such as employment policy, job creation strategies, poverty reduction, immigration law, unemployment) undertaken by national labour administrations and the ILO. Instead, this perspective is arguably far more transformative and can be applied to far more than labour market issues.⁹⁰ For example, the ILO's Decent Work Agenda does not ignore all 'that shapes labour's position in society'.⁹¹

Howe argues for the inclusion of industrial policy, stating its importance to 'the legitimacy of the field across time and space' and making valuable 'contribution to both the constitution and regulation of labour markets' as well as 'conditions of work'.⁹² Developed countries have benefited from this in the past and it is now, with the issue of informality predominantly effecting developing countries, it is time for these countries to do the same.⁹³ Developing countries make 'use of industrial policies to foster economic

⁸⁹ International Labour Conference (91st Session) Director-General's Report: Working out of Poverty (ILO Geneva April 2003) <<http://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/rep-i-a.pdf>> accessed 30 June 2015; Colin Fenwick and Evance Kalula, 'Law and Labour Market Regulation In East Asia and Southern Africa: Comparative Perspectives' (2005) 21 (2) International Journal of Comparative Labour Law and Industrial Relations 193 205

⁹⁰ Karl Klare, 'The Horizons of Transformative Labour and Employment Law' in Joanna Conaghan, Richard Michael Fischl and Karl Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (OUP 2002) 4. See also John Howe 'The Broad Idea Of Labour Law: Industrial Policy, Labour Market Regulation And Decent Work' (2010) Centre For Employment An Labour Relations Law, The University Of Melbourne;

⁹¹ Howe (n 87) 15-16; Hugh Collins, 'Regulating the Employment Relation for Competitiveness' (2001) 30 (1) Industrial Law Journal 17

⁹² Howe (n 87)

⁹³ Howe (n 87) 23; John Ruggie, 'Taking Embedded Liberalism Global: The Corporate Connection' IILJ Working Paper 2003/2 History and Theory of International Law Series 2

development and job growth' and it has shown to work, except in recent years, when this was rejected in favour of less helpful strategies to bring about economic growth such as trade liberalisation, *laisse faire* industrial policy – ideological consequences of globalisation outlined in chapter one.⁹⁴

The problem with this perspective is how these policies come about, who influences the policy making decisions at state level and at an international level (and even the composite of the ILO's tripartite structure). Developing countries inherited their model of labour law through colonialism, a pre-post war European one which does not match their conditions. The dominant labour model and all its assumptions are from the West and therefore do not always match the empirical realities as well as needs of the developing world which is where the informal economy issues are the greatest.⁹⁵ Currently, not enough moves have been made to amend these problems and at the same time the Labour Market Regulation perspectives end up taking away further attention from the core and traditional purpose of labour law which is about protecting the worker instead of strengthening it.

A further criticism of this perspective can found in questions regarding scope. How far would it be that these policies should go; what would they include or exclude, and why; and lastly, whose jurisdiction would they fall under? Scope can be limiting but, a labour law without boundaries leaves a vague, ambitious framework that is near impossible to implement. This was one of the main criticism of the Decent Work Agenda – trying to accomplish too much.⁹⁶ Ultimately, the ILO's 'full representation and involvement for all' workers objective in its constitution lost its significance in a myriad

⁹⁴ Howe (n 87) 23; Janine Berg and Sandrine Casez 'Policy Making Gone Awry: The Labour Market Regulations Of Doing Business Indicators' (2008) 29 (4) *Comparative Labor Law & Policy Journal*; Blackett (n 3)

⁹⁵ Tzehainesh Tekle (ed) *Labour Law And Worker Protection In Developing Countries* (Hart Publishing 2010); Kamala Sankaran 'Protecting The Worker In The Informal Economy: The Role Of Labour Law' in Guy Davidov and Brian Langille (eds), *The Boundaries and Frontiers of Labour Law* (Hart Publishing 2006)

⁹⁶ For an example, see Guy Standing's criticism. Standing (n 41)

of other objectives. It is this real fear and kind of extension that made Davidov want to focus so narrowly onto the qualities of employment relationships as means to inform our understanding of labour.

3.7.2. A Labour Constitution: The Democratising Function of Labour Law

If the labour market perspective is considered going too far and focussing just on inequality of bargaining too narrow, is there a way to balance the two via a satisfactory alternative? Dukes is concerned there is an oversimplification of old paradigms of labour law.⁹⁷ She instead aims to 'identify elements' which can be generalised in the traditional sense of labour law but also expanded without radically altering the normative ideas. Sinzheimer and Kahn-Freund's ideas, according to her, are not completely outdated as much of it still applies, in particular, the core idea of 'human dignity' and 'liberty'. It will be shown in later sections that the second aspect (liberty) is the far more significant of the two when it comes to building a moral justification for labour law.

Dukes is correct in not wanting to throw the baby out with the bath water when it comes to the traditional conception. She instead argues for the steps to be taken to 're-specify for current economic conditions'.⁹⁸ To her, the points in Sinzheimer and Kahn-Freund's writings that remain relevant are; the idea of a worker as a human being; the worker at the mercy of the employers (inequality of bargaining power); and finally most

⁹⁷ Ruth Dukes 'Hugh Sinzheimer and the Constitutional Function of Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law*. (OUP 2011) 57

Ruth Dukes, 'Constitutionalizing employment relations: Sinzheimer, Kahn Freund and the Role of Labour Law' (2008) 35 (3) *Journal of Law and Society* 341; Ruth Dukes, 'Otto Kahn Freund and Collective Laissez Faire: An Edifice without a Keystone' (2009) 72(2) *The Modern Law Review* 220; Ruth Dukes 'The Origins of the German System of Worker Representation' (2005) 19 *Historical Studies in Industrial Relations* 31 ; Paul Davies and Mark (n 21)

⁹⁸ Dukes (n 97) 58

important point, labour law's role in democratising the economy or the idea of economic democracy.⁹⁹

Dukes argues that thinking about labour law in terms of its constitutional function is beneficial. This 'constitution' is defined as the 'role played by the law in the regulation of labour relations' and labour law 'as a tool for the furtherance of economic and social justice'.¹⁰⁰ This is somewhat more beneficial than depending on the narrow focus on the imbalance of power in individual employment relations as it 'highlights instead the importance of considering the contribution of labour law to the constitutional task of establishing a particular economic and social order' and insists that 'the regulation of working relations cannot usefully be considered in isolation from the broader constitutional context'.¹⁰¹ This argument for a labour constitution was developed originally by Sinzheimer and Dukes contributes to it by putting forward a theoretical inquiry into the nature of constitutionalism under conditions of advanced economic globalisation. In this light, the maxim 'labour is not a commodity' becomes a 'benchmark for all the current shortcomings' and not the entire foundational idea of labour law.

Under this understanding, the state's role is that of the guarantor of this freedom, stepping in to ensure it. This is ILO's current view regarding the state's role in ensuring freedom of association and collective bargaining rights.¹⁰² However, this is still not going far enough since this 'economic community' of employers and employees is currently not reflective of the reality of workers (informal workers are outside it). Dukes states that the ILO can provide this encompassing framework and measure of limits, with the organisation's job being to provide normative guidance. The problem is that the ILO tried to be that all-encompassing, market correcting, international labour law/development

⁹⁹ Ibid

¹⁰⁰ Dukes (n 97) 68

¹⁰¹ Ruth Dukes, *A Global Labour Constitution: The Enduring Idea of Labour Law* (OUP 2012) 65

¹⁰² Bernard Gernigon, Alberto Otero and Horacio Guido, 'ILO principles concerning collective bargaining' (2000) 139 (1) *International Labour Review* 35; Michel Coutu, 'With Hugo Sinzheimer and Max Weber in mind: The Current Crisis and The Future of Labor Law' (2013) 34(3) *Comparative Labor Law & Policy Journal* 605

policy maker and the truth remains that the international labour standards the organisation puts out and everything else it does relies heavily on recognition from a variety of state and non-state actors.¹⁰³ It could be then argued the barriers to a global labour constitutions are too high which is why the answer must keep coming back to strengthening the ILO through strengthening its tripartite structure and legitimacy from ground upwards.¹⁰⁴

3.8. Outside the Box III: Addressing the 'Boundary-less' Problem of the Informality within the Boundaries of Labour Law

The idea of an industrial constitution is to limit the power of employers over workers.¹⁰⁵ However, the effectiveness depends on fulfilling the constitutional function of seeing labour as something more (as Langille and Dukes both argue).¹⁰⁶ The idea is that the constitutional function of labour law will keep us aware of the dangers the default treating people as commodities as a response to fears over constraining the market and creating inefficiencies.¹⁰⁷ Democratic control as the answer can be a strong, convincing argument. In theory, labour law can contribute to specific economic and social order. However, how it does this is should be through organising, empowering and allowing workers to represent their interest in all policy making forums (especially in the ILO whose entire existence is dependent upon fulfilling this purpose). There is a theory of industrial democracy that can be read in the writing of Sinzheimer and Kahn-Freund,

¹⁰³ States, courts, trade unions, transnational corporations, Non-governmental agencies. Bob Hepple, *Labour Laws and Global Trade* (Hart, 2005)

¹⁰⁴ Dukes states that an "effective mechanism for the exercise of countervailing power at supranational level" is vital to ensure that a two side definition of democracy Sinzheimer put forward, freedom from abusive treatment but also freedom to participate in the formation of the social and economic existence of their existence. Dukes (n 30) 66-7

¹⁰⁵ Dukes (n 30) 63 From commodity to human being. From subject to citizen.

¹⁰⁶ See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time* (2nd edn Beacon Press 2001)

¹⁰⁷ Langille (n 47)

focussing on participation, rights and collaboration with employers on equal footing as well as the 'overall economic development of productive force'.¹⁰⁸ This is present in the ILO's mandate, expressed as a commitment to social dialogue as a tool, with freedom of association as a fundamental principle and 'the foundation of a model of participatory democracy, based on free debate among independent actors'.¹⁰⁹ Thomas saw the basic purpose of the ILO as introducing 'universal, social and industrial democracy'.¹¹⁰ The Declaration of Philadelphia 1944, sets out the importance of tripartism and recognising workers and employers as necessary partners in 'the war against want' 'enjoying equal status with those of governments' and the 'involvement of workers and employers in free discussion and democratic decision with a view to the promotion of common welfare'.¹¹¹ There is room for commitment to inclusivity and cooperation, 'commitment to the principle of progressive social action which tended to force ILO members to accept the derivative principle of joint action'.¹¹²

The problem is not the goals of the two perspectives (Labour Market Regulation perspective and Labour Constitutionalism) presented in the above two sections, but that they are goals, not answers and justifications. The following section aims to provide these justifications in the form of viewing workers' as agents and focussing on the aspect of 'liberty' Dukes, Sinzheimer and Kahn-Freund all touched upon but failed to elaborate. Without it (and by widening the focus) Dukes runs into similar problems as the Labour Market Regulation perspective. She is, however, right in stating that Sinzheimer's strongest argument is labour law has to not just guarantee rights or freedoms but take power. Workers should be free from employers' efforts to dictate the social economic

¹⁰⁸ Constitution of the Weimar Republic (1919) English translation in B. Hepple (ed), *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945* (Hart Publishing 1985) 385; Neil Walker, 'Beyond The Holistic Constitution' (2009) University of Edinburgh Working Paper 16

¹⁰⁹ Gerry Rodgers, Eddy Lee and Lee Swepston, *The International Labour Organization and the Quest for Social Justice, 1919-2009* (ILO 2009) 1, 7

¹¹⁰ Duffy (n 30) 480

¹¹¹ *Ibid* I d

¹¹² Duffy (n 30) 481

conditions of their existence.¹¹³ This means real power to participate for all workers and not just a subset of those in the formal economy. A labour constitution alongside a political one about joint action, equality is important. It is unfortunate however, that we run into difficulties concerning the limitation of what the ILO should be focussing on when jumping to rethink the constitutional function of labour law in terms of international institutions without first justifying it on normative grounds.¹¹⁴ Finally, when looking at labour law's role in democratising the economy, we also risk viewing workers as a monolith with the same interests, goals and needs – something which the divisions between informal and formal workers has shown is not true.

3.9. Conclusion: Moving Towards A New Normativity of Labour Law - viewing Workers as objects versus Workers as subjects

In the sections above, it was shown why revisiting labour law's purpose is vital if the purpose and the capabilities of the ILO are to withstand scrutiny. The organisation's legitimacy depends on the justifications within the discipline of labour law and its foundational goals. Writers such as Davidov and Weiss do not think there is a normative crisis within labour law and argue against reinventing the wheel when the focus should be fixing the conceptual issues to better deal with new empirical reality and achieve the old normative goals 'inequality of bargaining power'.¹¹⁵ Hepple also fears overcomplicating the subject by 'developing an ideal theory of labour rights of social justice', something which is arguably impossible when there are (as seen in this chapter

¹¹³ Dukes (n 30) 60

¹¹⁴ It is important to ask in light of multiple state and non-state sources of normativity in labour law, "who or what might do the constitutionalising", Sankaran (n 49) 233. Is the ILO in its current unrepresentative form in a legitimate position to make these decisions. For further discussions see Chapters Four and Five

¹¹⁵ Langille (n 10); Guy Davidov 'The (Changing?) Idea Of Labour Law' (2007) 146 International Labour Review 311

and the previous) multiple theories of labour law.¹¹⁶ Instead he advocates labour lawyers to continue focusing on ‘the outcome of struggles between different social actors and ideologies, of power relations’ as ‘labour laws are used by people to pursue their own goals’ need ‘rights’ to survive’.¹¹⁷ Although this is a practical and sound argument, labour law cannot escape the call for a strong moral justification as highlighted by the ILO’s constant struggle and search for legitimacy. Our current understanding of labour law is preoccupied with goals such as efficiency, rights, the characteristics of employment relationships, labour standards, regulating labour markets and more. It has gone beyond the ‘conceptual’ level or ‘enlargement’ of work categories.¹¹⁸

After an overview of what the account of labour law could be or more cynically, should not be; it is important to see what can be derived from these ideas to build a stronger narrative. The aim still is to extract a moral justification needed to allow labour law to withstand ideological attacks by defining concepts such as ‘social justice’, ‘human dignity’ and ‘decency’ in real terms. These terms originally became reduced to slogans, suffering from vagueness but can be redefined to hold greater meaning if the focus is on viewing workers as subjects rather than objects. It is within this distinction, Langille argues, where the new normativity of labour law lies. It is crucial to reiterate that Langille’s distinction is not a new idea, since (as touched upon in the previous sections) it is present within the traditional idea of labour (i.e. the elevated status and significance of freedom of association and collective bargaining rights within the discipline). It has been, however, limited by the narrow way in which labour lawyers have focussed on the ‘inequality of bargaining power’ principle, a normative idea that on its own may not provide rationale to limit market power of others in this globalised, economically

¹¹⁶ Hepple (n 103) 3; Brian Langille, ‘Imagining Post Geneva Consensus Labour Law for Post Washington Consensus’ (2010) 31 Comparative Labour Law and Policy Journal 523;

¹¹⁷ Hepple *ibid*

¹¹⁸ Langille Theory of Justice (n 2) 102

liberalised world. Throughout his writings, Langille draws on the work of Sen to find this new normativity for labour law.¹¹⁹

The upcoming chapter will be dealing with the appeal of Sen's Capabilities Approach, showing how it is this approach and not a theory that can have a wide implication for labour law's normative discourse.¹²⁰ The Capabilities Approach (CA) provides a conceptual framework for a variety of normative exercises and more simply can be viewed as a basic ideas measurement.¹²¹ It will be argued that the ILO has already attempted to engage in this type of exercise with its ambitious Decent work Agenda, a multifaceted policy design based around achieving and measure 'decent work'. The Capabilities Approach, however, through its focus on how much real freedom social arrangements can give a person in terms of the opportunity to realise such freedom. This can address the shortcomings of the Decent Work Agenda while maintaining its holistic approach and preventing the framework from going into territories of development. If refocussed, the application of this approach can reaffirm the core ideas of human freedom and the 'labour' element of labour law.

By finding the link between labour law and the Capabilities Approach (the removal of obstacles to human freedom) we can hopefully address the issue of informal and formal workers but also consider the existing diversity between workers. This approach can allow for more than just the formal - informal economy distinction and better address the competition between the different workers, the difficulties they face in terms of organisation and variations of their inequalities. If we are, like Langille asks us to be, brave enough to stray beyond our normative box and use another normative yardstick (one given to us by Langille and Sen) then labour law can become stronger.¹²²

¹¹⁹ Langille (n 2)

¹²⁰ Amartya Sen, *Inequality Re-examined* (Clarendon Press 1992) 48

¹²¹ Ingrid Robeyns, 'Sen's Capability Approach and Gender Inequality: Selecting Relevant Capabilities' (2003) 9 (2-3) *Feminist Economics* 61

¹²² Langille makes reference to Wittgenstein on the idea of held captive by our ideas – see Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell, 1958) para 115; Freedland discussion's regarding these anxieties in labour law implies the normative exercise is not worth the confusion. This

The question to ask then will be, how do we achieve this human freedom in the context of work once we start to focus less on the theoretical application and more on the practical one.

thesis however disagrees (as does Langille). Mark Freedland, 'From the Contract of Employment to the Personal Work Nexus' (2006) 35 Ind LJ 1, 28–9. 26

**Chapter Four: A Stronger Case Beyond Enabling Rights? – Understanding
Freedom of Association & Collective Bargaining in terms of ‘Freedom’ &
‘Empowerment’.**

4.1. Introduction: How should the ILO further enable labour law’s ‘enabling rights’?

This chapter aims to show how Sen’s Capabilities Approach can strengthen the normative foundations of labour law and in turn provide a more coherent and strengthened mandate for the ILO. The following sections will seek to explain the ideas behind The Capabilities Approach as they can apply to the labour law problem, before examining how this approach can bring new meaning to fundamental principles such as freedom of association and the right to collective bargaining. It will be shown that these ‘enabling rights’, elevated to fundamental status by the ILO and the cornerstone of their tripartite structure, are in their current form struggling to fulfil their potential and benefit all workers – especially those in the informal economy. However, this does not have to be the case, as the following sections will analyse what is in the ILO’s current repertoire of labour standards and use Sen’s Capabilities Approach to extract a more meaningful understanding of freedom, rooted in empowerment. This more meaningful understanding of freedom should slowly begin to rectify the current deficit in labour standards between those in the formal and informal economy by placing human freedom at the centre of labour law. Furthermore, it will also be argued that although there appears to be a strong basis for these rights within the human rights tradition; reframing labour rights as human rights does not automatically increase their effectiveness in terms of enforcement. It does not prevent labour rights from becoming susceptible to

criticism already directed at human rights, but instead risks taking away the fundamental 'collective' identity of labour rights and further weakening it.

Chapters One, Two and Three have shown how the ILO's justifications and effectiveness depend on the justifications of labour law in general. This is why after taking stock of the ILO – its mandate, tripartite structure and labour standards – through a revised normative lens, Chapter Four will seek to recover sufficient evidence of a more functional/meaningful understanding and delivery of its goals already existence at the core of the organisation.

4.2. Sen's Capabilities Approach as A Conceptual Framework for Labour Law

The Capabilities Approach provides a 'conceptual framework for a range of normative exercises' and more simply can be viewed as a basic ideas measurement.¹ Robeyns makes the distinction between 'the capability approach and a capability account or theory', the latter referring to a general view which can be moulded to suit different disciplines and purposes.² While many capabilitarian theories of justice and accounts exist, here we will discuss the appeal of Sen's Capabilities Approach, the theory free approach open to application across all manner of fields.³ Considering labour law's 'anxieties' (as Langille puts it) or disagreements and confusion the entire quest for a

¹ Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law*. (Oxford University Press 2011) 101; Ingrid Robeyns, 'Sen's Capability Approach and Gender Inequality: Selecting Relevant Capabilities' (2003) 9 (2-3) *Feminist Economics* 61

² Ingrid Robeyns, 'Capabilitarianism' 17(3) *Journal of Human Development and Capabilities* 2016 397 414

³ Amartya Sen, *Inequality Re-examined* (Clarendon Press 1992) 48; Sabina Alkire, 'Why the Capability Approach?' *Journal of Human Development* (2005) 6(1) 115; Ingrid Robeyns, 'The Capability Approach: A theoretical survey' (2005) 6(1) *Journal of Human Development* 94; Amartya Sen, *The Idea of Justice* (Allen Lane 2009); Mozaffar Qizilbash, 'Amartya Sen's capability view: insightful sketch or distorted picture?', in Flavio Comim, Mozaffar Qizilbash and Sabina Alkire (eds) *The Capability Approach. Concepts, Measures and Applications* (Cambridge University Press 2008); Ingrid Robeyns, 'Capabilitarianism' 17(3) *Journal of Human Development and Capabilities* 2016 397

'theory of labour law' has had to deal with, it can be useful to look outside the discipline for an idea with practical application. This is because modern labour issues are infinitely more complicated and interrelated to different subjects.

Sen's approach focusses not on wealth as a measurement of well-being 'for it [wealth] is merely useful and for the sake of something else'.⁴ Therefore, the appeal of this approach is that Sen is concerned with 'true ends' versus 'means of achieving them'.⁵ Overall, Sen's Capabilities Approach is driven by a recognition of the differing abilities of individuals to achieve the life we value. It is not access to resources that matter or personal preference/satisfaction but the 'capability' of the individual to achieve what Sen calls 'functioning'; 'what she or he manages to do or be'.⁶ This is why 'capability' is defined as 'the combination of functionings the person can achieve, from which he or she can choose one collection'.⁷ There is intrinsic value in the exercise of this choice and it is not just an evaluation on means but what can be done with it. Sen discusses this within the field of human development field, but as Langille argues, for labour law it can have a different impact and implication.⁸

For example, as established in the previous chapters, the ILO's purpose/goal is much larger than just rectifying inequality of bargaining power. Its Preamble has goals surrounding justice, prosperity, development and peace.⁹ What the ILO would frame as a 'better world of work', Sen would place under the umbrella of 'human freedom' or 'the

⁴ Amartya Sen 'Development as Capability Expansion', in K. Griffin and J. Knight (eds), *Human Development and the International Development Strategy for the 1990s* (Macmillan 1990) 40 44

⁵ Amartya Sen, 'Human Capital and Human Capability' (1997) 25 *World Development* 1959; Amartya Sen, *Development as Freedom* (Knopf 1999) 292, 297

⁶ Sandrine Berges, 'Why The Capability Approach Is Justified' (2007) 24(1) *Journal Of Applied Philosophy* 16; Amartya Sen, *Commodities and Capabilities* (Elsevier Science Publishers 1985) 10

⁷ Amartya Sen 'Human Rights and Capabilities' (2005) 6(2) *Journal of Human Development* 151 153

⁸ Langille (n 1); Sen (n 5) 285

⁹ The Constitution of the International Labour Organisation (ILO), (adopted 1 April 1919, Part XIII of the Treaty of Versailles, 28 June 1919); Declaration of Philadelphia (Declaration concerning the aims and purposes of the International Labour Organisation) (adopted at the 26th session of the ILO, Philadelphia, 10 May 1944)

capacity to lead a life that we have reason to value'.¹⁰ Development would therefore be measured not in economic terms (productivity, efficiency and capital) but the 'removal of barriers to human freedom'.¹¹ The ILO alludes to this when it states economic goals and social justice goals being interlinked.¹² Economic goals are an end in themselves and not a means (as stated in the preamble).

There are many specific aspects of Capabilities Approach that should interest labour policymakers, examples of which being; the recognition of diversity in values and abilities of individuals, the disparities between groups, and finally, the significance of human agency and participation.¹³ Furthermore, characteristics, background, resources and the rights one can access, the structure and framework of society all may impact an individual's capabilities through either constraining or enhancing them. Through this lens, labour law's focus on merely remedying inequality of bargaining power between workers and employers would be insufficient.

There is a moral evaluation at the core of the Capabilities Approach that questions arrangements in labour law. Langille argues that a new normativity of labour law lies in the distinction between workers as objects and workers as subjects and idea that can be derived in principles of freedom of association and collective bargaining rights as fundamental status.¹⁴ The Capabilities Approach lends itself well to labour law as it is concerned with inequality, focussing on inequality of outcome and inequality of opportunity, the constraints on choice, control and substantive freedom rather than negative freedom and freedom from interference. Under the Capabilities Approach, we

¹⁰ International Labour Conference, (90th Session) Report VI: Decent work and the informal economy (ILO Geneva 2002) <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/---reloff/documents/meetingdocument/wcms_078849.pdf> accessed 14 June 2015

¹¹ Sen (n 5) 19

¹² The ILO's move towards the decent work agenda recognises this. ILO (90th Session) (n 10)

¹³ David A. Clark 'The Capabilities Approach: Its development, Critiques and Recent Advances' Global Poverty Research Group Working Paper Series No. 32/2005 5 <<http://www.gprg.org/pubs/workingpapers/pdfs/gprg-wps-032.pdf>> 4 January 2016

¹⁴ Langille (n 1) 111

can seek to expand narrow definitions and find strong justifications to the limitation of market power by labour law, arrive at a more significant understanding of empowering workers by first recognising not all workers are the same. The significance of this distinction will be elaborated upon in Chapter Five.

4.3. Using the ILO's Toolbox: The Case for Worker 'Empowerment' and 'Freedom'

After understanding the basic tenets of Sen's Capabilities Approach, the upcoming sections aim to provide an analysis of freedom of association and collective bargaining rights in its current context, critically examining its significance, success, and shortcomings. Here we will look to paint a picture of its history and current implementation and ultimately argue why these rights are crucial to addressing informality yet in their current state underwhelming in their performance.

Participation is a key aspect of the Capabilities Approach, but Sen also draws attention to the notion of adaptive preferences, arguing 'our mental reactions to what we actually get and what we can sensibly expect to get may frequently involve compromise with a harsh reality'.¹⁵ By applying this to freedom of association and the right to collective bargaining, a concept at the core of the ILO's mandate, embodied in the 1998 Declaration on Fundamental principles and Rights at Work and a significant aspect of the social dialogue pillar of the Decent Work Agenda, a great number of shortcomings come to light. The reason for this shortcoming is that, by Sen's standard, freedom of association would need not just be the freedom to join or form labour organisations but real access for all workers in organisations that value distinctions between workers

¹⁵ Sen 1985 (n 6) 21

where they can exercise their voice in a meaningful manner. Currently however, research and literature paints a bleak picture of the involvement of informal workers in workers organisations.¹⁶ The elevated status of freedom of association does not reflect the realities, where although the rights are considered universal and applicable regardless of worker category – a low numbers of workers in the informal economy exercise this right.¹⁷

We can look to Sen to find an answer as to why this may be. Sen argues that, when people are faced with harsh realities of poverty they compromise, ‘the vulnerable landless labourer precariously surviving at the edge of subsistence, the overworked domestic servant working round the clock...tend to come to terms with their respective predicaments.’¹⁸ Survival takes priority to such an extent they may not even be aware of the deprivation. Returning to the question of unions, joining a workers’ organisation is the furthest away from the mind of informal workers in this situation. This is why it is necessary to recognise the limitations of freedom of association and collective bargaining rights as they currently exist in the ILO’s toolbox.

4.3.1. Analysing the Significance Of ‘Freedom of Association’ And ‘Collective Bargaining’

¹⁶ Christine Bonner and Dave Spooner, ‘Organizing Labour in the Informal Economy: Institutional Forms of Organisation and Relationships’ (2011) 44(1) Labour Capital and Society 126; Christine Bonner and Dave Spooner ‘Organizing in the Informal Economy: A Challenge for Trade Unions’ (2011) 2 (11) International Politics and Society 87; Ilda Lindell, ‘Between Exit and Voice: Informality and the Spaces of Popular Agency’ (2010) 11 (2/3) African Studies Quarterly 1; Martha Chen, Chris Bonner and Francoise Carre, ‘Organizing Informal Workers: Benefits, Challenges and Successes’ (2015) UNDP Human Development Report Office Background Paper <http://hdr.undp.org/sites/default/files/chen_hdr_2015_final.pdf> accessed 4 April 2016

¹⁷ Chen and others (n 16) 5

¹⁸ Sen 1985 (n 6) 21 -22

There are two conventions that are deemed the 'cornerstone of the ILO tripartite structure' - the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).¹⁹ It is argued here that although 'the tripartite deliberations regarding labour standards setting/the entire organisation's mandate are able to exist', the rights guaranteed under Convention No. 87 and 98 are far more significant than the way they are currently being utilised. It is maintained throughout this thesis that the lack of empowerment of informal worker voices is at the centre of many of the issues with legitimacy of mandate and labour standard enforcement criticisms the ILO has faced in modern times.

The significance of these two conventions is that they do not work in isolation, their spirit found in ILO's principles and their scope elaborated in other standards, in comments of supervisory bodies and notes.²⁰ As was noted in 2009 by the ILO's Declaration on Social justice, these conventions enable conditions for the realisation of many other of the organisation's strategic objectives surrounding, employment, social protection, social dialogue and rights at work.²¹ The 2009 Global Job Pact further affirms these rights as enabling mechanism for productive social dialogue, promoting a range

¹⁹ From here onwards referred to as Convention No. 87 and 98; ILO Convention C098: Right to Organise and Collective Bargaining Convention (Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively) (32nd ILC Session Geneva 1 July 1949); ILO Convention C087: Freedom of Association and Protection of the Right to Organise Convention (Convention concerning Freedom of Association and Protection of the Right to Organise) (31st ILC Session Geneva 17 June 1948)

²⁰ A few other key conventions and recommendations are: ILO Convention C154: Collective Bargaining Convention (Convention concerning the Promotion of Collective Bargaining) (67th ILC Session Geneva 03 June 1981); ILO Recommendation R163: Collective Bargaining Recommendation (Recommendation concerning the Promotion of Collective Bargaining) (67th ILC Session Geneva 19 June 1981); ILO Recommendation R091: The Collective Agreements Recommendation (Recommendation concerning Collective Agreements) (34th ILC Session Geneva 29 June 1952); ILO Convention C135: The Workers' Representatives Convention (Convention concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking) (56th ILC Session 23 June Geneva 1971); ILO Recommendation R149: the Rural Workers' Organisations Recommendation (Recommendation concerning Organisations of Rural Workers and Their Role in Economic and Social Development) (60th ILC Session Geneva 23 June 1975)

²¹ ILO Declaration on Social Justice for a Fair Globalisation (adopted at the 97th session of the ILO, Geneva 10 June 2008)

of policy measure, and economic recovery.²² Most importantly, both these rights are enshrined in the ILO constitution, placing an obligation on states and the ILO to further these rights.²³ Article I (b) of the ILO constitution recognises freedom of expression and of association are essential to sustained progress. Article III (e) the effective recognition of the right of collective bargaining. Article I (d) equal status of all tripartite parties (workers, employers and government) and a place at the table 'free discussion and democratic decision with a view to the promotion of common welfare'. Joint decision-making process is the foundation of the ILO's structure and at the crux of the organisation's mandate.

Despite the rights under the two conventions being both universal and applying to all workers and employers equally, deemed 'fundamental' principles and elevated to this status by the 1998 Declaration, they are increasingly less effective in today's world. Furthermore, wherever they do remain functional, it is still to the benefit of formal workers as opposed to all workers as it claims.²⁴ With their success rate and purpose under attack, the nature of the organisation these rights are embodied under attack. Although, much criticism levied against these two conventions can be contested by statistics (i.e. that argument that freedom of association and collective bargaining rights impede economic efficiency targets); others do bear merit and must be addressed to make these rights, truly fundamental rather than flawed. This means reaching an understanding of what freedom means, the basis for these principles, what they should entail and how they should be eventually be realised in real world.

²² International Labour Conference, (98th Session) Recovering from the crisis: A Global Jobs Pact (ILO Geneva 19 June 2009)

²³ ILO Constitution (n 9); Article III(e) of the 1944 Declaration (Declaration of Philadelphia) (n 9); Article 2(a) of The ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up 1998 (adopted at the 86th session of the ILO, Geneva 10 June 1998)

²⁴ The 1998 Declaration (n 23) Article 2(a)

4.3.2. The Shortcomings of the ILO's Language of 'Fundamental Rights' & Effectiveness of Conventions No 87 & No 98

In their 2017 review of annual reports under the follow-up to the 1998, the ILO admits 'Conventions No. 87 and 98 remain the least ratified fundamental Conventions' with thirty-three member states yet to ratify Convention No. 87 and twenty two Convention No. 98.²⁵ It is relevant to note that all countries in Europe have ratified the conventions, which has a notably small informal economy compared to the world's other regions.²⁶ This is significant in terms of numbers, less than fifty percent of the world population is covered by conventions no. 87 and 98.²⁷ This considerable when compared to other fundamental principles such as discrimination and forced labour. The thirty-three countries that have not ratified the freedom of association convention including influential and populous states such as the USA, China and India. These figures factor into the concerns of unions across the globe indicating a lack of respect for workers' rights to organise.²⁸ The power of workers' organisations is declining locally and nationally, impacting their ability to advocate for their interests in the ILO.²⁹ This declining influence is illustrated by the 2012 Employers' group attack on the exercise of fundamental collective rights and their questioning of 50 years of ILO jurisprudence on the right to strike which according to trade unionists gives meaningful effect to these

²⁵ International Labour Conference, (106th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1A) (ILO Geneva June 2017 para 8-9.

²⁶ Para 8 *ibid*

²⁷ ILO Ratification figures for Convention No. 87 and 98 on the ILO Normalex. For more specific statistics see: ILO, 'Normalex: Information System on International Labour Standards available at: <<https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::targetText=Ratification%20comparative%20data&targetText=NORMLEX%20is%20a%20new%20information,labour%20and%20social%20security%20laws.>> accessed 30 July 2019

²⁸ International Trade Union Confederation (ITUC), *Countries at risk: Violations of Trade Union Rights* (ITUC 2013) 5

²⁹ The ITUC states '*Tripartite social dialogue advocated by the International Labour Organization (ILO) has so far only served as window dressing and there have been no real changes in law and policy*' ITUC (n 29) 15

rights.³⁰ Unions, as Lowell puts it, however, cannot place the blame for their decline solely on outside attacks from employers and the state and the consequences of globalisation.³¹ Understanding this concept is particularly important to the ILO, as it maintains that one of its missions to be strengthening the application of these two conventions in order to strengthen the tripartite structure.³²

Juan Somavia, former Director-General of the ILO, stated this role went beyond promotion of standard, supervision the application of standards in practice and compliance.³³ The ILO's success is based on the supervisory mechanism 'anchored in an institutional philosophy based on persuasion rather than repression'.³⁴ Regardless of this claim, freedom of association and collective bargaining rights are prefaced with this – 'measures appropriate to the national conditions shall be taken into consideration' and rather than enforcement it is 'encourage and promote the full development and utilisation of machinery for voluntary negotiation'.³⁵ The reality reflects these limitations and the success of the supervisory structure can be critiqued. On paper, it is celebrated as 'a system in which the action of the technical bodies, whose members are selected in view of their independence and expertise, is balanced by the activities of representative bodies grouping together delegates of governments, workers and employers'.³⁶

³⁰ Stephanie Luce *Labor Movements: Global Perspectives* (Polity 2014) 7; See also International Trade Union Confederation (ITUC) *The Right To Strike and the ILO: The Legal Foundations* (ITUC 2014) 14; Janice R. Bellace, 'The ILO and the Right to Strike' (2014) 153 (3) *Int'l Labour Review* 29; Tonia Novitz, 'Workers' Freedom of Association', in James Gross and Lance Compa (eds), *Human Rights in Labor and Employment Relations: International and Domestic Perspectives* (Labor and Employment Association 2009) 125-8

³¹ Luce (n 30)100

³² International Labour Conference, (102nd Session) Report of the Director-General 1(A): Towards the ILO Centenary: Realities, renewal and tripartite commitment (ILO Geneva 2013) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_213836.pdf> accessed 14 March 2015

³³ Introduction by Juan Somavia, International Labour Conference, (87th Session) Report of the Director-General: Decent Work: Report of Director-General (ILO Geneva June 1999) <<https://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm>> accessed 12 June 2015

³⁴ Eric Gravel, Isabelle Duplessis and Bernard Gernigon, *The Committee of Freedom of Association: Its Impact over 50 Years* (ILO 2002) 68

³⁵ ILO Convention C098: Right to Organise and Collective Bargaining Convention (Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively) (32nd ILC Session Geneva 1 July 1949) Article 4

³⁶ Gravel, Duplessis and Gernigon(n 34) 77

Freedom of association is defined by Committee of Experts on the Application of Conventions and Recommendation ((CEACR), the ILO's legal experts who review complaints and infringements for countries that have ratified the relevant conventions. For those who have not ratified the relevant conventions, the fundamental status of Convention No. 98 and 87 means the Committee on Freedom of Association (working with the Committee of Experts) come into action. This body has been made quasi-judicial and has the ability to make their conclusions binding.³⁷

The Committee on Freedom of Association (CFA)'s role is to examine alleged infringements of the principles of freedom of association and the effective recognition of the right to collective bargaining enshrined in the ILO constitution. In these cases, however, the Committee's task is to be objective and call for constructive tripartite dialogue and cooperation rather than 'blame or punish'.³⁸ This limitation of the Committee's powers is an extension of the issues raised in earlier chapters with regards to the overall concerns of the ILO's capacity for labour standard enforcement. However, the problem noted here is the number of cases where informal workers are involved. The complaints logged from Africa and Asia are three times less than the ones from Latin America.³⁹ These two regions have the large informal economy and it stands to reason that the lack of complaints here does not imply better protected freedom of association and collective bargaining rights but the opposite; not enough workers with the capacity to exercise these rights.

The Committee on Freedom of Association states '[b]y virtue of the principles of freedom of association, all workers – with the sole exception of members of the armed forces and the police – should have the right to establish and to join organizations of

³⁷ Ibid

³⁸ ILO, *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association* (6th edn, ILO 2018) para 3

³⁹ Appendix I of Gravel, Duplessis and Gernigon (n 34) 71 see Complaints examined by the Committee on Freedom of Association(1951-2001)

their own choosing. The criterion for determining the persons covered by that right, therefore, 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'.⁴⁰ ILO states these rights extend to informal workers who also have 'the right to represent their members in tripartite bodies and social dialogue structures'.⁴¹ Yet the statistics on complaints and the enforcement of convention no 87 and 98 are low even without considering the largely silent informal workers voices.

The ILO recognises that 'without organization and representation, those in the informal economy generally do not have access to a range of other rights at work' and without them they are not able to 'pursue their employment interests through collective bargaining or to lobby policy-makers on issues such as access to infrastructure, property rights, taxation and social security'.⁴² Furthermore, it is 'women and youth, who make up the bulk of workers in the informal economy, are especially without representation and voice'.⁴³ Unfortunately despite this, a 2009 observation by the Committee of Experts shows that informal workers still struggle to exercise these rights focussing on complaints from the formal sector.⁴⁴ More recently, the Committee of Experts (CEACR) confirmed this issue, by highlighting only one country.⁴⁵

⁴⁰ Peru (Case No 2687) Report of the Committee on Freedom of Association No 357 para. 891 ; ILO, *Extending the scope of application of labour laws to the informal economy: Digest of comments of the ILO's supervisory bodies related to the informal economy* (ILO 2010) 1

⁴¹ International Labour Conference, (103rd session) Report V(1): Transitioning from the informal to the formal economy (ILO Geneva 2014) Para 46

⁴² International Labour Conference, (90th session) 'Resolution concerning decent work and the informal economy' (ILO Geneva 2002) Para 17
<<http://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/pr-25res.pdf>> accessed 30 June 2015

⁴³ Ibid

⁴⁴ For more specific statistics see: ILO, 'Normalex: Information System on International Labour Standards' available at: <<https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::targetText=Ratification%20comparative%20data&targetText=NORMLEX%20is%20a%20new%20information,labour%20and%20social%20security%20laws>> accessed 30 July 2019

⁴⁵ Comments regarding Nepal p. 109 of International Labour Conference, (108th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1A) (ILO Geneva June 2019) <

According to the 2019 International Trade Union Confederation (ITUC) Global Rights Index, the targeting of unions and interference with workers right to organise has increased.⁴⁶ The ITUC reports 85 percent of countries are in violation of the right to strike, 80 percent are in violation of the right to collective bargaining and 59 percent responsible for preventing new unions from registration.⁴⁷ There has also been an increase in the number of countries which exclude the right to establish or join a trade union, 'from 92 in 2018 to 107 in 2019'.⁴⁸ These attacks on labour rights showcases the need for a stronger justification and enforcement mechanisms to protect them.

It is therefore unsurprising that trade unions often choose to see the benefit of treating labour rights as human rights, seeking their protection from the fickle 'winds of political appeal and popular support', arguing that this reframing can 'elevate their moral appeal'.⁴⁹ There is potential access to the human rights instruments and the role of the courts in protecting human rights can be more satisfying than a strongly worded report from the CFA or CEACR.⁵⁰ Then there is the faith that they can strengthen each other thanks to the significant place which human rights holds in the cultural narrative of 'fundamental rights' and public consciousness. A place that appears, at least on the surface, higher than that of labour rights.

4.4. Finding a Stronger Foundation for 'Enabling Rights'.

https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_151556.pdf > accessed 21 October 2019

⁴⁶ International Trade Union Confederation, *Report - ITUC Global Rights Index* (ITUC 2019) <https://www.ituc-csi.org/IMG/pdf/2019-06-ituc-global-rights-index-2019-report-en-2.pdf> <accessed 12 June 2019>

⁴⁷ ITUC 2019 Report (n 47) 4-5

⁴⁸ Ibid

⁴⁹ Judy Fudge, 'Labour rights as Human rights: Turning Slogans into Legal Claims' (2014) 37(2) The Dalhousie Law Journal 609

⁵⁰ Ibid

This section introduces the arguments employed in favour of placing labour rights within the scope of human rights narrative. Whilst the previous chapter examined the importance of finding a clear and strong normative foundation for labour law in the face of its modern challenges and challengers, here we will examine the appeal of seeking this justification outside of its traditional scope. One of the more prevalent arguments is to obtain a ‘rights-based’ justification for labour law. This argument, made by writers such as Mantouvalou, Alston and Fudge, seeks to reframe labour rights as human rights in a bid to strengthen it against the normative uncertainties and hopefully address the enforcement issues of ‘fundamental rights’ outlined in the previous section.⁵¹ However, it is will argued here that this move could risk individualising the struggle at work, a struggle built on solidarity, and without focussing on this core identity of labour rights (collectiveness) efforts to organise workers will be further impeded.⁵² A new human rights identity, where labour rights are a subset of human rights, opens it up to a series of further criticisms that human rights face.⁵³

However, before reaching this conclusion, we must look at the appeal of a labour law rooted in a framework of fundamental rights and ask why workers would not choose the universalism of human rights over the ‘merely class-based and parochial’ approach rooted in contracts and economics for better protection.⁵⁴

4.4.1. The Appeal of Rights Based Narratives of Labour Law

⁵¹ Ibid; Philip Alston (ed), *Labour Rights as Human Rights* (Oxford University Press 2005); Philip Alston, ‘Core Labour Standards and the Transformation of the International Labour Rights Regime’ (2004) 15 Eur. J. Int L. 483; Virginia Mantouvalou, ‘Are Labour Rights Human Rights?’ (2012) 3(2) European Labour Law Journal 151

⁵² Jay Youngdahl, ‘SOLIDARITY FIRST Labor Rights Are Not the Same as Human Rights’ in Jay Youngdahl and Lance A. Compa ‘Should Labor Defend Worker Rights as Human Rights? A Debate’ (2009) 18 (1) New Labor Forum 38

⁵³ Marie-Benedicte Dembour, ‘What are Human Rights – Four Schools of Thought’ (2010) 32 (1) Hum. Rts. Q. 1

⁵⁴ Harry Arthurs ‘Labour Law after Labour’ Brian Langille, ‘Labour Law’s Theory of Justice’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law*. (Oxford University Press 2011) 23

Those arguing for a rights based narrative for labour law reason labour law and human rights law are related through intellectual and ideological origins.⁵⁵ The emergence of this narrative in the international law and ILO jurisprudence can be traced back to the creation of constitution and the maxim 'labour is not a commodity'. The language of the maxim is as politicised and evokes the spirit of an inalienable truth similar to human rights language would go on to do.⁵⁶ The vision of the Universal Declaration of Human Rights when adopted in 1948 speaks in similar terms as the Declaration of Philadelphia, referring to terms such as 'dignity' and 'decency' and 'justice'.⁵⁷ There are original differences however; 'whereas human rights experts spoke of the rights of individual people everywhere, the ILO spoke of the duties of states' and while 'the human rights community spoke of abuses of individual human rights, the ILO spoke of failures to adhere to international standards'.⁵⁸ As mentioned throughout, this difference is significant enough to draw criticism of the normative weakness of labour law, in its language, justifications and commitment⁵⁹

These writers maintain that by creating a bond between rights-seekers, both disciplines can be strengthened, especially labour law since the place human rights holds in the cultural narrative of 'fundamental rights' is stronger than labour's.⁶⁰ Using Dworkin's language of 'rights as trumps' can be a powerful tool, the moral component making them far less assailable than other principles or laws and need less work to justify their protection.⁶¹ Adams argues 'equity is not solely about economics; it is more inclusively about dignity and the worth of the person' and therefore 'as a human right,

⁵⁵ Alston, Mantouvalou (n 51)

⁵⁶ When one compares the language used in the ILO constitution and 1944 Declaration to Human Rights documents such as the Universal Declaration of Human Rights.

⁵⁷ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR)

⁵⁸ Roy Adams 'From statutory right to human right: the evolution and current status of collective bargaining' (2008) 12 *Just Labour: A Canadian Journal of Work and Society* 48 50

⁵⁹ Alan Hyde, 'The idea of the Idea of Labour Law: A parable' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law*. (Oxford University Press 2011)

⁶⁰ Alston and Mantouvalou (n 51)

⁶¹ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977)

collective bargaining is also about not only economics but also dignity'.⁶² This is at the crux of labour law and the ILO. The ILO is 'the only international organization to maintain the concept of development which is not based on its purely economic content, but is also, more particularly founded on human and social factors irrespective of the level of development of the country or its system of social organization'.⁶³

Historically, there is further evidence of labour rights being framed as human rights, specifically with the right to freedom of association, organising and collective bargaining rights which are the focus here.⁶⁴ The conceptual relationship between labour rights and human rights is evident when examining how civil and political rights protect individual rights, which in turn imposes responsibility at a state level.⁶⁵ Human rights treaties such as the International Convention on Economic Social and Cultural Rights and Universal Declaration of Human Rights provide further evidence of labour rights being essentially human rights at their core.⁶⁶ Additionally, Article 20 (1) of the Universal Declaration of Human Rights states 'Everyone has the right to freedom of peaceful assembly and association'.⁶⁷

The ILO's 1998 Declaration on Fundamental Principles and Rights at Work is the most significant example of the attempt to promote certain labour rights as human rights – a move to enshrine certain standards as being fundamental and universal.⁶⁸ Fudge points out that the ILO has already committed to the language of fundamental rights.⁶⁹

⁶² Adams (n 58) 51

⁶³ Gravel Duplessis and Gernigon (n 34) 67

⁶⁴ Virginia Leary, 'The paradox of Workers' Rights as Human Rights' in Lance Compa and Stephen F. Diamond (eds) *Human Rights, Labour Rights and International Trade* (University of Pennsylvania Press 2003); James A. Gross, *Workers rights and Human rights* (Cornell University Press 2003); Adams (n 58); Gerry Rodgers, Lee Swepston, Eddy Lee and Jasmien van Daele, *The International Labour Organization and the quest for social justice, 1919-2009* (ILO 2009);

⁶⁵ Judy Fudge, 'The New Discourse of Labour Rights: From Social to Fundamental Rights?' (2007) 29 (1) *Comp Lab L & Pol'y J* 29

⁶⁶ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNGA Res 2200A (XXI)

⁶⁷ *Ibid*

⁶⁸ The 1998 Declaration (n 23)

⁶⁹ Fudge (n 65)

This alignment can be seen as a move to strengthen labour rights. Yet those in favour of a rights based justification of labour rights such as Alston, criticised the organisation for not going far enough to in actuality make these rights fundamental and universal as human rights.⁷⁰ Furthermore, the selection of rights were considered divisive and without clear justification as why the four chosen standards are considered fundamental when compared to others.⁷¹

4.4.2. Labour Rights as Human Rights: An Uneasy Relationship?

The previous sections focussed on whether labour rights should be human rights. It can be argued that such a question of 'should' is probably more valuable than focussing on if they already 'are'. However, for the question of 'are labour rights human rights' Mantouvalou has outlined three approaches. She begins with a positivist approach where the answer can be found by empirical means – a straightforward examination of the number of labour rights existing in human rights documents. The second approach, the instrumental approach, focusses on the role the rights play in reality, in other words; are labour rights promoted as human rights successful and not just named as such. Finally, the third and final approach (the most significant and overlooked approach according to Mantouvalou) – is the normative approach, which investigates what a human right is, in order to understand if labour rights share any of the same characteristics on a normative level. Nevertheless, it is crucial to mention that, even if each approach ends with a 'yes', it does not make the issue beyond reproach. In fact it

⁷⁰ Philip Alston, Facing Up to the Complexities of the ILO's Core Labour Standards Agenda (2005) 16(3) European Journal of International Law 467

⁷¹Ibid; Lance Compa 'Core labour rights: promise and peril' (2002) 9(3) International Union Rights 20

will be argued here that the same pitfalls as labour law remain, plus fresh ones associated with the enforcement of human rights.

4.4.3. Positivist Approach

To begin with, as the simplest approach, the positivist one is limited. It cannot justify the reasoning behind elevating some labour rights as human rights and therefore, rather than strengthening labour rights, it attracts similar criticisms as the 1998 Declaration did. Without a normative justification, elevating certain labour rights mentioned in human rights documents as being more ‘fundamental’ by virtue of being human rights poses another challenge – should others then be considered less significant or simply aspirational in their nature?⁷² While the 1998 Declaration has claimed universality of certain rights, evoking this significant human right characteristic, the form, content and application of the document has been criticised for its symbolic and less substantial nature when compared to human rights documents.⁷³

4.4.4. The Instrumental Approach

The instrumental approach states labour rights are human rights if they are successfully promoted as such by the institutions responsible. Based on the Marxist tradition, the role and function of laws are more significant than what is stated in legal documents.⁷⁴ If we wish to promote labour rights as human rights, then it should be because there is a value

⁷² Mantouvalou (n 51) 4

⁷³ Philip Alston and James Heenan, ‘Shrinking The International Labor Code: An Unintended Consequence Of The 1998 ILO Declaration on Fundamental Principles And Rights At Work’ (2004) 36 New York University Journal Of International Law and Politics

⁷⁴ Andrew Vincent, ‘Marx and Law’ (1993) 20(4) Journal of Law and Society 371

in using the enforcement tools and respect the human rights system has over the current ILO mechanisms (as discussed in Chapter One).⁷⁵ This however, raises the question of how much more successful will this approach be in actuality and whether human rights law mechanisms are really more capable than the labour law ones.

The instrumental approach looks to the role of courts and civil society to determine the answer to whether labour rights are human rights. However, even a brief examination at how domestic courts may rule when faced with the choice between individual rights and collective rights such as those under Convention No. 87 on Collective Bargaining shows a reluctance for courts to embrace convention rights.

For example, the United Kingdom's contentious Trade Union Act 2016 has raised balloting thresholds considerably and created a system of where members would have to contract in, yet Ewing and Hendy are sceptical of a successful human rights challenge in the courts, writing;

'Since aspects of the TUA 2016 engage ECHR rights, our secondary aim is to consider briefly some factors that may be relevant to the possibility of a successful human rights challenge in the courts. There are two reasons why such a challenge seems unlikely, the first being the political concessions made pre-enactment which have taken out those substantive provisions most susceptible to such a challenge. The second reason is that the domestic courts have been reluctant to embrace Convention rights in the field of employment law, whilst the Strasbourg Court has been notably sympathetic to the British government in Article 11 cases, dismissing applications on grounds of admissibility and carving out a special British position on freedom of association, creating an apparent but undeclared immunity applicable only to the UK'.⁷⁶

Furthermore, there is an inconsistency in courts attitudes and approaches to whether to treat labour rights as human rights.⁷⁷ This raises a question as to why it is

⁷⁵ Colin Fenwick and Tonia Novitz, *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010) 587

⁷⁶ See Keith Ewing and John Hendy 'The Trade Union Act 2016 and the Failure of Human Rights' (2016) 45(3) *Industrial Law Journal* 391 393; Ewing used to be more sceptical about treating labour rights as human rights see Tom Campbell, Keith Ewing and Adam Tomkins, *Sceptical Essays on Human Rights* (Oxford University Press 2001) 103

⁷⁷ Keith Ewing 'Human Rights Act and Labour Law' (1998) 27(4) *Industrial Law Journal* 275; Virginia Mantouvalou, 'Is There a Human Right Not to Be a Trade Union Member? Labour Rights under the European Convention on Human Rights' LSE Law, Society and Economy Working Papers 08/2007

that human rights route is needed when there is a system in place that should allow enforcement of labour rights as labour rights (if made more effective.).⁷⁸

Mantouvalou maintains we must not abandon viewing labour rights as human rights by fixating on the differences or expounding them. Under the instrumental approach, the answer to 'are labour rights human rights' changes based on the usefulness of the approach and Mantouvalou argues if courts or institutions do not see labour rights and human rights, this would change if at a normative level it is proven they are.⁷⁹

4.4.5. The Normative Approach

The final approach, the normative one, is about identifying moral truths of labour rights and comparing them to human rights. The problem is that the characteristics of the two are not always the same. The characteristics of human rights are defined by; their universality (whereas labour rights are not linked specifically to the worker); their inalienability (again, most labour rights are dependent on circumstance of employment); and their indivisibility (most labour rights are not, for example the right to paid vacation or maternity leave).⁸⁰

Despite these differences, Mantouvalou maintains certain labour rights can be human rights and be seen as preventing moral wrongs; they are universal and not just for workers or dependent on status, nor are they dependent on geographical location

<http://www.lse.ac.uk/law/working-paper-series/2007-08/WPS08-2007Mantouvalou.pdf> Accessed 20 July 2018

⁷⁸ ACL Davies, *Perspectives on Labour Law* (2nd edn, Cambridge University Press 2009) 38.

⁷⁹ Mantouvalou (n 51)

⁸⁰ Mantouvalou (n 51) 18

anymore.⁸¹ According to the ILO, freedom of association and the right to collective bargaining are such fundamental rights. Furthermore, these labour laws are considered 'stringent normative standards towards which society out to strive' and it does not matter if society fails to achieve – right continues to exist.⁸² According to the ILO, freedom of association and the right to collective bargaining are such rights – their promotion and enforcement not tied to a states' ratification of the related conventions.⁸³ These rights do not depend on the resources of a member state and are viewed as moral truths in the way human rights are. Furthermore, they satisfy the criteria for other perspectives; from an instrumental perspective, they are often treated and promoted as human rights and from a positivist perspective, they are contained in human rights documents.⁸⁴ However, because Mantouvalou has argued that it is through this normative examination that one can determine which labour rights are human rights and which are not.⁸⁵ This criteria raises the question of whether the status and nature of labour rights have in fact changed or whether it is the conditions of work and our understanding of the employment relationship which have changed.

It is important to note that Mantouvalou defines labour rights as essentially being 'entitlements that relate specifically to the role of being a worker', they are individual or collective in their nature.⁸⁶ By virtue of their nature and despite similarities they are essentially different – in foundation and principles.⁸⁷ The justifications of labour rights are based on the unequal nature of the relationship between worker and employer and the morality is tied to this.⁸⁸ This is how the ILO promotes labour standards, choosing to use the terminology of 'standards' and not rights, despite flirtations with the idea of

⁸¹ Ibid

⁸² Mantouvalou (n 51) 20

⁸³ The 1998 Declaration and its Follow Up elevated these rights to fundamental rights.

⁸⁴ See the Universal Declaration of Human Rights

⁸⁵ Mantouvalou (n 51) 24

⁸⁶ Ibid 2

⁸⁷ ACL Davies, *Perspectives on Labour Law* (2nd edn, Cambridge University Press 2009); Hugh Collins, 'Theories of Rights as Justification for Labour Law' Guy Davidov and Brian Langille (eds), *The Idea of Labour Law*. (Oxford University Press 2011)

⁸⁸ 'Labour is not a commodity' – The Declaration of Philadelphia

promoting labour rights as human rights.⁸⁹ If the ILO cannot go far enough in their commitments to the normative values of labour rights there is no reason to believe linking it to human rights would have a greater impact.⁹⁰

4.5.6. When Labour Rights Are Not Human Rights

It is important to recall that the ILO's constitution came into existence before the Universal Declaration for human rights.⁹¹ It is therefore understandable why there appears a connection between labour rights and human rights.

Collins argues this connection is the reason for so many labour rights being written into the Universal Declaration of Human Rights. However, this does not explain why there is such a cry to treat labour rights as human rights. For this explanation, Collins states; 'the inclusion of labour rights in political proclamations of universal human rights....as a method for addressing problems arising from globalization of the economic system' and 'not a coherent articulation of any philosophical doctrine....with a suitably strong moral imperative force'.⁹² He therefore reasons labour rights only share the characteristics of human rights when we ascribe them. The characteristics of human rights which are universal, imperatives with special moral weight are not a consistent fit to labour rights.⁹³ To make this argument, Collins points to the issue of comparing rights such as the right to a paid period of rest to the right to not be tortured.⁹⁴ These differences

⁸⁹ Philip Alston, 'Core Labour Standards and the Transformation of the International Labour Rights Regime' (2004) 15 Eur. J. Int L. 483; Philip Alston and James Heenan, 'Shrinking The International Labor Code: An Unintended Consequence Of The 1998 ILO Declaration on Fundamental Principles And Rights At Work' (2004) 36 New York University Journal Of International Law and Politics

⁹⁰ Alston's critique of the 1998 Declaration is point – he argues the ILO should have gone further in making that link. See *ibid*

⁹¹ Mathias Risse, 'A Right to Work? A Right to Leisure? Labor Rights as Human Rights' (2009) 3(1) Law & Ethics of Human Rights 1, 8

⁹² Collins (n 87) 154

⁹³ *Ibid* 140

⁹⁴ *Ibid*

is why, although closely linked, the human rights idea is not without its own shortcomings will not provide labour rights with the foundation it needs.

The truth of matter is that human rights mechanisms are not always as successful or able to escape similar critique as international labour law. Critics such as Posner argue that human rights are vague, aspirational and individualistic and their promotion internationally dependent on a 'coincidence of interest' of nations either coerced or opportunistic.⁹⁵ This is not too dissimilar to the critical assessment regarding the enforcement of international labour law discussed in Chapter One. Krasner takes a similar view regarding the commitment to human rights by states, pointing out the particular issue of stronger states having more choice in their promotion of human rights.⁹⁶

Hopgood has been even more critical, arguing that human rights operate as an 'ideological alibi to a global system whose governance structures sustain persistent unfairness and blatant injustice'.⁹⁷ Others similarly argue about the ineffectualness of human rights, the need for a new vision and engagement from the grassroots and a disillusionment with the institutions and instruments.⁹⁸

4.5.7. The Significance of Solidarity Rights

The benefits of seeing labour rights as human rights are that, if the courts do not do their job, the law should change to comply. The idea is that efficiency arguments against

⁹⁵ Jack L. Goldsmith and Eric A. Posner *Limitations of International Law* (Oxford University Press 2005) 34; Eric A. Posner, *The twilight of human rights law* (Oxford University Press)

⁹⁶ Stephen D Krasner 'Sovereignty, Regimes, and Human Rights' In Volker Rittberger and Peter Mayer (eds) *Regime Theory and International Relations* (Clarendon Press 1995) 140

⁹⁷ Stephen Hopgood, *The Endtimes of Human rights* (Cornell University Press 2015) 2

⁹⁸ See also Samuel Moyn, *The Last Utopia* (Harvard University Press 2010) 213; Samuel Moyn *Not Enough: Human Rights in an Unequal World* (Belknap Press 2018)

labour law can be stifled by the 'rights trumps efficiency goals' arguments at the core of the labour.⁹⁹ For example, under human rights, migrant workers are protected because their rights are not dependent on citizenship.¹⁰⁰ Furthermore, there is a clear answer to the 'waiver of rights question' that has always impacted labour law due to the concept of freedom of contract because if labour rights are human rights then we will scrutinise any contract tried to exclude them or waive them.¹⁰¹

As Compa argues, it is recognised here that the role of labour rights as human rights can be achieved if there was a change in culture for both labour law and human rights.¹⁰² However, the debate surrounding the treatment of labour rights as human rights is significant but ultimately distracting for the time being.¹⁰³ This is an issue for those critical of the viewing labour rights as human rights.

Leary is critical of the international human rights movement and arguing that where labour rights are to be considered the same as human rights, it is clear that within the human rights sphere, these workers' rights are paid less attention to when held up against other rights.¹⁰⁴ The concern of a hierarchy of rights is a prominent criticism of labour law and human rights law and particularly worries many labour lawyers.¹⁰⁵ This concern began with the division of civil and political rights from socio economic rights with the adoption of the Universal Declaration of Human Rights and intensified in 1998

⁹⁹ Donald H. Regan 'Glosses on Dworkin: Rights, Principles, and Policies' (1978) 76(1) Michigan Law Review 1213

¹⁰⁰ Virginia Mantouvalou, 'Workers without rights as citizens at the margins' (2013) 16(7) Critical Review of International Social and Political Philosophy 366

¹⁰¹ G S. Morris, 'Fundamental Rights: Exclusion by Agreement' (2001) 30(1) Industrial Law Journal 49; Paul Davies and Mark Freedland, *Kahn Freund's Labour* (3rd edn Stevens 1983) 18

¹⁰² Lance Compa, 'Solidarity rights AND Human Rights' in Jay Youngdahl and Lance A. Compa 'Should Labor Defend Worker Rights as Human Rights? A Debate' (2009) 18 (1) New Labor Forum 38

¹⁰³ Ibid.

¹⁰⁴ Virginia Leary, 'The paradox of Workers' Rights as Human Rights' in Lance Compa and Stephen F. Diamond (eds) *Human Rights, Labour Rights and International Trade* (University of Pennsylvania Press 2003) 22

¹⁰⁵ Ewing (n 77)

with the selection of core labour standards by the ILO for its 1998 Declaration on the fundamental principles and rights at work.¹⁰⁶

Another concern is that by moving labour rights under the realm of human rights, labour law risks a loss of identity for an untried and untested alliance where priorities may differ.¹⁰⁷ Having the numbers does not translate in effective actions. For example, despite being an increase in the global workforce and the need for decent work, the labour movement is remains fragmented due to the unintended consequence of globalisation – the perception of conflicting interests and competition between workers for work.¹⁰⁸ These differences in interests will be expounded under the human rights system.

Kolben sees the labour rights movement and human rights movement as being cooperative but conceptually different with human rights 'legalism and elitism' and 'individualist and philanthropic frame' when it comes to workers' rights so cannot use them to advance the cause completely.¹⁰⁹ Failure to treat labour rights as human rights has shown this selectiveness and it is agreed here while human rights and labour rights can be cooperative and further mutual goals, cooperation should not be assumed. If we apply this to the ILO, it is these type of assumptions regarding significance of different interests that has led the ILO to treat formal and informal workers as monolith and place them under one umbrella when promoting labour standards. In addition to downplaying places of divergence, the assumption of a shared goal fails to take into consideration if different groups are able to envision this common ground in the first place.

Going even further, Savage argues that the 'labour rights as human rights approach threatens to undermine class-based responses to the neoliberal globalization

¹⁰⁶ See the works of Philip Alston for more critique on the 1998 Declaration.

¹⁰⁷ Youngdahl (n 52) for this critique

¹⁰⁸ See Chapter One and Chapter Five for more on this decline.

¹⁰⁹ Kevin Kolben, 'Labour rights as human rights?' (2010) 50 *Virginia Journal of International Law* 449 P468; hw arthurs the constitutionalization of labour rights.

by contributing to the depoliticization of the labour movement' and it also 'ignore the material dimension of collective worker action and the central role of economic conflict in the employment relation'.¹¹⁰ While this thesis considers this position to some degree an overstatement, it shares the concern that the depoliticisation of labour has weakened labour law. Savage however also argues a viewpoint considered mistaken. He states that non-union organisation are a threat to labour movement as they 'lack in statutory strength of labour unions' or more cynically, are a ploy by employers trying to stop organising in unions¹¹¹

This argument wrongly places all non-union activities and attempts at organising as being rooted in bad faith, discounting the fact that the traditional form and concept of trade unionism owes its history to a in a western industrial model missing from countries in the Global South. Moreover, it does not take into consideration the fact that trade unions themselves can act in bad faith – taking an adversarial view to informal workers and the existence of alternative source of labour for employers.¹¹²

Savage's view almost frames the idea of labour rights falling under the human rights as betraying the romantic notion of a unified labour movement earning their rights. This fails to take into consideration the fractured nature of workers due to the impacts of globalisation and the difficulty of a fostering the political will and public support for such movements.¹¹³ Savage is also suspicious of extending right to collective bargaining via common law (courts non-statutory schemes) instead of organising workers.¹¹⁴ This concern is more appropriate, as it will be shown in the upcoming chapter, states track record for enforcing labour rights such the right to freedom of association and collective

¹¹⁰ Kolben (n 109) 68; Larry Savage, 'Labour Rights as Human Rights? A response to Roy Adams' (2008) 12 *Just Labour: A Canadian Journal of Work and Society* 68

¹¹¹ *Ibid* 69

¹¹² Naila Kabeer, Ratna Sudarshan and Kirsty Milward, (eds), *Organizing Women Workers in the Informal Economy: Beyond the Weapons of the Weak* (Zed Books, 2013)

¹¹³ Stephanie Luce *Labor Movements: Global Perspectives* (Polity 2014)

¹¹⁴ Savage (n 110) 74

bargaining is not effective.¹¹⁵ Furthermore, writers such as Youngdahl are correct to fear that framing labour rights as human rights can impede the significance of solidarity and trade unionism, it is important recognise the traditional features of labour movements are on a decline without this connection.¹¹⁶ However, once again, informal workers are not represented as they should be and, as the next chapter will show, and not privy to the solidarity of formal workers.¹¹⁷

In theory 'rights of citizenship do 'provide access to socio economic rights for a wider group of persons than do social security benefits that are contingent upon the scope of a worker/employee under the labour law'.¹¹⁸ It universalises it but also delinks it from labour. However, rights from labour law enjoy greater legitimacy than general socio-economic rights in terms of enforcement history.¹¹⁹ The recognition of these two tenets of democracy and an essential means to empower workers in employment relations.¹²⁰

The debate regarding the treatment of labour rights as human rights can ultimately be reduced to one crucial question: where are the workers' efforts best used in the political struggle or the legal realm? Writers such as Savage would argue the benefits of staying out of courts where the definition is narrower, and would advocate for labour to stay in the political institution.¹²¹ This pessimism is hard to disagree with given the statistics on the domestic enforcement of labour rights and the international record

¹¹⁵ See Chapter One for general discussion on the ILO's enforcement problems

¹¹⁶ Chapter Five for more; Youngdahl (n 52) 31-32

¹¹⁷ Luce (n 113)

¹¹⁸ Kamala Sankaran, 'Informal Employment and the Challenges for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law*. (Oxford University Press 2011)

¹¹⁹ Ibid

¹²⁰ Susan Hayter (ed) *the role of collective bargaining in the global economy: negotiating for social justice* (ILO 2011)

¹²¹ Lee SWEPSTON 'Human rights law and freedom of association: Development through ILO supervision' (1998) 137(2) *International Labour Review* 169

of the ILO's committee on freedom of association and other legal avenues on matters concerning the infringement of labour rights of those in the informal economy.¹²²

In conclusion, shedding the skin of labour law's traditional identity so completely, risks shedding the narrative of collective rights and solidarity associated with labour.¹²³ This traditional idea, although flawed and attempts to treat workers as monolith in a world where worker identities have become complex and labour movements in the traditional sense under attack, is a significant one that can be revived through the kind of normative recalibration we discussed in this chapter and the last.

The only way to reconcile the concept of freedom of association and collective bargaining rights in the modern context is to look to the significant role they play in the ILO's structure. By building on from the idea of freedom as understood by Sen and Langille, we can provide the envied normative weight of human rights to these two fundamental standards, without compromising on identity and ensure they have the practical means to reach the places they are currently most needed – in informal economy. This then should feed back in the form of offering legitimacy the ILO, in terms of its mandate and representation.

4.6. Concerns to Applying the Capabilities Approach to Labour Law

While this research sees great value in Sen's Capabilities Approach, it does acknowledge the limitations of the approach and so chooses to use it as a jump-off point for a more directed discussion regarding agency and the 'relevance of both substantive

¹²² This identity however must be expanded to make room for new, diverse and marginalised groups of workers

¹²³ Youngdahl (n 52)

opportunities and freedom of processes'.¹²⁴ It is argued often that Sen's Approach is devoid of the politicism necessary for labour law as well as the focus on collectivism. One such critique is by Fraser whose evaluation of the Capabilities Approach is that, in focussing on individual freedoms and choice, Sen overlooks the importance of collectives in labour.¹²⁵ This criticism is similar to the one levied against human rights earlier in this chapter, which raises the question: why is Sen's Approach more appropriate? The answer for this difference in treatment is that it is maintained Sen's Approach is more appropriate a lens to examine the ILO's method and the organisation's tripartite deliberations should be where a specified list of 'capabilities' emerges.¹²⁶ Instead of stumbling in the dark trying to find the 'royal road to evaluation of economic or social policies', Sen's tool provides a diagnostic approach the ILO can use to return legitimacy to its operations.¹²⁷ The fact Sen's Approach avoids a laid out theory of justice does not mean one cannot arise in different contexts.¹²⁸

The criticism that Capabilities Approach ignores groups and communities, inequal power structures and the significance of institutions is overstated. It is recognised today, that there is no unified labour movement or collective that is not without variance. Furthermore, the collective that most traditional understanding of labour works with is trade unionism in the western, industrialised countries. The Capabilities Approach's abstraction is beneficial enough to allow multidimensional application but one with more direction, able to refocus the ILO's Decent Work Agenda.

Another criticism is one concerned with focus of Sen's approach on procedural rights. However, here it is argued that Sen's approach is not fixated on just the

¹²⁴ Amartya Sen 'Human Rights and Capabilities' (2005) 6(2) Journal of Human Development 151 152

¹²⁵ Peter Evans, 'Collective capabilities, culture and Amartya Sen's development as freedom' (2001) 37(2) Comparative International Development 54 70

¹²⁶ Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (Columbia University Press 2009)

¹²⁷ Amartya Sen *Development as Freedom* (Knopf 1999) 84

¹²⁸ See Nussbaum for her version of a Capability Theory of Justice; Martha Nussbaum 'Capabilities as Fundamental Entitlements: Sen and Social Justice' (2003) 9(2/3) Feminist Economics 33

procedural rights but also substantive and social rights.¹²⁹ This can be significant for the way freedom of association and collective bargaining rights function as ‘enabling rights’, both procedural and substantive function. Furthermore, Deakin and Wilkinson argue that Sen’s concept delivers a basis for deliberating which labour rights should be considered fundamental instead of offering a normative justification for a specific set of rights.¹³⁰ The approach allows for a link between human freedom and market efficiency, addressing the perceived notion that labour rights are in conflict with efficiency goals of the market.¹³¹ It is this ‘potential for linking the economic notion of capabilities to the juridical conception of social rights’.¹³² This perspective allows for social rights to be viewed ‘part of the process of “institutionalizing capabilities”’ or in other words as ‘providing mechanisms for extending the range of choice of alternative functions on the part of individuals’.¹³³ It is argued in this research that the ILO engages in this perspective already in how it aims to promote certain labour standards as core standards.

A further criticism is that the Capabilities Approach is informationally demanding.¹³⁴ This less of a concern for the ILO considering the organisation continuously carries out informationally intensive research. The problem is not a lack of resources but the questions and focus of said research. A more significant criticism is the information gaps that may arise as it is challenging to obtain information on the many dimensions of individual’s lives necessary the capability approach calls for.¹³⁵ It is argued that the gathering of this data can be invasive, too subjective and the variations too great. However, the current pool of experiences and opinions the ILO draws from is

¹²⁹ Supriya Routh, *Enhancing Capabilities through Labour Law: Informal Workers in India* (Routledge 2014)

¹³⁰ Simon Deakin, and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford University Press 2005) 278, 351

¹³¹ Jude Brown, Simon Deakin, and Frank Wilkinson, ‘Capabilities, Social Rights and European Market Integration’ in Robert Salais and Robert Villeneuve (eds), *Europe and the Politics of Capabilities* (Cambridge University Press 2005) 209

¹³² Ibid 205

¹³³ Ibid 201

¹³⁴ David A. Clark ‘The Capabilities Approach: Its development, Critiques and Recent Advances’ Global Poverty Research Group Working Paper Series No. 32/2005 <<http://www.gprg.org/pubs/workingpapers/pdfs/gprg-wps-032.pdf>> 4 January 2016

¹³⁵ Ibid

those of formal workers through workers' organisations in the formal economy. This is where the voices of the workers' group in the ILO's tripartite structure originate. These voices are considered the norm of workers' experiences, interests and concerns and informality seen as that which falls outside the norm. It is therefore argued here that a new data collection priorities taking into consideration the different perspectives of those outside this shallow pool is necessary.

4.7. Conclusion: Freedom and all it entails? The Search for Actionable Labour Laws & The Goal of Empowering Informal Workers

The Capabilities Approach is holistic, multidimensional and accounts for variations of outcomes and needs. Furthermore, the process to achieving capabilities is as important as the outcomes. There is no definitive set of capabilities which allow for flexibility to appropriate this concept to apply it labour law. Langille makes the strong case for a 'Senian' outlook of labour law where he considers the overlap of human freedom and human capital with labour 'as that part of our law which structures the mobilization and deployment of human capital' through constraints or liberations.¹³⁶ Instead of simply viewing labour law as law 'aimed at protecting employees against superior bargaining power in the negotiation of contracts of employment' its normative purpose is expanded.¹³⁷ This chapter has shown why it is crucial to free labour law of the narrow merely instrumental pigeonhole if it is to confront the modern issues of informality.

Freedom of association and collective bargaining rights are central to the foundations of labour law, yet in their current form do not provide informal workers with

¹³⁶ Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law*. (Oxford University Press 2011) 113

¹³⁷ *ibid*

the same level of freedoms as formal workers. Whilst Langille argues this conception of labour law centred on the removal of obstacles to human freedom has not been fully explored, the upcoming sections will aim to show how the full spectrum of the capabilities of informal workers have not been considered by the ILO. If Labour law's motivation as Langille puts it, 'is both the instrumental and intermediate end of productivity and the intrinsic and ultimate end of the maximizing of human freedom' then this demands a greater emphasis being placed on the most significant pillar of the ILO – Social Dialogue.

This is why this research focusses on the significance of the degree to which informal workers have the ability to shape their circumstances and the extent to which they are consulted. Sen's Capabilities approach focusses on the equality of outcome and process and makes a great diagnostic tool for the level of informal workers' participation, influence and voice in workers' organisation and the ILO's tripartite structure.

Chapter Five: Social Dialogue for All & The False Formal - Informal Economy

Dichotomy

5.1. Introduction: Social Dialogue for The Selective Few

The year 2019 marks the International Labour Organisation's centenary, a time of celebration of past achievements, a reflection on present shortcomings and fashion ambitious future plans. Four years earlier at the organisation's 104th International Labour Conference, a 'far-reaching enquiry into the impact of transformations in the world of work' was launched focussing on 'four major areas – work and society, decent jobs, the organization of work, and production and the governance of work'.¹ This 'future of work initiative' organised around those four 'Centenary conversations' sought to involve the ILO's tripartite constituency 'fully and universally' but also 'to reach beyond them to the academic world and to all other relevant and interested actors'.²

As we will see in the upcoming chapter, the ILO has recognised the limitations of its mandate which failed large segments of the world's labour force, namely those in the informal economy, from benefiting from the application of fundamental labour rights and has made attempts at formulating a social dialogue framework which encompasses all workers. However, these changes still fail to prioritise the involvement of all workers in the creation and enforcement of labour policy and equal application of fundamental labour rights to all. This chapter will shine a light on informal workers limited involvement

¹ ILO, 'Guy Ryder: Antcipating the Future of Work esstential for advancing Social Justice' (*ILO News*, 13 June 2015) <https://www.ilo.org/ilc/ILCSessions/previous-sessions/104/WCMS_375766/lang-en/index.htm> accessed 15 July 2015

² International Labour Conference, (104th Session) Report of the Director-General: Report I:The Future of Work Centenary Initiative (ILO Geneva 2015) Para 7 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_369026.pdf> accessed 12 August 2015

in social dialogue processes, the ILO's ineffectiveness and the subsequent consequences with regards to the complex relationship between informal and formal workers.

5.2. The ILO, Informality & The Issue of Restricted Representation

Since the ILO clearly stated 'the ambition is not to mark the ILO's centenary in a purely ceremonial way, but with a process that will help to guide its work for social justice into its second centenary' it is important not to shrink away from the significant questions surrounding the ILO's current form.³ Yet one question that was not received is whether or not the ILO's tripartite structure made up of workers', employers' and government representatives, in its current form is still appropriate and effective to fulfil its mandate. The ILO recognises that, while its tripartite structure is a key to the governance of work and has served 'the ILO and its member States well for nearly a century', it is not without its detractors or its challenges.⁴ The main concern outlined in this research is that the world has changed significantly in terms of the nature and location of work and employment relationships as well as the state's capacity to regulate labour. These changes, as shown in the above chapters have cast doubt over how representative this tripartite structure can be while it continually fails to reflect the makeup of the modern, predominantly informal, global labour force.

Chapter One outlined how, the effectiveness of the ILO's normative function has come under fire mainly due to the perception that its voluntary aspect is unsuitable to counter the negative effects of globalisation on the worker protection.⁵ However,

³ Ibid

⁴ Ibid para 82

⁵ Kimberly Ann Elliott & Richard B. Freeman 'Can Labor Standards improve under globalization' (2003) Institute for International Economics 93 10
<http://www.piie.com/publications/chapters_preview/338/5iie3322.pdf> accessed 23 March 2015;

Maupain states the ILO's real dilemma lies in ensuring it has the capacity to fulfil its political and economic 'goals effectively in this new context, using institutional choices (gambles) originally made by its founders in 1919'.⁶ Since the organisation's role depends on 'the legitimacy conferred by universal tripartite debate, and its 'institutional capacity' to ensure the standards set are translated into action – it is argued here that its relevance in the modern world is linked to workers' awareness of their rights, active participation in local and national labour discussions and their needs being translated onto the international agenda.⁷

A lack of awareness of rights and of participation is an issue in the informal economy.⁸ Despite the complexities of conceptualising, measuring and dealing with the informality discussed in the previous chapter, the ILO does not pay enough attention to the fact informal workers are citing 'not being free to do what we wanted' as one of the barriers they face when organising.⁹ The main challenge for the organisation remains to 'adapt the tripartite model to a globalising world, where there are new actors operating outside national frameworks and increasingly diverse forms of voice and representation'.¹⁰ This involves ensuring informal actors have the freedom and are empowered to act as such to formulate and pursue goals in their best interest; the enforcement of fair labour standards and spread of human rights. This is a goal they share with the ILO, whose constitutional objectives demands the organisation to view those in the informal economy as actors with agency and to facilitate their mobilisation

Andrew Guzman 'Trade, labour, legitimacy' (2003) 91(3) California LR 885 886; Susan Kneebone 'The Governance of Labor Migration in Southeast Asia' (2010) 16 Global Governance 383 387 – for full discussion of the introductory chapters

⁶ Francis Maupain, *The Future of the International Labour Organization* (Hart 2013) 7

⁷ Ibid 6

⁸ Manuel Simone Velasco (ed) *Unprotected labour: What role for unions in the informal economy?* Labour Education 2002/2 No. 127 (ILO 2002) 2

⁹ Andrea Cornwall with Creuze Oliveira and Terezinha Gonçalves 'If You Don't See a Light in the Darkness, You Must Light a Fire': Brazilian Domestic Workers' Struggle for Rights in Naila Kabeer, Ratna Sudarshan and Kirsty Milward, (eds), *Organizing Women Workers in the Informal Economy: Beyond the Weapons of the Weak* (Zed Books 2013) 165

¹⁰ Gerry Rodgers, Lee Swepston, Eddy Lee and Jasmien van Daele, *The International Labour Organization and the quest for social justice, 1919-2009* (ILO 2009) 18

in order to fulfil its constitutional obligations and remedy the representative deficit the organisation is currently suffering from.

5.3. Social dialogue as an End in Itself

A couple of key questions asked throughout this research are; *Who is represented by the ILO; Who should be and Why are they currently not?* In order to attempt answering these questions, we must begin with an analysis of the significance of social dialogue.

5.3.1. Defining Social Dialogue

The ILO acknowledges there is no universal definition of social dialogue as it can come in many forms. What the organisation does is provide a working definition which ‘reflects the wide range of processes and practices that are found worldwide’ which includes ‘all types of negotiation, consultation or information sharing among representatives of governments, employers and workers or between those of employers and workers on issues of common interest relating to economic and social policy’.¹¹

While social dialogue can come in many forms its preconditions do not and without certain factors the environment to for successful social dialogue cannot exist. The criteria include a respect for the fundamental rights enshrined in the ILO constitution and conventions no. 87 and 98. The burden is on the governments to ensure these preconditions are fulfilled, democratic and foundational rights to freedom of association and collective bargaining respected and strong, legitimate, independent and

¹¹ ILO, *National Tripartite Social Dialogue: An ILO guide for improved governance* (ILO 2013) 12

representative workers' and employers organisation can exist on a national level. Equality between the partners while engaging in social dialogue is paramount, with each party coming to the table with the political will and commitment to participate in good faith. Without the strong laws and regulations committed to fulfilling these conditions, protecting and promoting conventions no 87 and 98, social dialogue cannot be practiced in a way that will not only ensure a more just world of work but also fulfil the tenets of democracy. Social dialogue, therefore, is not only a means to an end but also an end within itself.

5.3.2. Social Dialogue & Decent Work Agenda

The ILO's decent work agenda helps states and social partners reach objectives of good governance, social cohesion and stability which in turn creates economic and social development. The function of social dialogue is rooted in 'core principles of democracy such as public participation' the mechanisms are participative i.e. all stages are ingredients of good governance.¹² It is supposed to be inclusive, balanced, equitable and promote social justice. It is the pillar of the Decent Work Agenda that most directly helps achieve all its decent work objectives.

The scope of social dialogue has changed hugely to include more than just labour relations and social policy. The ILO argues that this because issues are now overlapping in the modern global economies (trade industry fiscal policies etc) interrelated components require a multifaceted approach.¹³ Therefore, the content of

¹² Ibid

¹³ ILO Recommendation R113: Consultation (Industrial and National Levels) Recommendation (Recommendation concerning Consultation and Cooperation between Public Authorities and Employers' and Workers' Organisations at the Industrial and National Levels) (44th ILC Session 20 June 1960)

tripartite consultations is dependent on the national circumstance.¹⁴ The goals of The Decent Work Agenda are broad and interconnected and the Decent Work Country Programs are designed and implement with the full involvement of tripartite constituents who are supposed to have active participation throughout.¹⁵ The process of social dialogue therefore is ongoing and cyclical.¹⁶

5.3.2. The Significance of the Scope of Social Dialogue

By extending these foundational rights to all workers using the Decent Work Agenda, and no longer excluding millions of informal workers, the ILO also extends to the workers involvement in the making and enforcement of the laws that seek to protect them.¹⁷ The Agenda's pillars on social dialogue and the recognition and respect for fundamental rights were supposed to revitalise the organisation's efforts to empower workers on the ground, this time regardless of their employment status whether formal or informal and providing recognition to groups of workers originally marginalised. The fundamental rights that make up a pillar of the Decent Work Agenda can be traced to the Declaration on Fundamental Principles and Rights at Work and its Follow-up 1998 aimed to ensure core labour rights such as freedom of association and the right to collective bargaining applied to all workers including those in the informal economy by virtue of their States'

¹⁴ ILO Convention C144: Tripartite Consultation (International Labour Standards) Convention (Convention concerning Tripartite Consultations to Promote the Implementation of International Labour Standards) (61st ILC Session Geneva 16 May 1976):ILO National Tripartite Social Dialogue Guide (n 11) 83 – 87 includes a checklist of possible scope for tripartite consultations. This is not a definitive list. For the wide scope of social dialogue under the ILO see: ILO, (9th European Regional Meeting) Report of the Director-General: Growth and social justice (ILO Oslo April 2013) https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_205270.pdf accessed 12 August 2015

¹⁵ ILO, *ILO Decent Work Country Programmes – A Guidebook, Version No. 3* (ILO 2011)

¹⁶ Junko Ishikawa, *Key Features of National Social Dialogue: a Social Dialogue Resource Book* (2003 ILO); Sarosh Kuruvilla 'Social dialogue for decent work', in D. Ghai (ed.): *Decent Work: Objectives and Strategies*, (IILS-ILO 2006)

¹⁷ Bob Hepple *Labour Laws and Global Trade* (Hart 2005) 66

membership to the ILO, instead of the formal ratification of any convention.¹⁸ The fundamental status acknowledged these standards were important as ‘enabling rights’ and setting the groundwork for securing other rights, allowing workers to improve their own social and economic condition through empowerment and engagement. However, there were criticisms surrounding the selection of these rights, as seen in the previous chapters. The criticism such as that by Alston that the Declaration’s adoption demonstrated ‘pragmatic political selection’ rather than ‘economic, philosophical and legal’ reasoning on the part of the ILO cannot be easily dismissed.¹⁹ However, this argument that the rights selected were the least troublesome to enforce fails to consider what a quick review of the organisation’s constitutional objectives shows, that they are philosophically at the heart of the ILO. Instead, a more appropriate criticism is that the rights which were selected provided an inadequate, uneven application to all groups of workers in practice. Freedom of association and collective bargaining are civil and political rights that if exercised effectively allow for actors to ‘draw attention forcefully to general needs and to demand appropriate public action’.²⁰ However, this principle firstly requires the ILO to see those these rights have been extended to (informal workers) as agents with their own interests, with a right to be heard and involved in the process.

5.3.3. The Shortcomings of the Social Dialogue Pillar of the Decent Work Agenda

Unfortunately, as shown in Chapter Four, the fundamental rights foundational to effective social dialogue are not exercised in an effective way. In practice, The Decent Work campaign is not centred around ensuring an environment suitable for the exercise

¹⁸ The ILO Declaration on Fundamental Principles and rights at work and its follow up 1998

¹⁹ Philip Alston, ‘Core Labour Standards and the Transformation of the International Labour Rights Regime’ (2004) 15 *European Journal of International Law* 457, 485

²⁰ Amartya ‘Democracy as a Universal Value’ (1999) 10(3) *Journal of Democracy* 3, 7

of the collective bargaining rights of informal workers and providing the resources and education needed to involve all actors in the policy making process. Instead, Standing has contended that the organisation is slowly shifting towards a more developmental role concerned with poverty reduction strategies and funding development projects than the spread of its normative values, which are directly based on the enforcement of fundamental human rights principles.²¹ The ILO aims to remedy what it calls 'decent work deficits' in terms of work quality, productivity, adequate remuneration and legal protection, through the promotion of essential securities; including promoting workers' rights to organise and participate in social dialogue.²² Yet, the overall agenda is superficial with regard to its actual focus on rights when it comes to empowering informal workers. The language is vague, with its country specific programmes not giving equal attention to freedom of association across the globe. Furthermore, viewing the pillars of the Decent Work Agenda as 'inseparable, interrelated and mutually supportive' does not fully acknowledge the intrinsic and instrumental value of fundamental rights that enable there to be an environment suitable for effective social dialogue.²³ Instead it allows the ILO's 'full representation and involvement for all' workers objectives to lose its significance in a myriad of other objectives.

5.3.4. Wider Implications of an Ineffective Social Dialogue Pillar

Despite talk of the intrinsic value of freedom of associations and collective bargaining rights, the ILO by its own definition of the term fails to in practice promote these rights above all others. Global statistics, showing widespread poverty and increasing injustice in the world of work, make it clear that more emphasis and focus on ensuring social

²¹ Guy Standing, 'The ILO: An Agency for Globalization?' (2008) 39(3) Development and Change 355

²² International Labour Conference (90th Session) Report VI 4

²³ See the ILO's Decent Work Agenda

dialogue is needed for the realisation of the organisation's ambitious social justice goals – goals that are present but masked by the concept of decency.²⁴ The ILO's Declaration on Social Justice for a fair Globalization claims to be a much needed 'powerful reaffirmation of ILO values' emphasising the key role of the 'tripartite Organization in helping to achieve progress and social justice in the context of globalization'.²⁵ However, the problem is that the Declaration limits itself to the operationalisation and execution of the Decent Work objectives, instead of taking a hard look at where the real social justice deficit lies – in the representation of informal interest and voices in all tripartite settings.²⁶ The ILO aims to meet the need expressed by its constituents through 'provision of high quality information, advice, and technical programmes'.²⁷ These needs, however, are according to the ILO based 'on the outcome of full tripartite discussion'. Unfortunately, informal workers are still effectively without a voice under the tripartite model.

The Decent Work Agenda and the 2008 Declaration simply fail to effectively involve informal voices directly. The ILO continues to show great apprehension to ideas other than voluntarism, fearing states will conspire to adopt low standards if standards are forced on them, however what has been adopted instead is a wide agenda where the state's commitment can amount to minimal acceptance or an outward appearance of acceptance of a vague concept such as decency.²⁸ The ILO would argue its model is

²⁴ Ibid

²⁵ ILO Declaration on Social Justice for a Fair Globalisation (adopted at the 97th session of the ILO, Geneva 10 June 2008)

²⁶ Francis Maupain, *The Future of the International Labour Organization* (Hart, 2013) 16; Francis Maupain, 'The Liberalization of International Trade and the Universal Recognition of Workers' Fundamental Rights: The New ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up', in Linos-Alexander Sicilianos & Maria Gavouneli (eds) *Scientific and technological development and human rights* (2001 Sakkoulas); International Labour Conference, (102nd Session) Report of the Director-General 1(A): Towards the ILO Centenary: Realities, renewal and tripartite commitment (ILO Geneva 2013) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_213836.pdf> accessed 14 March 2015

²⁷ Guy Ryder at para 9 of ILO Declaration on Social Justice for a Fair Globalisation (adopted at the 97th session of the ILO, Geneva 10 June 2008)

²⁸ Interview: Professor Guy Standing New Unionism) (<http://www.newunionism.net/library/internationalism/Interview%20-%20Guy%20Standing,%20ex%20ILO%20-%202008.htm> accessed 20 June 2014 ; Bob Hepple *Labour Laws and Global Trade* (Hart 2005) 251; See Chapter One of this thesis for the arguments for and against voluntarism in international labour law.

the result of the need to find a way to balance the interests of all its constituents, yet it continues to make conclusions while failing to consider the voices and interests of the labour segment most in need of the global dissemination of decent work ideals.

The ILO constitution and the Declaration of Philadelphia, unlike the Decent Agenda and 2008 Declaration, have the potential for a strong theoretical foundation based on fundamental civil and political rights ensuring representation, involvement and social justice. Unfortunately, making this the focus in policy framework - explicitly and coherently, just has not happened. In order for its Agenda to have real meaning, the ILO must view its pillars as a set of structural steel connections defined by and founded on the idea of tripartism which views the lack of informal voices as a gap threatening the entire structure. Measuring the progress of workers organisations, their power and participation, is far more beneficial than struggling over how to measure a conceptually vague concept such as decent work. Since the first suggestion depends on the level of visibility of workers' in every stage of the policy-making progress, it is evident that by this standard, that the ILO falls short. The political visibility of informal workers needs to be a priority, which is why measuring, comparing and understanding the barriers to and success of approaches to organising the informal economy is vital for realisation of the organisation's constitutional objectives. In its current form the ILO's tripartite structure is unrepresentative, focussing on representing formal sector interests. This in turn then impacts the legitimacy of the ILO as primary promoter of international labour laws. The act of tripartite social dialogue increases legitimacy by drawing attention to concerns of partners and allowing governments to remain informed, allows social partners to better prepare for policy changes.²⁹

5.4. Social dialogue as a function of the ILO tripartite structure

²⁹ ILO National Tripartite Social Dialogue Guide (n 11) 67- 68

The organisation's tripartite structure is its unique quality, representing its mandate of cooperation and of social dialogue. This tripartite structure involves states sending representatives from the three social partners to yearly conferences where they have the ability to raise, discuss and vote on labour issues from an agenda set by the tripartite governing body.³⁰ Furthermore, the organisation encourages tripartite deliberation on labour issues at a national level between national employers' associations and workers unions and the state with support from ILO's regional and field offices.

Tripartite structure is significant as it is the foundation of the ILO and whilst instilling it with legitimacy is crucial, this begins with social dialogue and tripartite cooperation on the national level. This is where the exclusion of informal voices begins – in unions and workers organisations on the national level. Workers voices in general are more muted today than before due to a decline in trade unionism in countries across the world.³¹ The growth of the unorganised informal economy along with the decline in workers from the formal sector organising on a national level, threatens the function of the ILO's tripartite structure – which relies on an equal balance of interests and voices between its three parties. Therefore, tackling this decline and growth has been on the forefront of priorities of the organisation. Nearly all review of the labour situation in member states reveals 'strengthening tripartism and social dialogue' as a recommendation.³²

5.4.1. Promoting Social Dialogue at National & International levels

³⁰ Ibid

³¹ Ibid

³² (see xiii of the International Labour Conference, (329th session) 'Programme and Budget for the Biennium 2018-19' (ILO Geneva 2017) https://www.ilo.org/wcmsp5/groups/public/---ed_mas/---program/documents/genericdocument/wcms_582294.pdf accessed 2 April 2018

Social dialogue and tripartite cooperation are not only 'viewed as tools of sound governance of the labour market' but also 'effective instruments for promoting crisis recovery and facilitating adaption to change'.³³ The multiple and interrelated roles of social dialogue makes it integral for stability, economic progress and the fulfilment of the principles of democratic participation. It is for this reason that the organisation has published several resources, guides and materials to assist countries. One such guide, *National tripartite social dialogue: an ILO guide for improved governance 2013*, provides a framework to promote tripartite social dialogue at the national level and recognises that 'there is unevenness in terms of the structures in existence across the world'.³⁴ The ILO describes an effective framework as one that 'engages constituents in consultation and negotiations on economic and social matters'.³⁵ Furthermore, the organisation recognises the diversity of situation out there and guides such as the 2013 one on Social Dialogue and Tripartism are supposed to give different options to suit the varied national structures. It outlines different forms of national tripartite social dialogue such as economic and social councils, labour advisory councils at a variety of policy levels. The guide goes on to discuss the strengths and challenges of each form of national tripartite social dialogue in more detail, allowing states an informed decision about which may suit them best. Part of the ILO's greatest quality is its recognition that promoting labour standards is not a one size fits all situation. This same belief is what drove the ILO to create the individualised tailored Decent Work Country Programmes. Seeing the ILO capable of this nuance, raises the questions as to why there is an inconsistency in applying this thinking to the situation of informal and formal workers, instead of at times reducing them to a simplistic and inaccurate dichotomy or monolith.

³³ ILO National Tripartite Social Dialogue Guide (n 11) 3

³⁴ Ibid

³⁵ ILO National Tripartite Social Dialogue Guide (n 11) 3

Returning to the issue of national tripartism and social dialogue, the ILO maintains understanding the national is important and as is the concept of local ownership'.³⁶ The organisation identifies the barriers to the effective national tripartism and social dialogue as being low public awareness, unclear mandate and a lack of adequate resources.³⁷ Their guides are ambitious and aim to remedy these issues by supporting member states in encouraging a situation for more effective national tripartism and social dialogue. The organisation recognises that the success of its own tripartite structure and legitimacy is dependent upon the existence of strong social dialogue on the domestic front.

The ILO governing body and International Labour Conference are tripartite but its International Labour Office is made up of individual civil servants and staff, with two bureaus – for workers (ACTRAV) and employers (ACT/EMP). Their role is to strengthen services such as technical assistance, capacity building and training to employers and workers organisations. The International Labour Office is the permanent secretariat of the ILO, under the scrutiny of the ILO governing body. The role of the International Labour Organisation in supporting tripartite social dialogue at the national level begins with helping governments either start or improve national tripartite social dialogue. The ILO supports labour administrations through involvement of national tripartite bodies in the modernisation and reform of labour legislation and by promoting the ratification and implementation of labour standards.³⁸ A key instrument in this task is Convention No. 144, the convention concerning Tripartite Consultations to Promote the Implementation of International Labour Standards.³⁹ In 2017, the ILO launched a campaign towards the universal ratification of Convention No. 144 where the convention was identified as a

³⁶ ILO National Tripartite Social Dialogue Guide (n 11) 7

³⁷ Ibid

³⁸ Ludek Rychly, 'Ministries of Labour: Comparative Overview – Database, Organograms' ILO Action, LAB/ADMIN Working Document No. 27/2013; ILO, *Compilation of African experiences on social dialogue*, (ILO 2011)

³⁹ ILO Convention C144: Tripartite Consultation (International Labour Standards) Convention (Convention concerning Tripartite Consultations to Promote the Implementation of International Labour Standards) (61st ILC Session Geneva 16 May 1976)

priority convention because it 'promotes application of an essential principle on which the International Labour Organization (ILO) was founded: tripartite social dialogue in the development and implementation of international labour standards (ILS)'.⁴⁰ By assisting social partners understand the convention, provide technical assistance in the form of training and information, the application of the convention can better the tripartite process and encourage more ratifications of other conventions through successful consultation.⁴¹ Since the move towards universalisation only seven more countries ratified Convention No. 144.⁴² Moreover, as discussed previously ratification numbers are not an indication of successful application of conventions.⁴³

5.4.2. The Significance of Tripartism

The ILO maintains that labour laws created through tripartite consultations are more sustainable (balanced economic development and social needs) and representative of interests of all.⁴⁴ Social dialogue is the instrument to promote labour law and ensure conditions in which it can work out. Objectives of social dialogue are many and significant.⁴⁵ The ILO has a constitutional mandate to assist member states framing their

⁴⁰ ILO, 'Towards the universal ratification of convention No. 144 on Tripartite Consultation by the ILO Centenary in 2019' DIALOGUE 2 < https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_590126.pdf > accessed 19 June 2019

⁴¹ International Labour Conference, (102nd Session) Report VI: Recurrent discussion on the strategic objective of social dialogue under the ILO Declaration on Social Justice for a Fair Globalization (ILO Geneva 2013)

https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_205955.pdf accessed 14 March 2015

⁴² From 139 in 2017 to 146 in 2019 (as of 20 June 2019) see ILO website for ratification figures <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C144>

⁴³ See the discussion in Chapter One of this thesis.

⁴⁴ ILO National Tripartite Social Dialogue Guide (n 11) 259

⁴⁵ International Labour Conference, (102nd Session) Report VI: Recurrent discussion on the strategic objective of social dialogue under the ILO Declaration on Social Justice for a Fair Globalization (ILO Geneva 2013)

https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_205955.pdf accessed 14 March 2015

labour legislation.⁴⁶ Tripartism and social dialogue are at the heart of the ILO and encouraged by several conventions and recommendations.⁴⁷ There are multiple choices available in terms of social dialogue mechanisms with the only prerequisite being the technical expertise to engage in the process, something the ILO offers to ensure social partners are versed in labour law matters. The process can take a variety of forms including formal multi body dialogue with the role of government as simply a facilitator or more involved.

The term tripartism only applies if government is one of the three partners and all other forms comes under the umbrella of 'civil dialogue'.⁴⁸ On the idea of bipartism, the ILO acknowledges the government does not necessarily play a role as an active partner at all times. Governments take on the role of mediator or advisor and contribute to the collective bargaining situation.⁴⁹ Collective bargaining opens up dialogue regarding the conditions of employment and work, fosters relations between employers and workers and their respective organisations. It is the foundation that one can build upon for successful tripartite social dialogue. The ILO states that 'tripartism builds on sound and effective industrial relations' and the outcome of 'bipartite discussions can influence tripartism and vice versa'.⁵⁰

The term tripartite 'plus' is now favoured to signal a willingness to involve wider civil society in social dialogue including NGOs.⁵¹ The purpose of inviting other social actors to the table is in an effort to gain wider consensus and perspective, for the ILO to 'share the same values and objectives and pursue them in a constructive manner' in

⁴⁶ Article 10 para. 2 (b) of the ILO Constitution

⁴⁷ ILO Recommendation R113: Consultation (Industrial and National Levels) Recommendation (Recommendation concerning Consultation and Cooperation between Public Authorities and Employers' and Workers' Organisations at the Industrial and National Levels) (44th ILC Session 20 June 1960)

⁴⁸ ILO National Tripartite Social Dialogue Guide (n 11) 259

⁴⁹ See ILO Convention C154: Collective Bargaining Convention (Convention concerning the Promotion of Collective Bargaining) (67th ILC Session Geneva 03 June 1981)

⁵⁰ ILO National Tripartite Social Dialogue Guide (n 11)

⁵¹ ILO National Tripartite Social Dialogue Guide (n 11) 15

collaboration with NGOs wherever appropriate.⁵² The term ‘appropriate’ is key and this does not signal what the negatives of involving other social actors are. The ILO makes it clear that ‘employers’ and workers’ organizations are distinct from other civil society groups in that they represent the actors of the ‘real economy’ and draw their legitimacy from their membership’.⁵³

By affirming that ‘the capacity building responsibilities of the ILO are towards its tripartite constituents, and to them alone’.⁵⁴ This indicates a willingness to conference but a distinction that gives rise to questions regarding who represents the interests of informal workers best and where they fit in. As it will be shown in this chapter, their interests often represented by non-democratic organisations such as non-profits which count as civil society rather than one of the tripartite members. Furthermore, the term ‘real economy’ can be contested when considering the current size of the informal economy when compared to the formal economy. The language implies less legitimacy and plays into the previous ideas regarding the informal economy being a ‘shadow economy’.⁵⁵ The ILO currently prefers to speak of addressing the challenges posed by informality in terms of transitioning to the formal economy which fails to consider the complexities such as the differences, blurred distinction and the state of the world of work – particularly the capacity of workers organisation.

5.5. The Decline of Labour Organisations & Their Influence

⁵² ILO Governing body, (285th Session) Effect to be given to resolutions adopted by the International Labour Conference at its 90th Session (2002) (Geneva November 2002) GB.285/7/1 <<http://www.ilo.org/public/english/standards/relm/gb/docs/gb285/pdf/gb-7-1.pdf> > accessed 30 June 2016

⁵³ ILO National Tripartite Social Dialogue Guide (n 11) 15

⁵⁴ International Labour Conference, (102nd Session) Report of the Director-General 1(A): Towards the ILO Centenary: Realities, renewal and tripartite commitment (ILO Geneva 2013) Para 99

⁵⁵ ILO National Tripartite Social Dialogue Guide (n 11) 15

5.5.1. Participation in Social Dialogue: A Criteria

Participating in social dialogue needs to be 'strong, legitimate, independent and representative workers' and employers' organisations' well equipped with the technical resources and capacity to be on an equal footing with the government. These groups need to be most representative and include the participation of marginalised groups. Social dialogue institutions are very dependent on contact with government as well as independence to prevent interference.⁵⁶ They should have independent groups within the institution in terms of influence. In light of the strength, independency and representation of traditional workers organisations means that the focus on trade unions can no longer be taken for granted.

The conventions that make the tripartite process possible beginning with the core freedoms, such as Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) and supporting conventions such as the Labour Relations (Public Service) Convention, 1978 (No. 151), the Collective Bargaining Convention, 1981 (No. 154), and the Workers Representatives Convention, 1971 (No. 135) are vulnerable to the ineffective implementation by domestic labour administrations, specifically those in countries with large informal economies⁵⁷

Furthermore, recommendations in support are the Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113), the Workers' Representatives Recommendation, 1971 (No. 143), and the 2002 Resolution concerning tripartism and social dialogue. Instruments relating to labour administrations are also relevant. The

⁵⁶ ILO National Tripartite Social Dialogue Guide (n 11) 134

⁵⁷ Keith Ewing and John Hendy, 'The Eclipse of the Rule of Law: Trade Union Rights and the EU' (2016) IER Brief 13
<<https://www.ier.org.uk/sites/ier.org.uk/files/The%20Eclipse%20of%20the%20Rule%20of%20Law%20Trade%20Union%20Rights%20and%20the%20EU%202016.pdf>> accessed 20 April 2015

Labour Administration Convention, 1978 (No. 150). Other instruments also refer to them. Member states report back regularly to ensure conformity and share information regarding what has been done to ensure impact.

The ILO points out to three activities that can take place in the social dialogue process – negotiations, consultations, and information sharing.⁵⁸ They can occur at different levels, times and have a different purpose and lead to different outcomes – some formalised or bindings, other not. The precise approach adopted depends on issues and national circumstances.⁵⁹ Involvement in all social dialogue process can be achieved through voluntary decision, promotional action by public authorities or laws or regulations.⁶⁰ They are also about reaching the collective will of all parties so not about voting and majorities. Statements on disagreements are useful have a protocol for disagreement and future time to re-examine. An exchange of information between social partners is the simplest form and the starting point for the other processes. It is an important step to allow parties to understand each other better. Consultation is the most used tool of social dialogue, as it is more in depth and promotes engagement in the policy making process. Furthermore, it gives governments the opportunity to collect different opinions on how potential policies will be received as well as giving the other parties a platform to air their own opinions. As it is not binding, consultation may not lead to formal agreements but understandings like reports, statements or opinions. Although it is not about sharing the decision-making power, the ILO states it cannot be viewed as just another ‘talking exercise’, arguing it would be wrong to view it as such for loss of ‘credibility’ and support.⁶¹ This consultation stage is where the exclusion of informal actors begins but does not end.

⁵⁸ ILO National Tripartite Social Dialogue Guide (n 11)

⁵⁹ ILO National Tripartite Social Dialogue Guide (n 11) 24

⁶⁰ ILO Recommendation R113: Consultation (Industrial and National Levels) Recommendation (Recommendation concerning Consultation and Cooperation between Public Authorities and Employers’ and Workers’ Organisations at the Industrial and National Levels) (44th ILC Session 20 June 1960) Para 3

⁶¹ ILO National Tripartite Social Dialogue Guide (n 11) 27

5.5.2. Collective Bargaining Framework & Potential Bias

Blackett states the significance of a link between the discrimination and collective bargaining core standards because it is aspiration for many so not everyone gets to set the terms of employment 'those excluded from the from the effective exercise of collective bargaining rights include a disproportionate number of workers hailing from groups traditionally discriminated against on grounds included race, sex, religion, and national extraction, as listed in ILO Convention No. 111'.⁶² In this case, collective representation can become a double-edged issue which deepens inequality. Blackett argues that 'inequality of access to collective representation is a challenge to arguments that privilege traditional collective bargaining mechanism, particularly if the mechanism involved favour the most privileged workers to the detriment of the least privileged'.⁶³ It has been shown how informal workers, majority of which are women are unable to participate in collective bargaining or gain representation due to their marginalised.⁶⁴ Moreover, this difficulty means they do not even seek it – viewing organising. and all it entails such as collective bargaining, as out of there reach or not a priority. In Senian terms this would be 'adaptive preferences' where a compromise is being made by the individual between reality and what one can sensibly expect to receive or achieve; a compromise which stops involvement of marginalised groups in the collective bargaining process.⁶⁵

Blackett argues strongly that 'collective bargaining frameworks are not equality neutral; rather the choice of collective bargaining framework can be crucial in

⁶² Adelle Blackett and Colleen Sheppard, 'Collective Bargaining and Equality: Making Connections' (2003) 142 Int'l Labour Rev 419 420

⁶³ Ibid 420

⁶⁴ Ibid

⁶⁵ Amartya Sen, *Commodities and Capabilities* (Elsevier Science Publishers 1985) 21

determining whether systemic obstacles to equality of access to collective bargaining can be removed'.⁶⁶ This research has shown the ramifications this bias (which began at a workplace level) can have on the ILO's entire tripartite structure. It shows how self-enforcing this can be when even ILO frameworks in their understanding of the concept of worker, work and workplaces still favour that associated with the formal economy.

This is why 'in an increasingly complex, integrating world, special care needs to be taken to cultivate new sites for social dialogue, sites that ensure representation for traditionally marginalized or excluded groups.'⁶⁷ Blackett asks if one principle is impeding the other and looks for the places workers do exercise their fundamental rights to freedom of association and to bargain collectively in order to consider another level of interface between fundamental right and principle of equality: the interaction between collective bargaining, the majoritarian mechanism for workplace governance; and the structurally 'minority position of equality seeking groups in many workforces'. This thesis agrees with Blackett's viewpoint and has been advocating for inclusivity to be extended to all spaces – from grassroots to the ILO tripartite structure.

State privileges collective bargaining 'as the vehicle for private ordering of workplace relationships' and its role is important when it comes to making sure equality is not impeded. Blackett therefore advocates for 'a regulatory environment that reduces barriers to access to collective bargaining', prevent discriminatory practice and makes room for democratic participation mechanisms.⁶⁸ This is the significant way to move forward to ensure true participation and empowerment.

5.5.3. Trade Unionism: The Space Between Relevancy & Regression

⁶⁶ Blackett (n 62) 420

⁶⁷ Ibid 420

⁶⁸ Ibid

Despite the changing landscape of worker organisations and the concerns of inequality and bias, this section and those that follow show that the ILO is still failing to move away from its traditional focus on workers' and employers' associations in the formal sector. The recent discussion on the potential adoption of an informal recommendation illustrates there still exists a myopic view of the organisational capabilities of informal actors and their complex, diverse identities and interests.⁶⁹ How the continuing negative views on informal actors organising capabilities held by its tripartite constituents harms the ILO's efforts at tackling the labour problems associated with informality will be discussed in later sections.

Here, however, it is asked if the ILO is more capable or willing to aide or work with specific forms of workers' organisations than others because of the continuing exclusion of a large informal economy in tripartite discussion. Traditionally, the purpose of trade unions was to counter the unequal power dynamic that favours employers in the employment relationship.⁷⁰ Therefore, it is natural that the ILO found one of its key social partners in the trade unions as being the type of institution that is 'most representative' of the worker constituency. This relationship was once incredibly important, as the pressure of an organised workers' movement lead to the drafting and ratification of the first international labour convention; a limitation on excessive working hours.⁷¹ Today, however, unions in their traditional form are struggling to maintain their role as 'the only institutions capable of correcting the great imbalances in today's economy'.⁷² This section, therefore argues that by failing to effectively engage with the following concerns

⁶⁹ Ananya Roy, Nezar AlSayyad (eds) *Urban Informality: Transnational Perspectives from the Middle East, Latin America, and South Asia* (Lexington books 2004)

⁷⁰ Stephanie Luce *Labor Movements: Global Perspectives* (Polity, 2014)6

⁷¹ ILO Convention C001: Hours of Work (Industry) Convention (Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the week) (1ST ILC Session Geneva 13 June 1919)

⁷² Luce (n 70) 11

preventing the tripartite structure from being representative of the global workforce, the ILO cannot claim to be fulfilling its mandate.

5.5.4. ILO Legitimacy: The Impact of Declining Workers' Organisations & the Flaws of Convention No 98 & 87

The failures of Conventions No. 98 and 87 in terms of enforcement are well documented and the repercussions far reaching and includes the decline of workers organisations. Yet it is through reliance on these two conventions that the ILO's tripartite function depends. This begins on a local level, is transplanted to a national level and then impacts the function of the ILO at an international level.

The ILO acknowledges that 'tripartite agreements constitute contingent institutional constructions' which means they 'depend on political and social situations of the country, the state of the economy, the distribution of power between social partners and government'.⁷³ They also depend on accuracy of information, good exchange, trust and commonality in terms of goals. Additionally, the technical competence, sense of responsibility and negotiation skills of the partners involved in tripartite discussions play significant role. Together, these are the elements that make up effective dialogue.⁷⁴

Delivery and compliance with commitments is what ensures real trust and is a precondition for tripartism. The countries where high levels of informality exist are also countries with weaker labour administrations and more challenging social, political, and economic conditions necessary for effective social dialogue. Implementation at national

⁷³ ILO National Tripartite Social Dialogue Guide (n 11) 34

⁷⁴ ILO National Tripartite Social Dialogue Guide (n 11) 34

level is dependent on the national governments, the ILO's aim is capacity building to ensure effective ability to implement agreements which ensures that the actions of ILO at an international constitutes more than talk.

Successful social dialogue requires 'appropriate institutional support' and gaining 'practice and experience'.⁷⁵ The ILO states that eighty percent of its member states have institutionalised national tripartite social dialogue in one form or another.⁷⁶ This however does not account for the real numbers in terms of meaningful social dialogue in those states.⁷⁷ The availability of institutionalised national tripartite social dialogue does not equate for effective use or involvement of marginalised workers. Furthermore, there remains the question of how significant is the informal economy of the twenty percent of the ILO membership that have not institutionalised national tripartite social dialogue.

The minimum requirement is a 'sound legislative framework for tripartite social dialogue at the national level that provides solid foundation for practice, which otherwise would be vulnerable to changing political attitudes'.⁷⁸ It should 'provide the necessary guarantee and protections and should define the forms of cooperation between the social partners, as well as the principles, procedures and functions of tripartite bodies'.⁷⁹ It needs 'political will, a sense of responsibility and commitment of all parties to engage in social dialogue' which cannot be forced and is understood as common goals. This involves long-term commitment and not just in times of crisis. The idea behind the ILO producing guides is to support all of those engaging in social dialogue or aiming to do so and those wishing to 'review their operation and increase their impact in policy making'.⁸⁰ There is a huge list of these covering most social partners and wider civil

⁷⁵ Ibid 44

⁷⁶ Ibid 52

⁷⁷ Ibid

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ Ibid 5

society, showing the ILO acknowledges this is a joint effort. The issue then becomes, what if an important potential partner (informal workers) is unable to engage social dialogue because of an absence of necessary pre-conditions? This is why the ineffective enforcement of Conventions No. 98 and No. 87 is significant.

5.5.5. The Limitations of Tripartism

The level of commitment to social dialogue and tripartism varies. For example, the basis of national tripartite social dialogue can be found in domestic legislation or constitutions which can provide a strong legal basis and protect the structure. Alternatively, it could be through an agreement between parties to create a voluntary body after negotiated tripartite agreement which is the weakest foundation but can be more beneficial because of the political will and consensus behind it.⁸¹

There are however, arguments made against social dialogue – these arguments exist in terms of costs, the speed of the process and the possibility of market interference.⁸² One challenge to tripartite or bipartite dialogue is that it impedes ‘prompt and decisive decision-making’, continual changes happen with new issues arising and the long discussion cannot meet these tests.⁸³ Other arguments point to the ineffectiveness of compromises which may cause freedom of action or external criticism from wider public when a lengthy process leads to an unsatisfactory compromise.⁸⁴

⁸¹ Ibid 122

⁸² Richard Posner, ‘Some Economics of Labor Law’ (1984) 51 *University of Chicago Law Review* 988.

⁸³ International Labour Conference, (104th Session) Report of the Director-General: Report I: The Future of Work Centenary Initiative (ILO Geneva 2015) para 83 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_369026.pdf> accessed 12 August 2015

⁸⁴ ILO National Tripartite Social Dialogue Guide (n 11) 72

However, since the process is voluntary and close communication with members internally will prevent criticism and encourage involvement, this argument is weak. Monitoring the powers of other relevant ministries than the one of labour is also crucial to dissipate tension. The role of domestic legislatures must be considered, all members of workers and employers organisations need to have legitimacy gained from their mandate and broad based membership to strength all social dialogue outcomes.

Although, the process of social dialogue is time consuming it is in the long run cost effective if outcomes are long lasting and it can be viewed an investment for a more stable and productive economy.⁸⁵ This is why, the ILO reasons, there is no alternative to social dialogue exists to provide social peace and prosperity through industrial relations. Government policies need information while the co-ownership of social partners ensures effective implementation and sustainability is achieved through balancing of interests and effects on all groups.⁸⁶ It is the best path to avoid resistance, conflict and ineffectiveness due to lack of information. However, ultimately it is a tool and its effectiveness depends on how one wields it, which is the perspective being offered here.

A more reasonable objection to how social dialogue is practiced may involve the concern that the actors are not viewed as legitimately representative. Regarding the selection of organisations to take part in tripartite social dialogue the ILO's guidelines state it must be determined that those partaking be of the 'most representative' and based on 'precise, objective and pre-established criteria' to avoid abuse.⁸⁷ Governments cannot be in charge due to risk of political bias and disputes can be settled by impartial bodies.⁸⁸ The ILO compiled a list of practices from several countries but has no definitive

⁸⁵ Youcef Ghellab, Nancy Varela and John Woodall, '*Social dialogue and social security governance: A topical ILO perspective*' (2011) 64 (4) International Social Security Review 55

⁸⁶ ILO National Tripartite Social Dialogue Guide (n 11) 58

⁸⁷ Ibid

⁸⁸ Ibid 105; Giuseppe Casale (ed) *The Employment Relationship – A Comparative Overview* (Hart Publishing 2011)

criteria. The criteria is quantitative (numbers of members, geography,) quantitative (capacity of organisation, experience, respect for the democratic principles and independence) and other indicators such as affiliations.⁸⁹ The ILO emphasises the importance of non-interference in the matters of other social partners such as selection of representatives and also outlines the rights of the organisations that are not considered most representative i.e. the minority organisations.⁹⁰

The ILO recognises the limitations of tripartism when at times ‘the positions taken by social partners may be characterized as special pleading by vested interests to the detriment of the common good’.⁹¹ Although this is discussing the clash between three actors (workers, employers and governments) it can be said that this idea of vested interests can be applied to the pleading that the workers group do which remain ignorant of informal interests. Moreover, the ILO recognises that ‘if the representative legitimacy of the partners to engage in social dialogue is called seriously into question, the place of tripartism as a keystone of governance will be too’.⁹² And while the organisation is concerned with the future of strong and democratic trade unions and employers organisation as a precondition for social dialogue, it fails to place emphasis on the makeup of these organisations not reflecting the global workforce.⁹³

5.6. Workers’ Organisations & True Representation: The Exclusionary Nature of Unions

⁸⁹ Ibid 106

⁹⁰ Para 346 to 359 ILO, *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th edn, ILO 2006); para 96 to 98 International Labour Conference, (101st Session) Giving Globalization a Human Face: General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization 2008 Report III (Part 1B) (ILO Geneva June 2012)

⁹¹ International Labour Conference, (104th Session) (n 83) para 83

⁹² Ibid para 84

⁹³ Ibid para 85

It is a continuing concern that, although trade unions according to the ILO are supposed to be ‘democratic, self-organizing institutions of working people wishing to advance their rights as workers and citizens’, they in fact at times operate as a groups of workers banding together guided by common goals or struggle against a common enemy.⁹⁴ This enemy is not necessarily limited to the state or employer but can take the form of the ‘Other’ – anyone deemed an outsider such as women in a traditionally male dominated industry, an influx of migrant workers ‘stealing’ jobs or even workers in other parts of the world providing domestic employers with an alternative, cheaper labour force.⁹⁵ The issue of unions being exclusionary cannot be seen as separate from their decline in membership and power.⁹⁶ However, it also needs to be understood, as we continue to see, as a factor impacting organisation efforts in the informal economy and influencing the way the ILO’s tripartite constituents discuss the issue of informality. The prevalent trade union view of who should be considered as encompassing the worker identity is still significantly limited, despite the ILO’s efforts of defining, redefining and interpreting informal employment status through its Decent Work Agenda. For example, domestic workers, home based workers, own account workers are still not fully acknowledged by all formal workers as fellow ‘workers’ and their informal activities are viewed as something outside the scope of labour.⁹⁷

As well as conceptual and political discrimination against informality, informal actors, particular those on the margins of society such as female domestic workers, suffer from societal discrimination which extends into the labour movement.⁹⁸ Women in particular are faced with barriers when it comes to political involvement in trade unions.⁹⁹ According to the ILO, gender issues are at the heart of all policies, and present in all of

⁹⁴ Ibid

⁹⁵ Luce (n 70) 101

⁹⁶ Ibid

⁹⁷ Christine Bonner, Dave Spooner, ‘Organising Labour in the Informal Economy – Institutional Forms of Organisation and Relationships’ (2011) 44 (1) *Labour, Capital and Society* 1, 4

⁹⁸ Cornwall (n 9) 170

⁹⁹ Sue Ledwith, ‘Gender Politics in trade unions. The representation of women between exclusion and inclusion’ (2012) 18 *European Review of Labour and Research* 185, 185

its material and a 'holistic approach to gender equality forms an intrinsic part of the Decent Work Agenda'.¹⁰⁰ Their gender responsive delivery of the Decent Work Agenda aims to promote the organisation of female workers, sufficient representation and equal employment opportunities as being crucial aspects of the economic independency and effective coverage of labour standards for all workers.¹⁰¹ Despite this, women are still excluded when it comes to taking control of their labour and having their experiences brought to the table.¹⁰² A more accurate feminist analysis of workers' organisations is essential, considering the informal workforce is predominantly female, with women making up the largest number of people living in extreme poverty.¹⁰³

According to Ledwith, this exclusion is rooted in the persistent of a 'culture of hegemonic masculinity' in trade unions.¹⁰⁴ This culture is rooted in the continuing labour market gender differences which can be 'traced back to the historical and contemporary valorization of men and their work' positioning them at head of the family as breadwinner and women in a role subordinate.¹⁰⁵ Despite the feminisation of the labour markets over the last couple of decades, 'occupational and industrial gender patterns are reproduced in unions' with female experiences, identities and cultures struggling to find a space.¹⁰⁶ Furthermore, gender equality initiatives by international organisations such as the ILO have shown to not having a lasting impact due to the prevalence of gender injustice in

¹⁰⁰ I International Labour Conference, (98th Session) Report VI: Gender equality at the heart of decent work' Report VI (ILO Geneva June 2009) 12
http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_105119.pdf accessed 26 May 2014

¹⁰¹ Ibid 13

¹⁰² OECD, *OECD Fact book 2013: Economic, Environmental and social statistics* (OECD 2013) 256
 Naila Kabeer, *Mainstreaming Gender in Social Protection for the Informal Economy* (Commonwealth Secretariat 2008)

¹⁰³ Naila Kabeer, Kirsty Milward and Ratna Sudarshan 'Organising women workers in the informal economy' (2013) 21 (2) *Gender and Development* 249

¹⁰⁴ Ledwith (n 100) 187; See Joan Acker, 'Gendering Organizational Theory'. In A J Mills and P Tancred (eds) *Gendering Organizational Analysis*. (Sage 1992) 248; Paul Willis 'Shop Floor Culture, Masculinity and the Wage Form' in P Murphy (ed) *Feminism and Masculinities* (Oxford University Press, 2004) 108

¹⁰⁵ Ibid

¹⁰⁶ Ibid

wider society.¹⁰⁷ Although this is a particular problem in the developing world, the exclusion of women is a global issue, as women are underrepresented in leadership position even in trade unions in the developed countries.¹⁰⁸ The fact remains that ‘the processes and problems that lead to inequality remain imbedded in union cultures and structures’, which is why women in the informal economy often choose to create their own organisations and movements.¹⁰⁹

5.6.1. Tension Between Informal & Formal Workers

Lindell argues that the perceived competition between the formal and informal sector, as a consequence of globalisation and employers moving jobs out of the formal sector, feeds into the tension and clashes between the sectors.¹¹⁰ For example, the existence of a large unregulated workforce undermines the pressure that trade unionists aim to put on employers via collective action. Also, the existence of informal enterprises, according to entrepreneurs in the formal sector, prevents ‘spreading the tax and social protection burden more evenly and equitably’.¹¹¹ All the while, as Ratnam explains (using the example of India), formal workers are viewed by informal workers as the labour ‘aristocracy’ with access to rights and protection they themselves are not entitled to due to their informal status.¹¹² Additionally formal enterprises, as Jimu argues, do not suffer the negative public sentiments legitimising the repression and persecution of own

¹⁰⁷ Akua Britwum and Pim Martens ‘The Challenge of Globalization, Labor Market Restructuring and Union Democracy in Ghana’ (2008) 10 (2/3) *African Studies Quarterly* 1, 14

¹⁰⁸ Ledwith (n 100) 191

¹⁰⁹ Lise Lotte Hansen, ‘Women’s Trade union Leadership and the Reproduction of Gender Inequality’ (Work, Employment & Society Conference Brighton, September 2010) 17

¹¹⁰ Ilda Lindell, *Africa’s Informal Workers: Collective Agency, Alliances and Transnational Organizing in Urban Africa* (Africa Now) (Zed books 2010) 20

¹¹¹ International Labour Conference (103rd session) Report V(2): ‘Transitioning from the informal to the formal economy’ (Geneva, 2014) 63

¹¹² C. S. Venkata Ratnam ‘India’ (1999), in *Trade unions in the informal sector: Finding their bearings Nine country papers* Labour education 1999/3 No.116 (International Management Institute, 1999) 25 44

account workers in the informal economy.¹¹³ For these reasons and others more fully explored in the upcoming section and later chapters, there exists a tension between organised formal workers and unorganised informal workers.

These tensions exist despite the surface impression that they should have a common goal of securing better, safer and more decent work in a world becoming increasingly more unjust for all workers. The ILO's vision for The Decent Work Agenda from the start included the aim to 'transform unions into social movement of working people'. However, reconciling differences will require fully ensuring informal representation in the tripartite structure.¹¹⁴ Due to their inflexibility, trade unions' cannot encompass and fully represent the interests or the diverse work and employment relationships present in the informal economy. Lindell convincingly argues that framing the alliance between formal and informal workers based on joint oppression and a common enemy rather than a spirit of social justice will result in a temporary and seemingly 'unnatural' relationship one with the vanquishing of the 'enemy' may not last.¹¹⁵

It is important to acknowledge these tensions between formal-informal actors. As a result, informal actors have legitimate concerns causing them to view organised labour movements in the formal sector as an unfavourable place to promote informal interests, feeling instead the need to establish their own movements.¹¹⁶ It is not enough just having a presence of a strong national labour movement. Cornwall points to the Brazilian labour movement as an example of a strong labour movement however far from free of issues

¹¹³ Ignasio Malizani Jimu 'Self-Organized Informal Workers and Trade Union Initiatives in Malawi: Process, Challenges and Directions of Organizing the Informal Economy' in in Naila Kabeer, Ratna Sudarshan and Kirsty Milward, (eds), *Organizing Women Workers in the Informal Economy: Beyond the Weapons of the Weak* (Zed Books 2013) 102

¹¹⁴ International Labour Conference, (103rd session) Report V(2): Transitioning from the informal to the formal economy (ILO Geneva 2014) 48

¹¹⁵ Ilda Lindell, *Africa's Informal Workers: Collective Agency, Alliances and Transnational Organizing in Urban Africa* (Africa Now) (Zed books 2010) 21

¹¹⁶ Christine Bonner and Dave Spooner 'Organizing in the Informal Economy: A Challenge for Trade Unions' (2011) 2 (11) *International Politics and Society* 87 89; Christine Bonner and Dave Spooner, 'Organizing Labour in the Informal Economy: Institutional Forms of Organisation and Relationships' (2011) 44(1) *Labour Capital and Society* 126

of class and gender. As well as failing to advocate for domestic workers rights 'some of the most influential unions are categories who themselves employ domestic workers,' and therefore 'would feel the effects of improvement in workers' pay and rights'.¹¹⁷ This illustrates one of the ways in which informal workers organisations' interests clash with the formal sectors, casting serious doubt onto the ILO's insistence that organisation of the informal economy is best done through the work of formal trade unions.

Gallin argues that formal trade unions activities aimed at organising the informal workers cannot be viewed as 'missionary work amongst an amorphous and passive mass of individuals' but crucial work since the informal economy is not a 'transitory phenomenon' that will be absorbed by the formal sector.¹¹⁸ However, whilst listing the ways in which organising informal workers can benefit formal workers interests, such as contributing to the 'stabilisation of formal sector organisations' which are in decline, Gallin overlooks the tensions which demonstrate why the task of organising the informal economy cannot be limited to formal unions extending their traditional activities to the informal economy.¹¹⁹ As with internal issues of trade unions in terms of equal representation and access to leadership roles, informal associations can also be subject to issues of gender, race and class.¹²⁰ However, those such as Gallin and Horn, who argue for formal existing unions to take the lead in organising informal workers fail to realise the importance of providing marginalised groups with their own space which they can use to shape and promote their interests.¹²¹ By placing the organising capabilities of informal actors solely in the hands of the formal sector, there is no way to prevent the marginalisation of certain groups of workers, such as female informal workers, who are more vulnerable to discrimination. Female membership of trade unions in the formal

¹¹⁷ Cornwall (n 90) 170

¹¹⁸ Dan Gallin, 'Propositions on Trade Unions and Informal Employment in Times of Globalisation' (2001) *Antipode* 33 (3) 532, 541

¹¹⁹ *Ibid* 541

¹²⁰ Ilda Lindell, *Africa's Informal Workers: Collective Agency, Alliances and Transnational Organizing in Urban Africa* (Africa Now) (Zed books 2010) 12

¹²¹ Pat Horn, 'Respective Roles for and Links between Unions, Cooperatives, and Other Forms of Organising Informal Workers' (2008, WIEGO).

sector has been traditionally very low due to exclusionary practices such as preventing women from taking on leadership roles, therefore expecting formal organisations to solve the problem of a predominantly female informal economy is a questionable method of fulfilling the ILO's promise of gender justice.¹²²

Furthermore, Fashoyin states there is a 'deep unease' about the involvement of 'other' actors in the 'domain' of trade unions and employers' organisations.¹²³ This unease can translate into resistance against the increasing influence of non-governmental organisations in tripartite discussions, organisations that promote the interests of informal workers excluded from such discussions.¹²⁴ Fashoyin, however, argues civil society and non-governmental organisations add to the tripartite tradition, rather than threaten it, they strengthen it by increasing the influence of workers' organisations.¹²⁵ This thesis however aims to show that this trade union monopoly on being the only legitimately democratic organisations is a consequence of the ILO's narrow interpretation of freedom of association and their policy towards promoting trade unions as such despite their shortcomings.

In light of their tendency to exclude and their declining influence, it makes little sense for the ILO to leave the important task of organising in the informal economy in the hands of formal trade unions. Furthermore, focussing on strengthening its tripartite structure through strengthening trade unions fails to acknowledge the lack of representation for informal voices within its tripartite structure. These voices are very much needed, yet as we shall below, still missing.

¹²² Fiona Colgan, Sue Ledwith, 'Tackling gender, diversity and trade union democracy – a world project?' in *Gender, Diversity and Trade Unions: International Perspectives* Fiona Colgan, Sue Ledwith eds (2003, Routledge) 1

¹²³ Ibid 37

¹²⁴ Gerry Rodgers, Eddy Lee, Lee Swepston, *The International Labour Organization and the Quest for Social Justice, 1919-2009* (International Labour Office 2009) 17

¹²⁵ Tayo Fashoyin, 'Tripartism and other actors in social dialogue' (2005) 21 (1) Int J Comp LLIR 37, 50

5.6.2. Informality: The Gender Dimension

Blackett states that workers' rights to collective bargaining are overlooked because they are not part of dominant paradigm. 'systemic discrimination – embedded in social and institutional practices, policies or rules'. The dominant paradigm she outlines is the Fordist one, a paradigm that has become long outdated due to increasing diversity of workers and workplaces yet the 'vehicles to render collective bargaining effective failed to capture the increasingly plural workplace realities.'¹²⁶ Those excluded tend to be from marginalised discriminated groups already. Ultimately 'the choice of collective bargaining framework can be crucial in determining whether systemic obstacles to equality of access to collective bargaining can be removed. Moreover, in an increasingly complex, integrating world, special care needs to be taken to cultivate new sites for social dialogue, sites that ensure representation for traditionally marginalized or excluded groups.'¹²⁷

Over the years, the ILO has taken steps to improve the promotion of gender equality including mainstreaming gender issues within the organisation itself.¹²⁸ By strengthening its efforts to 'institutionalize gender concerns' within, it can guarantee better policies promoting labour standards equally benefiting men and women.¹²⁹ The ILO's 'holistic approach to gender equality forms an intrinsic part of decent work agenda'.¹³⁰ The principle of equality between the genders is present throughout the ILO's materials, obliging states to make reflective national policies. Gender responsive

¹²⁶ Blackett (n 62) 421

¹²⁷ Ibid 420-421

¹²⁸ ILO, *Action Plan for Gender Equality 2010–15 Phase I: Aligned with Programme and Budget 2010–11* (ILO 2010); ILO, *Action Plan for Gender Equality 2016–17* (ILO 2016); ILO, *Action Plan for Gender Equality 2018–21* (ILO 2018)

¹²⁹ Ibid 52

¹³⁰ International Labour Conference, (98th Session) Report VI: Gender equality at the heart of decent work' Report VI (ILO Geneva June 2009) <http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_105119.pdf> accessed 26 May 2014

delivery of the Decent Work Agenda promotes a harmonisation of work and family responsibilities, organisation of female workers to ensure sufficient representation, equal employment opportunities so they can work towards economic independency and effective coverage of labour standards.¹³¹

The informal economy is referred to as 'the women's sector' due to the high concentration of female workers unable to work in the formal sector.¹³² And yet, men are overrepresented as own-account workers and employers in the informal economy, earning more than women who dominate the informal economy in terms of numbers.¹³³ The increased feminisation of the informal economy is due to the barriers women face accessing education and training to increase their employability. They also find it difficult to compete with men in terms of obtaining labour, capital and property to set up their own business enterprises.¹³⁴ Furthermore, social and cultural constraints prevent them from dedicating time to a career as the unfair division of labour places the burdens of raising a family onto the women.¹³⁵ There is often a lack in sufficient institutional support and labour laws for these women, and it is vital to involve them in the social dialogue process. Collecting data on these women is difficult but necessary for institutions and governments to make better informed policies.¹³⁶

It is estimated that the economic value of unpaid household work, if counted, is worth half each country's GDP.¹³⁷ It reduces burden on the state yet goes unnoticed and

¹³¹ Ibid 13

¹³² Marty Chen 'Addressing informality, reducing poverty', in *Jobs, jobs, jobs – The policy challenge, Poverty in Focus* No. 16 (2008, International Poverty Centre) 6, 6 <<http://www.ipc-undp.org/pub/IPCPovertyInFocus16.pdf>> accessed 18 July 2015

¹³³ Ibid

¹³⁴ Martha Alter Chen 'Women in the Informal Sector: A Global Picture, The Global Movement' (2006, World Bank) 1, 7 <<http://info.worldbank.org/etools/docs/library/76309/dc2002/proceedings/pdfpaper/module6mc.pdf>> accessed 18 July 2015

¹³⁵ Mary Cornish 'Securing pay equity for women's work – Everyone benefits: The international experience' Paper for ILO International Seminar on Equal Pay for Work of Equal Value (Santiago, 25 August 2008) 1, 3 <http://www.cavalluzzo.com/publications/newsletters/securingpayequityforwomenswork_cornish_september7_08.pdf> accessed 18 July 2015

¹³⁶ ILO 2009 (n 130) 46

¹³⁷ Ibid 123

is undervalued. Furthermore, women work in areas of the informal economy invisible to any legislative frameworks. For example, domestic work is 'often regarded as an extension of women's traditional unpaid household and family responsibilities' and in turn workers are unprotected.¹³⁸ Any specific conventions aiming to cover vulnerable groups of informal workers such as domestic workers or home workers suffer from lack of effective enforcement. Another concern is how often the outdated 'male bread winner model' is used when discussing labour policies and social security entitlements at the ILO.¹³⁹ Furthermore, traditional work injury compensation schemes are also tailored to benefit males and consider less female needs.¹⁴⁰ Sexual harassment, for example, is not often looked at as a health and safety issue when measures to combat it should be considered part of providing a safe work environment.

Economic empowerment is often what is missing from the lives of female informal workers. The ILO's response of marrying economic growth policies with gender equality has led to the adoption of several programmes. Expertise developed under Women's Entrepreneurship Development and Gender Equality (WEDGE) led to the creation of the WED programme supporting the economic empowerment of women as part of the wider Small Enterprise Development (SEED).¹⁴¹ There is also an emphasis on interagency cooperation aligning UN programs with the ILO's to deliver decent work as one.¹⁴²

¹³⁸ Ibid 36

¹³⁹ Ibid 335

¹⁴⁰ Mary Cornish 'Realizing the right of women to safe work – Building gender equality into occupational safety and health governance,' Concept Note for XVIII World Congress on Safety and Health at Work, (ILO, Seoul, 29 June 2008) http://www.cavalluzzo.com/publications/newsletters/realizingtherightofwomentosafework_ilo_sept12_08.pdf accessed 18 July 2015

¹⁴¹ Women's Entrepreneurship Development Programme (WED), (ILO, Geneva) <http://www.ilo.org/empent/areas/womens-entrepreneurship-development-wed/lang-en/index.htm> accessed 18 March 2015

¹⁴² ILO 'Partnerships for Decent work: UN reform and the ILO' (ILO Geneva 2008) http://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/genericdocument/wcms_173428.pdf accessed 18 March 2015

Aware that 'women are poorly represented in the higher echelons of informal work', the ILO promotes gender inclusive country programs to remedy this imbalance.¹⁴³ The Decent work agenda 'finds its policy anchor in the 1998 Declaration and operational delivery through instruments such as the Decent Work Country Programmes'.¹⁴⁴ At its 98th Session, the ILO outlined of roles of stakeholders and training sessions and its program finances to make sure public expenditure benefits all.¹⁴⁵ However, the 2010 Women in Labour Markets report shows that despite these efforts the gender gap in terms of quality employment was increasing , a gap that persisted through to 2018 when World Employment Social Outlook Trends For Women was released.¹⁴⁶ These reports are supposed to measure progress and identify challenges, but it is clear the 'challenges' heavily outweigh any progress. Using an analysis of twelve key indicators of the labour market, it can be show that in India for example, the number of women engaged in vulnerable work remains the same and 'gender disparity continues when it comes to quality and opportunities'.¹⁴⁷ Again this shows a clear need for the ILO's mission to refocus on providing women with a platform through enabling rights such as freedom of association. This needs to be considered a separate effort.

The term 'gender mainstreaming' is used throughout the ILO's papers as well as on its website. However, gender issues should already be at the forefront of policymaking, the simple fact that it often is not is an injustice. Therefore using the term 'gender justice' is more appropriate meaning 'the ending of, and if necessary the provision of redress for inequalities between women and men that result in women's

¹⁴³ ILO 2009 (n 130) 123

¹⁴⁴ ILO Governing Body, (308th session) Matters arising out of the work of the 98th Session of the International Labour Conference: Follow-up to the adoption of the resolution concerning gender equality at the heart of decent work (Geneva November 2009) GB.306/3/2 166 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_114997.pdf> accessed 03 August 2015

¹⁴⁵ Ibid 160

¹⁴⁶ ILO, *Women in labour markets: Measuring progress and identifying challenges* (ILO 2010); ILO, *World Employment and Social Outlook* (ILO 2018)

¹⁴⁷ Ibid 13

subordination to men'.¹⁴⁸ Women make up a significant proportion of the earth's population and it is necessary to communicate their struggles using the term 'injustices' when describing all economic, cultural and societal biases. The term gender justice is both a process and outcome but more importantly connotes an 'additional essential element' of 'accountability' conveying 'the responsibility and answerability of precisely those social institutions set up to dispense justice'.¹⁴⁹

One of the issues faced by the ILO, as well as states, is to avoid succumbing to 'gender fatigue' in terms of enforcement and considering gender dimensions in policymaking.¹⁵⁰ Societal attitudes towards decent work and gender equality may take time to change. Government approaches need to consider long term investments to remove barriers to decent work for women and reforms with lasting institutionalised change. The ILO has published a plethora of papers showcasing its deep understanding of the issues at hand but there also needs to be effective follow ups and engagement with member states regarding specific problem areas.

5.6.3. Informality, Informational Asymmetry & The ILO

In *Human Capital and Human Capability* Sen writes the following;

'Consider an example: If education makes a person more efficient in commodity production then this is clearly an enhancement of human capital. This can add to the value of production in the economy and also to the income of the person who has been educated. But even at the same level of income a person may benefit from education, in reading, communicating, arguing, in being able to choose in a more informed way, in being taken seriously by other, and so on. The benefits of education, thus, exceeds its role as human capital in commodity production. The broader human-capability perspective would record - and value - these additional roles. The two perspectives are, thus, closely related but distinct.'¹⁵¹

¹⁴⁸ Maitrayee Mukhopadhyay and Navsharan Singh (eds) *Gender Justice, Citizenship, and Development* (International Development Research Centre 2007) 1 4

¹⁴⁹ Ibid 5

¹⁵⁰ ILO 2009 (n 130) 168

¹⁵¹ Amartya Sen, 'Human Capital and Human Capability' (1997) 25 *World Development* 1959, 1961

The role of education in the creation of human capital is a significant and rarely contested one.¹⁵² To put it simply (and in the context of this research), the more educated individuals are, the less likely they are to participate in the informal economy and all its pitfalls of precarious work.

Over the course of this chapter, we examined the pre-conditions for social dialogue and effective tripartism and education is an aspect that cannot be overlooked. Although Sen makes a connection between human capital and freedom, it is important to recognise that the latter is more significant and not always a result of the other. Furthermore, it is important to realise that, rather than education's role being limited to increasing worker productivity and human capital as put forward by human capital theory, it has another function too. This requires examining the theory of Information asymmetry in a labour context, or more specifically, in the context of what it can mean for the ILO's tripartite structure.

This theory originates in economics and is concerned with the impact transfer information can have in transactional scenarios from those who have it to those who need it.¹⁵³ It can have applications outside of economics and looks at the communication failure as an outcome. Spence shows that education endows workers with a signalling function, a solution to informational asymmetry, allowing one to make greater gain in human capital due to the ability to signal their skill to employers.¹⁵⁴ This theory has many applications such in collective bargaining process and hiring process.¹⁵⁵

¹⁵² Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Belknap 2006) 322

¹⁵³ See George Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 *Quarterly Journal of Economics* 488

¹⁵⁴ Michael Spence 'Job Market Signalling' (1973) 87(3) *Quarterly Journal of Economics* 355; Michael Spence. 'Signaling in retrospect and the informational structure of markets.' (2002) 92 *American Economic Review* 434; Andrew Weiss, 'Human capital vs. signaling explanations of wages' (1995) 9 (4) *Journal of Economic Perspectives* 133; Brian L Connelly and others, 'Signaling Theory: A Review and Assessment' (2011) 37(1) 39

¹⁵⁵ *Ibid* Connelly

If we apply this to informal employment, it can be concluded that an imbalance in information prevents informal workers interacting effectively with workers' organisations and vice versa. Informal workers in this situation are unable to 'signal' their needs and value to the formal workers' organisations to assist their own organising efforts due to being uninformed. Since informal actors are unable to do this without information, skills and education, it is the role of the ILO to act as the agent since this informational imbalance impacts the organisation directly via its unrepresentative tripartite structure. This can be done through 'screening', where one party has less information than the other but the capacity to find out this information from said party.¹⁵⁶

Information asymmetry impacts many aspects of the informal economy; from national labour administrations' lack of information on informality in their country, to trade unions being unable to effectively facilitate informal workers' transition from informal employment; and finally, to the assumptions made by the ILO's tripartite partners regarding capabilities of informal actors. The discussions that led to the adoption of Recommendation No. 204's and the disappointment of its content, show the significance of addressing the informational gaps regarding the experiences of informal actors –their skills, values and needs as articulated by themselves. It is therefore, purpose of the ILO to bridge these informational gaps. While the social dialogue guides are effective in educating the tripartite partners – unions, employers' organisations and governments – they are not enough to remedy the situation for informal workers.

5.6.4. Workers' Organisations & Movements: The Myth of The Monolith

¹⁵⁶ Joseph Stiglitz. 'Information and the change in the paradigm in economics' (2002) 92 (4) American Economic Review 460

Tripartite social dialogue is at the core of the ILO constitution, providing the lines along which the organisation is organised and how it aims to fulfil its objectives. The benefits of social dialogue are many; from the active democratisation of decision making, accountability to resulting social peace, stability and effectiveness in governance. The ILO states the process of social dialogue, beginning at national level, 'can bring about a virtuous cycle in which the word of social partners gains public recognition, more visibility and influence in social policy making'. If successful, it will combat the decline in memberships of trade unions. Therefore, government needs to play a role in expanding the scope of existing national tripartite bodies, as well as trade unions and employers organisations to represent informal interests.¹⁵⁷ This is however, a somewhat optimistic view to hold when we view the current shortcomings when it comes to organising and empowering workers to partake in the social dialogue process.

Organisation of workers is a recurring theme throughout this research and it will continue to argued empowerment and organisation is the only treatment to do more than just alleviate the negative symptoms of informality. Workers, due to their informal status, are without the backing of trade unions even where they have been working for many years.¹⁵⁸ Collective bargaining is an important tool for enforcing other labour rights as workers themselves are in a strong enough position to make demands, such as rectification of unfair wages or better working hours.¹⁵⁹

Many states refer to informal workers as being those who are not unionised or organised.¹⁶⁰ A mixture of macro contextual factors act as a barrier to the unionisation of informal workers. The most common one is their ineligibility due to work status, lack of social protection, and legislative thresholds such as salary and duration of work. The

¹⁵⁷ ILO, National Tripartite Social Dialogue (n 11) 76; International Labour Conference, (90th Session) Report VI: Decent work and the informal economy (ILO Geneva 2002)

¹⁵⁸ K.R. Shyam Sundar, 'Non-regular workers in india: social dialogue and organizational bargaining strategies and practices' ILO Working Paper No. 30/2010 1

¹⁵⁹ C. S. Venkata Ratnam 'India' (1999), in *Trade unions in the informal sector: Finding their bearings Nine country papers* Labour education, International Management Institute 1999/3 No.116 25, 33

¹⁶⁰ Ibid 25

second barrier is the fragmentation of informal workers and workplaces preventing their organisation.¹⁶¹ Furthermore, the informal workforce is viewed as unskilled, ill equipped and uneducated. The trade unions can no longer just focus on formal workers since the numbers and therefore power now lies in the informal economy.¹⁶² It is in the interest of trade unions to help unorganised workers and there is evidence that trade unions are slowly realising that the organised sector is shrinking and so is the base for their membership.¹⁶³

The need for numbers and overlap in interests of workers however is not a strong enough justification for treating all workers organisations as being perfect homes for informal workers. Interviews with workers show many employers dismiss or suspend casual workers for attempting to form trade unions or fire workers after a certain time to prevent them from being considered permanent workers.¹⁶⁴ Contract workers do not feel comfortable talking about unionisation since they do not feel it is their place to do so due to the nature of their employment.¹⁶⁵ Additionally, women need to be more involved in social dialogue and workers' organisations but are continually excluded.¹⁶⁶ Freedom of association and collective bargaining have been lifted to fundamental 'core labour standard' status by the ILO and therefore apply to all workers by virtue of state membership. Therefore, there is pressure on both the ILO and its member States to ensure this fundamental principle is respected. What is needed is an alignment of strategies with the ILO and states working towards 'a more pro-active intervention in favour of workers and trade unions'.¹⁶⁷

¹⁶¹ Ibid 15

¹⁶² ILO, *Women and men in the informal economy: A statistical picture*. (3rd edn, ILO 2018)

¹⁶³ Ratnam (n159) 22

¹⁶⁴ Sundar (n 158) 33

¹⁶⁵ Ibid 34

¹⁶⁶ Linda Briskin and Angelika Muller, 'Promoting gender equality through social dialogue: Global trends and persistent obstacles' *DIALOGUE ILO Working Paper No. 34* 12/2011

¹⁶⁷ Ibid 34

As shown in this chapter and the last there is a disconnect between freedom of association and collective bargaining rights as they are promoted and as they are practiced. It is important to recognise promotion at all levels – democratic participation at the workplace but also the ‘broader notion of industrial citizenship in social policy.’¹⁶⁸ The idea of collective bargaining and organising we see are built on the Fordist workplace and Blackett reminds us that ‘emerging post-Fordist paradigms pose difficult challenges to the founding concepts on which twentieth-century industrial relations were constructed.’¹⁶⁹ Models built on Fordism are limited since certain groups of workers are assumed to be outside the ambit of legislation. Blackett points to the example of those in employment in agricultural and domestic settings as being routinely excluded, on the assumption that their work ‘naturally’ falls outside the industrial model, sometimes quite literally because of the absence of an industrial *workplace*.¹⁷⁰ Therefore, the gap between legislative inclusion and de facto access to collective bargaining is far wider than we anticipate. Collective bargaining systems of Fordist era are also national in scope.¹⁷¹ This model relies on guarded national borders, ‘low level organization’, with immigrants and racial minority workers kept out through ‘occupational segregation’.¹⁷² Productive relations existing outside a particular nation-State were not considered to fall within the distributional range which the social partner in a given country should be concerned, making informality a huge issue. While ‘everyone whose basic interests are affected by policies should be included in the process of making them’ the problem with protective legislation is that it is concerned with matters inside a state not outside it and the ‘national scope of distributive justice increasingly failed to capture reality of

¹⁶⁸ Blackett (n 62) 420

¹⁶⁹ Blackett (n 62) 420

¹⁷⁰ Ibid

¹⁷¹ Blackett (n 62) 423

¹⁷² Ibid

production that crossed national borders, necessarily delinking itself from consumption'.¹⁷³

Fordism created what Blackett calls 'fictions' including a homogenous society, a failure to acknowledge 'labour market segmentation of racial, ethnic and religious minority workers in industrialised societies' and immigrant workers.¹⁷⁴ There is a link between racial, ethnic, religious equality and the struggles against colonial control over economic and political life. Unions are essentially concerned with promoting broad structural societal change about reversing consequences of colonialism, yet according to Blackett failed to even address this in the first place.¹⁷⁵ Fordism assumed away divergences of the norm and these ideas have been exported to across the globe. Without addressing these inherent inequality, unions cannot be the vehicle for change and represent the interest of marginalised workers.

5.7. Conclusion: The ILO & The Task of Getting All Workers at the Table

Whenever the ILO outlines the participants of social dialogue and their roles, the organisation makes it that it is the governments' who are supposed to 'provide support in the form of the appropriate institutional and legal frameworks for national tripartite social dialogue, promote national tripartite social dialogue as directed by ILO labour standards, participate as one of the three parties and implement the outcomes and ensure monitoring to guarantee compliance with agreements'.¹⁷⁶ Therefore, the mission and mandate of national tripartite social dialogue institutions are country specific. Generally, the mandate will include information sharing, administration of established

¹⁷³ Iris Marion Young *Inclusion and democracy* (Oxford University Press 2000) 236; Blackett (n 62) 424

¹⁷⁴ Blackett (n 62) 426

¹⁷⁵ Blackett (n 62) 426

¹⁷⁶ ILO National Tripartite Social Dialogue Guide (n 11) 98

policies, analysis of existing laws and programmes, negotiation and supervision of the implementation of tripartite agreements, advice to government on policy issues (consultations on policy formulation, development analysis of policy initiatives, recommendations on economic, social and labour related issues).¹⁷⁷ Involvement in these significant activities have a wide reaching impact on the state and enforcement of labour laws on a national scale but also at the ILO level, yet remain currently outside the reach of millions of workers. Social dialogue institutions, therefore, need to be strengthened so they can set the groundwork for long term change and commitment to regulation through the organisation of all workers.¹⁷⁸ However, the foundational understanding of freedom of association and the right to organise and collective bargaining they are based on must be rooted in true 'freedom' and empowerment, taking into consideration varied needs. This is will guarantee all globally workers – formal and informal – have the same entitlements and level involvement.

¹⁷⁷ ILO National Tripartite Social Dialogue Guide (n 11) 123

¹⁷⁸ Ibid 39

Chapter Six: The ILO & The Importance of Re-Framing Informal Workers As 'Organizable Central Actors'

6.1. Introduction: How The ILO Represents Informal Actors & Interests

This chapter aims to follow on from what was set up in the last chapter about the importance of changing the ILO's approach to informal workers. The current approach, guided by old ideas, frames informal workers not as actors but as a group in need. The approach is centred around the transition of informal workers into the formal economy and the language employed points to an 'absorption' strategy that is simplistic and fails to address the tensions existing between workers outlined in chapter four. It is therefore argued here, the ILO must depart from this reductive approach for one more reflective of the complexities of the problem.

This chapter will begin by unpacking the current issues surrounding the ILO's engagement with the informal economy. This will include a closer examination of the adoption of Recommendation No. 204 concerning the Transition from the Informal to the Formal Economy by International Labour Conference at 104th Session in Geneva, on 12 June 2015 and why it falls short when it comes to placing significant emphasis on the organising capabilities of those in the informal economy.

Next it will be show that although the ILO's tripartite structure reflects the interest of formal workers, favours them and the old approaches to organising, there are new, grassroots informal led approaches which have shown success. It is by bringing these informal voices into the fold – returning the ILO to its status of being truly representative of the workers across the globe.

The catch all terminology of the Decent Work Agenda helped bring workers under the umbrella of fundamental labour standards and the study of the complexity of

the informal economy facilitated our understanding of the issue. However, the next step is to highlight the ways informal actors are exercising their rights and placing human freedom at the centre of discussion of labour.

6.2. The ILO's Engagement with the Informal Economy: A Critical Analysis

Workers in the informal economy are vulnerable on multiple fronts with higher rates of illiteracy, poverty and exposure to unsafe working conditions as well as fewer protections (social security, maternity, health & safety), skills, opportunities and instances of regular income.¹ Drawing new membership from the informal economy can be a significant boost to trade unions who view it as bring lost voices into the fold and the action of organising informal workers is often framed as being as much as benefit to unions as it is to informal workers.² Falling union density and a weakening the global labour movement has impacted the voice of the workers' group at the ILO, which can have further impact on the powers of workers' organisations as shown by the disagreement in 2012 over the existence of the right to strike.³

When engaging with informal workers' organisations, the this chapter has shown trade unions view their role is to increase their own strength and 'secure that the new IE affiliated organisations get capacity building and knowledge of the basic principles and democratic structures of unions.'⁴ This, however, raises questions regarding who it is trade unions should focus on organising considering the variety of informal workers

¹ International Labour Conference, (103rd session) Report V(1): Transitioning from the informal to the formal economy (ILO Geneva 2014)

² Jørgen Assens and Eva Tabor (eds) *Paving the way for formalization of the informal economy: Experiences and perspectives from ITUC-Africa and trade unions across Africa*. (LO/FTF Council, 2015) See page 14 for the example of the Sierra Leone Labour Congress

³ International Trade Union Confederation (ITUC) *The Right To Strike and the ILO: The Legal Foundations* (ITUC 2014) 5

⁴ Assens and Tabor (n 2) 25

groups that exist – from own account users who have more in common with entrepreneurs to home based workers with an absence of clear employer or work place.⁵ Furthermore when engaging with informal groups, unions must ask themselves if they have the ‘capacity and knowledge to service own-account workers or economic units since it requires comprehensive knowledge of entrepreneurial issues and legislation which is not the natural sphere of work of union’.⁶

Chapter Five has shown how the workers’ constituency of the ILO’s tripartite structure is rooted in the formal sector which can be at odds with the interest of formal workers’ organisation. Based on our understanding, true workers involvement and empowerment starts with reflecting on the ILO’s preconceived assumptions about informal and formal workers, their relationship and the role of workers’ organisations. It is only after unpacking these entrenched positions that the organisation can remedy the institutional flaws with regards to representing workers voices. It is demonstrated in the following sections that 1) workers are not a monolith, 2) categorising them differently superficially does not achieve the desired outcome of empowerment either and 3) not without there first existing a recognition of the nuanced relationship between different groups of workers.

6.2.1. Freedom of Association: A Senian Model

Going into this section it is important to accept the following positions; 1) the right to freedom of association, collective bargaining and organising in their current form are ineffective; 2) they are ineffective not because of lack of relevance to the modern realities

⁵ Ibid

⁶ Ibid

of the world of work but because of limiting factors preventing the full realisation of these rights.

On the first statement of concern, one aspect is that they are predominately exercised within western industrial models and are not promoted equally across the world.⁷ A brief glance at the history of these rights and our understanding of workers organisations shows they came into existence with western democracies, male breadwinners and dated employment arrangements in mind and have stayed rooted in these ideas.⁸ This was shown in the previous chapter where Blackett's argument regarding the neutrality of collective bargaining was outlined.⁹ If we apply Senian terms with regards to the ineffectualness of Conventions No. 98 and No. 87, it is important any examination of the conventions is aware to outcomes functionings and capabilities.¹⁰

6.2.2. From Informal to the Formal Economy: Transitioning versus 'Absorption'

The capability of informal actors to engage with the tripartite structure of the ILO is narrow in practice. On the agenda at the International Labour Conference's 103rd session held in June 2014, points based on the report from the Tripartite Interregional Symposium on the Informal economy were at the centre of discussions. These were held with the aim of leading to a recommendation on facilitating the transition from

⁷ Adelle Blackett, 'Decolonizing Labour Law: A Few Comments' (2016) 92 Bulletin Of Comparative Labour Relations 89

⁸ Adelle Blackett, 'Emancipation in the Idea of Labour Law'" in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011); Stephanie Luce *Labor Movements: Global Perspectives* (Polity 2014)

⁹ Adelle Blackett and Colleen Sheppard, 'Collective Bargaining and Equality: Making Connections' (2003) 142 Int'l Labour Rev 419 420

¹⁰ Amartya Sen 'Development as Capability Expansion', in K. Griffin and J. Knight (eds), *Human Development and the International Development Strategy for the 1990s* (Macmillan 1990)

informality to formality at the following session in 2015.¹¹ The final conference report did not 'seek to provide a comprehensive and detailed analysis of the subject' but rather 'highlight some key elements' in preparation for next year, and review the 2002 framework on the informal economy.¹² As the standard setting mandate requires, in preparation for this potential recommendation, governments were 'asked to consult the most representative organizations of employers and workers'.¹³ Furthermore, governments were advised to 'consult other relevant national ministries and institutions which deal with the informal economy'.¹⁴ However, exactly who in this process is deemed 'most representative' fails to take into consideration the importance of informal voices even in discussions directly concerning the informal economy. The nature of the responses, as will be discussed later, betray a lack of capacity to fully reflect the interests of those in the informal economy as well as the perpetuation of a narrative harmful to the universalisation of labour rights.

A glance at the attendance list of international labour conferences reveals the position of informal voices within the ILO and their limiting participation in advisory positions as substitute and advisor delegates or as representatives of the observers and international nongovernmental organisations invited to the Conference. For example, the final list of delegates at the 108th session of the International Labour Conference held on the 21st June 2019 celebrating the organisation's centenary shows the limited presence of informal workers organisation within the tripartite structure of the ILO has continued despite the focussed mission on the informal economy since the 103rd

¹¹ ILO, '103rd International Labour Conference, ILO moves the discussion on the informal economy one step forward, (*ILO Press Release*, Geneva 12 June 2014) <http://www.ilo.org/global/about-the-ilo/media-centre/press-releases/WCMS_246810/lang--en/index.htm > accessed 04 July 2014; ILO Report of the tripartite Interregional Symposium on the Informal Economy: Enabling transition to formalization, 'Decent work and the transition to formalization: Recent trends, policy debates and good practices (Geneva November 2007)

¹² International Labour Conference, (103rd session) Report V(1): Transitioning from the informal to the formal economy (ILO Geneva 2014) 1

¹³ In accordance to article 39(1) of the Standing Orders of the Conference. ILO, 'The Standing Orders of the International Labour Conference' (*ILO*, June 2018) <https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:3088520:NO> accessed 18 June 2018

¹⁴ International Labour Conference (103rd session) Report V(1) (n 12) para 42

session. Other than the continued presence of Women in Informal Employment: Globalizing and Organizing (WIEGO) as representative of international non-governmental organisation, only the Philippines had a significant representative of the informal sector in an advisory capacity to the worker's delegation – the president of the Alliance of Employees in the Informal Economy/Sector.¹⁵

At the 104th session where the conference adopted the noteworthy Recommendation concerning the transition from the informal to the formal economy the presence of informal voices was only slightly greater yet still insufficient when considering the agenda of the conference. The Afghan delegation sent in an advisory capacity to the governmental delegation a representative of the Informal Business and Chamber Support Unit.¹⁶ Furthermore, Ghana sent the General Secretary, Union of Informal Workers Association and a representative of the Union of Informal Workers Union to attend the conference in what appears to be an observer capacity.¹⁷ Again only the Philippines sent an informal sector representative as part of the workers delegate in a more significant position as an advisor to the workers delegation.¹⁸

The significance of these conferences is that it is a 'forum where social and labour questions of importance to the entire world are discussed freely' and where 'delegates explore the course of social progress in the world'.¹⁹ It is at these conferences where conventions and recommendations are crafted, adopted and supervised, where reports concerning their application at national level examined and the future agenda of the ILO set.²⁰ Yet over the years, other than WIEGO, there has not been a consistent

¹⁵ International Labour Conference (108th Session) Supplement to the Provisional Record: Final List of Delegations (Geneva June 2019) <https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_703542.pdf> accessed 07 July 2019

¹⁶ International Labour Conference (104th Session) Supplement to the Provisional Record: Final List of Delegations (Geneva June 2015) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_372007.pdf> accessed 07 July 2019

¹⁷ Ibid 45

¹⁸ Ibid 85

¹⁹ ILO, About the ILC <<https://www.ilo.org/ilc/AbouttheILC/lang--en/index.htm>> accessed 8 July 2019

²⁰ Ibid

informal presence partaking in the policies that concern the situation of informal workers. It seems to have been assumed that the interest of informal workers can best be articulated by worker delegates that overwhelmingly represent formal workers – a notion that fails to consider the nuanced differences between groups of workers.

The obvious way to ensure the amplification of informal voices is by joining national workers organisations, since it is that pool which the ILO draws its delegates at the tripartite level. As it has been argued throughout, the ILO has always claimed to be committed to the idea that all workers have the right to establish and to join organisations of their choice, regardless of employment status or relationship.²¹ The Committee of Experts extends its work to requesting regular information on the informal economy and the domestic realisation of rights under Freedom of Associations conventions, whilst the Committee on Freedom of Associations is open to examining complaints from the informal economy.²² Furthermore, Article 7 of Convention No. 150 ‘envisages the extensions of the functions of the system of labour administration to include the activities of appropriate categories of workers who are not, in law, employed persons’.²³ Despite these commitments, and the ILO’s insistence that ‘organising is the first step to social dialogue as well as the development of tripartite solutions that take into account the contextual factors and diversity within the informal economy’, the political agency of

²¹ para. 222 states ‘include domestic workers, workers in the informal economy and EPZ self-employed workers, workers without employment contracts agricultural workers’. ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th edn, ILO 2006)

²² paras 71–76, para 50. International Labour Conference, (101st Session) Giving Globalization a Human Face: General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization 2008 Report III (Part 1B) (ILO Geneva June 2012) <https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_174846.pdf> accessed 14th March 2015

²³ See comments by the Committee in International Labour Conference, (100th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1A) (ILO Geneva June 2011) <https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_151556.pdf> accessed 21 October 2017

informal actors is very much under researched.²⁴ Instead, the ILO continues to support what it sees as ‘the innovative and effective practices used by employers’ organizations and trade unions in various countries to reach out to, organize and assist workers and enterprises in the informal economy’ all of which ‘should be more widely publicized’ – whilst moving the conversation away from the direct empowerment of informal actors and keeping it within the organised sector.²⁵ National policies that fall short are best addressed by the political pressure of organised actors. Consequently, only having policies in place that allow collective bargaining does very little to contribute to lasting change.²⁶

The ILO does acknowledge informal economy organisations, but it also acknowledges their ‘key organizational and representation gaps’ which it states ‘can only be filled by trade unions and employers’ associations’.²⁷ The view that ‘trade unions sensitize workers in the informal economy to the importance of collective representation and are making greater efforts to include them in collective agreements’ is problematic on two grounds.²⁸ Firstly, it discredits the value of initiatives that come from the informal workers themselves. Secondly, it fails to represent the tensions between unions and informal associations. Lessons that can be learned from successful cases of actors organising in the informal economy as well as overestimating the capacity of organisations in the formal sector. By assuming there is strength and also a willingness to ‘reach out to and unite smaller self-interest organizations’, the ILO is unknowingly creating additional barriers preventing organising – a perception barrier.

²⁴ Ibid at para 139; Ilda Lindell, *Africa’s Informal Workers: Collective Agency, Alliances and Transnational Organizing in Urban Africa* (Africa Now) (Zed books, 2010); para 17 International Labour Conference, (90th session) ‘Resolution concerning decent work and the informal economy’ (ILO Geneva 2002)

²⁵ International Labour Conference (103rd session) Report V (1) (n 12) para 139

²⁶ Ilda Lindell, *Africa’s Informal Workers: Collective Agency, Alliances and Transnational Organizing in Urban Africa* (Africa Now) (Zed books 2010)

²⁷ para 212-13 International Labour Conference, (97th Session) Report I (B) Report of the Director-General ‘Freedom of association in practice: lessons learned’ (2008, Geneva)

²⁸ International Labour Conference (103rd session) Report V (1) (n 12) 141

Lindell discusses the problem with perception on several levels. She firstly maintains it would be a mistake to view organising in the informal economy as a problem separate from the formal sector, and that there should be greater awareness of the continual interaction between the two that blurs the divide considerably.²⁹ In fact it has been discussed how informal actors' interests differ or at times even clash with those in the formal sector. Downplaying the complexity of the relationship, whilst advocating that 'trade unions can act as a hub for coordination of efforts by informal economy networks', is counterproductive to the ILO's mission.³⁰ This does not mean there are no cases of positive interactions between the informal and formal economy, but that it is important to acknowledge the barriers preventing collaboration.³¹ There have been positive cases of trade unions having an incentive to work with NGOs and informal workers' organisations towards common goals such as organising workers in specific informal industries in India.³² However, the ILO can certainly do more to facilitate this relationship worldwide, as informal workers are often unaware of such possibilities and face being overwhelmed by the bureaucracy of unions.³³ The formal sector, the base for union membership, is shrinking. Therefore, as Luce notes, there is a growing need for trade unionists to turn to working with and organising the informal sector to strengthen their own influence locally, nationally and internationally.³⁴ Whilst it is true that trade unions are in a position to aid informal economy workers seeking to organise through the dissemination of information on legal rights or engaging in 'educational and advocacy projects', organising informal workers cannot be done solely to strengthen existing formal sector workers' and employers' organisations. Rather, it should be done out

²⁹ Elizabeth Hull and Deborah James 'Introduction: Popular Economies in South Africa.' (2012) *Journal of the International Africa Institute* 82 (1) 1 2

³⁰ ILO Bureau for Workers' Activities International Workers' Symposium, 'The role of trade unions in the global economy and the fight against poverty' (October 2005) Para 216

³¹ Ibid para 214-15

³² Adelle Blackett 'Regulating Decent Work for Domestic Workers' (2011) 23 *Can. J. Women & L.* 1 22

³³ C. S. Venkata Ratnam 'India' (1999), in *Trade unions in the informal sector: Finding their bearings Nine country papers* Labour education, International Management Institute 1999/3 No.116 40

³⁴ Stephanie Luce, *Labor Movements: Global Perspectives* (Polity 2014) 6, 92

respect for the fundamental principles at the heart of the ILO's mandate. It requires accepting the fact that not all unions can, or have the incentive, to accurately reflect the interests of those in the informal economy for a myriad of reasons that deserve more research within the ILO. Tripartite discussions on informality betray an ignorance of the true importance of this issue. Furthermore, this cannot be effectively be addressed without firstly acknowledging informal actors as agents themselves with their own visions of what their labour movements and organisations should look like.

6.3. An Analysis of Recommendation No. 204: A Story of Potential & Problems

On June 15th 2015 the International Labour Organisation (ILO) finally adopted the recommendation aiming to facilitate the transition from informality to formal work.³⁵ The ILO praises Recommendation No. 204 as a progressive instrument; the first of its kind to fully address the complex nature of informality and with near universal approval of its members.³⁶ This recommendation provides a comprehensive guide for policy-makers, labour institutions and social partners; cutting across multiple policy areas to address the decent work deficits facing informal workers.³⁷

However, past criticisms of the capability of ILO instruments to encourage real commitment to the enforcement of labour standards remain unresolved and it is hard to see how No.204 will be different to the ILO's other documents.³⁸ This section will offer

³⁵ ILO Recommendation R204: Transition from the Informal to the Formal Economy Recommendation (Recommendation concerning the transition from the informal to the formal economy) (104th ILC Session Geneva 12 June 2015)

³⁶ ILO, 'ILO adopts historic labour standard to tackle the informal economy' (*ILO Press Release* Geneva, 12 June 2015) <http://www.ilo.org/ilc/ILCSessions/104/media-centre/news/WCMS_375615/lang--en/index.htm> accessed 1 March 2016

³⁷ ILO, 'Ways out of informality: How a new ILO standard tackles the informal economy trap' (*ILO Press Release* Geneva, 23 June 2015) <http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_377771/lang--en/index.htm> accessed 1 March 2016

³⁸ Guy Standing, 'the ILO: An Agency for Globalization?' (2008) *Development and Change* 39(3); Kimberly Ann Elliott & Richard B. Freeman 'Can Labor Standards improve under globalization' (2003)

an appraisal of Recommendation No 204. It will be argued that although the document does a good job of highlighting the complexity of informal economy and ensures near universal consensus on the significance of the labour rights issues facing informal workers, Recommendation No. 204 continues to fall short when it comes to placing significant emphasis on the organising capabilities of those in the informal economy.³⁹

6.3.1. Recommendation No. 204: A Closer Look - The Aims & Objectives of Recommendation No. 204's Purpose

The Recommendation is intended to give direction on how to 'facilitate the transition of workers and economic units from the informal to the formal economy, while respecting workers' fundamental rights and ensuring opportunities for income security, livelihoods and entrepreneurship.'⁴⁰ This transition requires also member States to also promote 'the creation, preservation and sustainability of enterprises and decent jobs in the formal economy' and the prevention of further informalisation of formal economy jobs.⁴¹ This three-pronged approach is supposed to ensure no further leaking of jobs into the informal economy as well as recognising 'the coherence of macroeconomic, employment, social protection and other social policies'.⁴²

While a clear benefit of Recommendation No. 204 is that is the first step in direct advocating of practical steps to dealing with the issues of informality with a goal of decent work and 'inclusive development' bringing this action about is not a simple task.⁴³ As a

Institute for International economics 93; Philip Alston, 'Core Labour Standards and the Transformation of the International Labour Rights Regime' (2004) 15 European Journal of International Law 457.

³⁹ Particular emphasis will be placed on the significance of part VII of the instrument regarding the inclusion of informal workers in the social dialogue process and we will explore the role the instrument envisions for informal workers' organisations throughout the transition process.

⁴⁰ Recommendation No 204 I (1 A)

⁴¹ Recommendation no 204 I (1 b, c)

⁴² Ibid

⁴³ ILO, *Women and men in the informal economy: A statistical picture*. (3rd edn, ILO 2018) 3

result of the adoption of Recommendation No. 204 in 2015, ACTRAV set out to create a series of briefs and guides with the purpose of ensuring effective implementation of Recommendation No 204. In 2016, ACTRAV released a policy brief titled *Organizing Workers in the Informal Economy* aimed at assisting workers organisations 'in understanding and tackling the injustices and decent work deficits associated with employment in the informal economy'.⁴⁴ The brief contained information and suggested strategies to 'organise, protect and promote the rights and interests of informal economy workers'.⁴⁵ Furthermore, in 2017 saw the publishing of a Workers' guide on Recommendation No. 204 which 'services as a valuable reference to workers' organization on the provisions of the Recommendation' as well as offering examples and suggestions to support the transition.⁴⁶

The purpose of Recommendation No. 204 can be loosely categorised as recognising and reaffirming certain understanding with regards to informality as well as a number of measures to tackle its challenges.⁴⁷ It has nine sections which cover enough ground to make sure the document touches on all of the most important aspects of informality; defining informality, the multiple causes ('acknowledging that most people do not enter the informal economy by choice'), multiple actors and the challenges ('including governance and structural issues').⁴⁸ Besides 'recognizing the high incidence of the informal economy and its impact on the rights of workers' the Recommendation also 'outlines a legal and policy framework to facilitate the transition' ; the 'importance of a comprehensive employment policy framework' and data collection and monitoring;

⁴⁴ ILO, 'Organizing workers in the informal economy: trade union strategies to extend membership, services and organizing activities to workers in the informal economy and facilitate transition from the informal to the formal economy.' Bureau for Workers' Activities (ACTRAV) Policy Brief (Geneva 2016)

⁴⁵ ACTRAV Policy Brief (n 44)

⁴⁶ ILO, *Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204) Workers' Guide* (ILO ACTRAV 2017)

⁴⁷ International Labour Conference, (103rd session) Report V(1): Transitioning from the informal to the formal economy (ILO Geneva 2014); International Labour Conference, (103rd Session) Report VI: Recurrent discussion Employment policies for sustainable recovery and development under the ILO Declaration on Social Justice for a Fair Globalization (ILO Geneva 2014)

⁴⁸ Preamble to Recommendation No. 204

acts as ‘guidance on the design of coherent and integrated policies to facilitate the transition’ as well as ‘incentives, compliance and enforcement mechanism’ needed to fulfil its mandate.⁴⁹

ACTRAV states that ‘the inclusion of informal economy representatives is crucial for ensuring that there is respect for the right of informal economy workers to freedom of association and to collective bargaining, and helps make sure that national realities are taken into consideration’.⁵⁰ The Recommendation therefore ‘follows a rights-based approach to formalization’ emphasising the significance of social dialogue and more significantly ‘acknowledges the crucial role that social partners can play in facilitating the transition’.⁵¹ The recommendation requires member States to ensure informal workers ‘enjoy’ these rights and create an ‘enabling environment for employers and workers to exercise their right to organize and to bargain collectively and to participate in social dialogue in the transition to the formal economy’.⁵² Employers’ and workers’ organizations ‘should, where appropriate, extend membership and services to workers and economic units in the informal economy’.⁵³ This is significant as the terms ‘should’ and ‘where appropriate’ used in the Recommendation need elaborating. The Policy Briefs such as *Organising Workers in the Informal Economy (2016)* and resource guides such a *Workers’ Guide on Recommendation No. 204 (2017)* outline the specific challenges of implementing the Recommendation but fail answer them.⁵⁴

6.3.2. Recommendation No. 204: Addressing Challenges to the Formalisation of Informal Workers

⁴⁹Section VI of Recommendation No. 204; see also ILO Recommendation(No. 204) Workers’ Guide (n 46) 6

⁵⁰ ACTRAV Policy Brief (n 44)

⁵¹ Ibid

⁵² Para 32 of Recommendation No. 204; Para 31 Recommendation No 204

⁵³ Para 33 of Recommendation No. 204

⁵⁴ The intended audience of these guides are workers’ organisations and states.

The ILO admits that determining the extent of unionisation among informal economy is complex and that 'trade unions face a multiplicity of challenges, both internal and external, in organizing workers in the informal economy'.⁵⁵ Firstly, identifying workers to target is a huge concern, where traditional employment relationships are absent, employers are not as recognisable and contracts are not as clear (agency work, subcontractors or absence of a contract).⁵⁶ Furthermore there is the diversity of the informal economy, the costs locating informal workers who are dispersed and at times working from their homes or in hard to reach sectors such as agriculture or domestic work.⁵⁷

Secondly, there are financial challenges with collecting the cost needed to cover membership fees from informal workers. Therefore, it is argued by unions that 'some systems should be developed to secure that the IE members also contribute to the trade unions if they want to be part of the trade union family and get their protection and services'.⁵⁸ An example of how unions can meet this challenge can be found in the actions of the Sierra Leone Labour Congress (SLLC);

'The SLLC in Sierra Leone adopted a policy at their last Congress that eases the burden of meeting financial obligation to the SLLC by charging IE organisations minimal service fees as opposed to per member fee charged to unions operating in the formal sectors'.⁵⁹

However, what has not been considered is how this may cause tension when unions are required to cover the costs of informal workers – as well as a deficit in political power where informal workers have less say due to limited financial contributions.

⁵⁵ ILO Recommendation (No. 204) Workers' Guide (n 46) 6

⁵⁶ Martha Chen, Chris Bonner and Francoise Carre, 'Organizing Informal Workers: Benefits, Challenges and Successes' (2015) UNDP Human Development Report Office Background Paper <http://hdr.undp.org/sites/default/files/chen_hdr_2015_final.pdf> accessed 4 April 2016

⁵⁷ Ibid

⁵⁸ Assens and Eva (n 2) 25

⁵⁹ Ibid

Furthermore, the lack of administrative skills informal workers have incurs further costs of training and may decrease their recruitment value in the eyes of trade unions.⁶⁰

The final and most overlooked reason for difficulty in organising is the thoughts and feelings regarding organising from informal workers. The ILO recognises that informal workers 'are not all drawn to solidarity and collective action' or 'may not consider themselves workers' or 'be engaged in competitive forms of work that do not inspire collaboration'.⁶¹ However, the organisation fails to fully acknowledge how this may impact the relationship between workers and how the organisation itself views the task of organising informal workers.

Just a brief summary of these challenges shows how challenging it is 'to devise comprehensive and coherent organizing strategies' for trade unions.⁶² The ILO is in a supporting capacity where employers and workers' organisations are free to seek assistance to build their capacity, which extends to 'representative organizations of those in the informal economy'.⁶³

6.4. The ILO's Internal Struggle: Assumptions about the Agency of Informal Workers

The ILO needs to learn from the successes of informal workers movements and strategically improve upon their weaknesses. This requires not only collecting and publishing data, but firstly recognising that informal workers are 'organizable central actors' that need to be brought into the fold of labour policymaking.⁶⁴ The ILO needs to

⁶⁰ Ibid

⁶¹ ILO (n 44) 5

⁶² Ibid

⁶³ Para 6 of Recommendation No. 204

⁶⁴ Rina Agarwala, 'India in Transition India's Informal Workers and Social Protection' (*CASI: University of Pennsylvania*, 04 November 2011) 1, 3

engage with workers on a level which goes beyond limiting Decent Work to hand-outs, but goes to the core of the principles found in every declaration and reaffirmation of the organisation's commitment to social justice. The discussion between the tripartite partners leading up to the drafting of Recommendation No. 204 shows this gap exists.

During the 103rd International Labour Conference, when it came to a question regarding the extension of fundamental rights to all of those in the informal economy, some governments asked for emphasis on freedom of association and guidelines on the 'how' - a sentiment echoed in the workers' response which also highlighted concerns about a lack of guidance which ensures standards are enjoyed by all.⁶⁵ This shows that on the surface there is consensus on the fundamentality of these principles. However, there was also a recurring concern about the 'tacit acknowledgement of informality' and 'legitimizing this form of work', which reinforces these tensions between state and the informal economy as well as informal actors and their formal sector counterparts.⁶⁶

There are many factors acting as a barrier to the unionisation of informal workers. The most common one is their ineligibility due to work status, lack of social protection, and legislative thresholds such as salary and duration of work which factor into such status.⁶⁷ The responses coming out of the 103rd ILC sessions show that although workers, employers and governments are in agreement that informal workers need to be organised, there were fears that separate organisation from the formal sector would give informality 'specific status' and 'result in the creation of a dual system' preventing the transition from informal to formal and adding to government burdens.⁶⁸ Instead, the view held by the majority was that the participation of workers and entrepreneurs in

⁶⁵ International Labour Conference, (103rd session) Report V(2): Transitioning from the informal to the formal economy (ILO Geneva 2014) 36

⁶⁶ Ibid

⁶⁷ See Chapter Two of this thesis for the discussion on the features of informality.

⁶⁸ See the comments by state representatives from Portugal and Montenegro 62 International Labour Conference, (103rd session) Report V (2): Transitioning from the informal to the formal economy (ILO Geneva 2014)

existing formal organisations should be encouraged ‘by stressing common interest’.⁶⁹ This, as Lindell puts it, shows a continuing view of the informal economy as ‘marginal, manifestations of chaos and decay or deviation from western normative ideal’ – a view in part responsible for a continuing misconception that informal actors are incapable of organising.⁷⁰ This feeds into the possibility of mainstreaming an even more dangerous misconception – that fundamental rights only apply to those in the formal sector. Despite the ILO explicitly combating this misconception, this view is still prevalent in the informal economy where actors do not feel entitled to or are not aware of their rights.⁷¹ That ignorance continues to undermine the universality and fundamental nature of the social justice principles at the core of the ILO’s mandate.⁷²

The ILO has acknowledged the fragmentation of informal workers and workplaces as a barrier to their effective organisation.⁷³ Although ‘the political subjectivities of informals should not be seen in terms of a singular class subject, [...] sharing the same class interest’, the ILO’s language implies simultaneously the informal economy is immensely wide and complex, but also wrongly promotes formal-informal organising as the answer.⁷⁴ These two ideas are contradictory – on the one hand the organisation is shouting warnings from the proverbial rooftops against research into informality and definitions, which do not reflect the ‘dynamic, heterogeneous and complex aspect of a phenomenon’.⁷⁵ On the other hand, they are willing to leave solving such a complex issue to an oversimplified relationship between formal and informal economies.

⁶⁹ Ibid Comments by state representatives from Netherlands, Norway and South Africa

⁷⁰ Ilda Lindell, *Africa’s Informal Workers: Collective Agency, Alliances and Transnational Organizing in Urban Africa* (Africa Now) (Zed books 2010) 2; AbdouMaliq Simone, *For the city yet to come* (Duke University Press 2004) 13

⁷¹ Ibid

⁷² International Labour Conference, (89th Session) Report of the Director-General: Reducing the decent work deficit: A global challenge (ILO Geneva June 2001) 34

⁷³ Ibid 15

⁷⁴ Ilda Lindell, ‘Between Exit and Voice: Informality and the Spaces of Popular Agency’ (2010) 11 (2/3) *African Studies Quarterly* 1

⁷⁵ International Labour Conference, (90th Session) Report VI: ‘Decent work and the informal economy’ (ILO Geneva 2002) 2

The economic differentiations present in the informal economy means there are differences within and between associations in terms of their strengths, resources and influence.⁷⁶ The experiences of those in the informal economy may overlap in terms of the injustices they face but their identities are fragmented. Owing to this, organisation is difficult, though not impossible⁷⁷ States cannot use this complexity as a reason to exclude informal actors from the labour policy development process crucial to the interests of all workers,⁷⁸ or worse, in cases where consultation is sought, to devalue the considerations as advice that can be accepted or ignored.⁷⁹ The ILO cannot allow this to happen with its proposed recommendation on the informal economy. Involving informal workers be a prerequisite for the policy to have any chance of impact or legitimacy.

Despite being the pioneer in researching informality and internationalising the discourse surrounding the struggles of informal actors, the ILO is still allowing tripartite concerns to construct 'informals as a relatively homogenous and undifferentiated group – the familiar category of the 'working poor' a group with a 'common structural position' 'driven by common intent or singular identity' against the same oppressors.⁸⁰ There is also a view that 'collective organizing is an exclusive capacity of formal wage workers, but other categories of workers [...] are deemed incapable of self-organizing'. Both views threaten to further reduce the power of informal workers.⁸¹ Research representing the voices of informal actors and their own initiatives to organise is therefore very important. The ILO is responsible for bringing the informality and labour rights discourse

⁷⁶ Karen Tranberg Hansen, Mariken Vaa (eds) *Reconsidering Informality: Perspectives from Urban Africa* (2004, The Nordic Africa Institute)

⁷⁷ Ilda Lindell, *Africa's Informal Workers: Collective Agency, Alliances and Transnational Organizing in Urban Africa* (Africa Now) (Zed books, 2010) 14

⁷⁸ See comment by representative of Switzerland International Labour Conference, (103rd session) Report V(2): Transitioning from the informal to the formal economy (ILO Geneva 2014) 65

⁷⁹ See comment by representative of Venezuela International Labour Conference, (103rd session) Report V(2): Transitioning from the informal to the formal economy (ILO Geneva 2014)

⁸⁰ Ilda Lindell, *Africa's Informal Workers: Collective Agency, Alliances and Transnational Organizing in Urban Africa* (Africa Now) (Zed books, 2010) 15

⁸¹ Ibid 20

to the international platform but recognising the informal economy and allowing for its participants to bring claims to the CFA, is not the same as empowering them to do so or involving them as equal actors. There are many obstacles to organising informal actors that the ILO can assist in overcoming, from a lack of resources to isolation, which limit the impact of informal actors to the local sphere.⁸² However, before it can do this the organisation needs to address its own shortcomings which favour the rights of a limited number of workers.

6.5. Engagement versus Empowerment: Lessons from Grassroot Informal Initiatives

As the earlier chapters of this thesis examined, despite the fundamental nature and universal promotion of freedom of association and collective bargaining rights, these rights are still largely unavailable to those in the informal economy. Blackett also argues that even if express exclusion from collective bargaining regimes were reversed this would not solve the problem of unequal access to collective bargaining because access is more difficult in certain sections of economy.⁸³ While inadequate bargaining power is an issue, the legal and socio-economic realities of certain kinds of work render collective organisation ineffectual and workers will continue lack sufficient bargaining power despite being organised.⁸⁴ Furthermore, collective bargaining reveals its limited ability to ensure equality at work and it may even 'accentuate gap between workers with effective bargaining power and those without it'.⁸⁵ Blackett argues for a closer relationship between freedom of association and collective bargaining conventions and

⁸² Ibid 9

⁸³ Adelle Blackett and Colleen Sheppard, 'Collective Bargaining and Equality: Making Connections' (2003) 142 *Int'l Labour Rev* 419 427

⁸⁴ This is the case for informal workers whose organisations and initiatives are not always recognised

⁸⁵ Blackett (n 83) 427-428

the Convention concerning Discrimination in Respect of Employment and Occupation or Discrimination (Employment and Occupation) Convention (ILO Convention No.111. She states 'effective recognition' depends on the 'interface between fundamental principles and rights at works' and therefore, Conventions No. 98 and No. 87 cannot be considered effective if they structurally exclude from access to collective bargaining those disadvantaged workers whom Convention No. 111 guarantees equality.⁸⁶ This is why this research is critical of the effectiveness of informal workers joining established unions.

It is for this reason that true empowerment is preferred rather than provisional engagement as currently available to informal workers under the traditional system of trade unions and collective bargaining. Alternative methods of informal workers organising themselves are 'unsung in the academic world' despite evidence of success.⁸⁷ While Recommendation No. 204 shows the increasing pressure to address the issue of informality, an overlooked driving force behind real change can be the informal workers themselves. It is there where the most significant lessons for the ILO can be found.

6.5.1. Lesson One: Alternatives routes to organising informal workers

There is evidence that informal workers have adapted conventional labour movement strategies by utilising their powers as voters instead of workers. They may not have the bargaining power to demand change from employers but there are cases of workers organising themselves to vote for certain candidates so they can influence local

⁸⁶ Ibid

⁸⁷ C. S. Venkata Ratnam 'India' (1999), in *Trade unions in the informal sector: Finding their bearings Nine country papers* Labour education 1999/3 No.116 (International Management Institute, 1999) 25 37

government instead.⁸⁸ Labour may be a difficult area to legislate in but improving upon workers' voting rights should be less controversial and can indirectly promote decent work. Furthermore, workers have also organised themselves to demand training programs, housing aid and medical centres, instead of traditional worker demands of fixed wages, social security and better working hours. These demands work towards education, lifting workers burdens and bringing lasting change to communities. These tactics empower workers and need the attention of the ILO.

A specific example of this action is the informal workers organisations in India which have been set up with the help of State governments. This has created tripartite structured welfare boards which are funded by the State, employers and workers jointly. States such as Kerala and West Bengal have been praised for introducing innovative schemes, although they are not without faults and require help to remain sustainable.⁸⁹ There are different non-legal routes taken by non-traditional workers organisations and grassroot organisations such as Self-Employed Women's Association (SEWA) to empower workers who need support. Trade unions need to be incentivised to collaborate with NGOs and informal worker organisations and not just absorb in a superficial manner. Self-Employed Women's Association (SEWA) is 'both a registered national trade union and a grassroots organization that works to provide employment through the creation of cooperatives owned and run by its two million women members'.⁹⁰ The idea of the 'worker-owner' is one that is growing more popular as a means of empowering those in the informal economy.⁹¹ The All India Central Council of Trade Unions (AICCTU) for example has worked to organise workers in specific informal industries such as Beedi Cigars and fisheries.⁹² Unions themselves need to be encouraged to seek out informal workers personally instead of relying on bureaucratic approaches many workers are not

⁸⁸ Rina Agarwala, 'India in Transition India's Informal Workers and Social Protection' (*CASI: University of Pennsylvania*, 04 November 2011) 1, 2

⁸⁹ Ratnam (n 87) 25 34

⁹⁰ ILO (n 44) 8

⁹¹ Ibid

⁹² Adelle Blackett 'Regulating Decent Work for Domestic Workers' (2011) 23 *Can. J. Women & L.* 1, 22

aware of.⁹³ There is a space for positive collaborations between unions and informal workers, something that can be further explored by the ILO.

6.5.2. Lesson Two: Meaningful collaboration between unions & Informal workers

Despite the problems with unions, this should not dissuade the ILO from working on the development of democratic, empowered workers' organisations that are inclusive and reflective of the modern world's true labour force to fill the gaps left by dwindling union strength.⁹⁴ Whilst Luce correctly argues that the functions unions carry out are still very relevant, it is argued here that their composition, form and approaches are not reflective of the demands of the modern world of work. Furthermore, despite the ILO undergoing several states of organisational renewal in order to expand their activities to capture all workers, it is being shown throughout this chapter how much their functions and vision still very much favour the workers' organisation structures they traditionally interacted with. There is not enough research into the benefits of alternative grass root efforts of self-organisation in the informal economy – the kind of research that could lead to supporting their activities and strengthening informal voices so they can become fully involved in tripartite policy making process. Instead, many successful schemes remain 'unsung in the academic world'.⁹⁵ Although the form and nature of associations in the informal economy are context specific and cannot be universalised, there are universally applicable lessons to be learned.⁹⁶

There are examples of positive engagement with informal workers organisations. For example, the ILO cites the actions of the Sierra Leone Labour Congress (SLLC) who

⁹³ Ratnam (n 87) 25

⁹⁴ Stephanie Luce *Labor Movements: Global Perspectives* (Polity, 2014) 100

⁹⁵ Ratnam (n 87) 25 37

⁹⁶ Kate Meagher, 'Culture, Agency and power: Theoretical reflections on Informal economic networks and political process' DIIS Working Papers/2009

‘registered ten trade unions for workers in the informal economy, with a declared number of 279,856 members from various sectors’ and the Congress of South African Trade Unions (COSATU) which is assisting not just its affiliates with organising and resources but also non-affiliate unions such as domestic workers one.⁹⁷ However significant of a step bringing informal workers into the fold is, it is crucial the efforts such as lending support, organising and practical steps such as subsidising fees leads to ensuring informal voices are amplified within decision-making scenarios rather than limited generosity.

6.5.3. Lesson Three: Bringing together All Lessons

Further research into the effectiveness of less explored and less politically divisive alternatives to traditional unions such as workers’ NGOs, workers’ cooperatives’ and work centres is crucial in easing some of the tensions present in the modern world of work.⁹⁸ There are worker interest groups that are more flexible than unions, acting like unions when it comes to negotiating with local governments and employers but being more inclusive and innovative in their approach – despite concerns over their democratic accountability.⁹⁹ An understanding of local tactics will help the ILO in their mission to ensure their labour standards are incorporated in local and global policies, and therefore more worthy of attention.

One important example already touched upon in this chapter is how informal workers seek out different avenues of influence. To counter the lack of bargaining power, where they have to demand change directly from their employers, informal workers have

⁹⁷ ILO (n 44) 6

⁹⁸ Steve Jenkins ‘Organizing, advocacy and member power: a critical reflection’ (2002) Working USA 6 (2) 56, 63; Immanuel Ness and Dario Azzellini, *Ours to Master and To Own: Worker Control from the Commune to the Present* (Haymarket books 2011).

⁹⁹ Stephanie Luce *Labor Movements: Global Perspectives* (Polity, 2014) 187

organised politically to vote for a candidate representing their interests in local government.¹⁰⁰ Instead of traditional union demands of fixed wages and social security which come on the back of threats of strike action, informal workers in India have found alternative avenues of success such as organising themselves to demand training programs, housing aid and discounted or free medical centres.¹⁰¹ By utilising ‘a rhetoric of *citizenship* – rather than labor – rights’ in order to garner ‘the attention of elected state politicians’, informal workers in India achieved effective methods of realising their labour needs.¹⁰² These movements bring positive changes to the local communities, as well as lifting economic and social burdens to allow further opportunities for education and empowerment. However, there is the issue of ensuring voting capabilities are there from the start and that there is in place a democratic environment essential for meaningful worker mobilisation.

The ILO, in cooperation with governments and other social partners, have already set up successful skills development programmes in the informal economy based on vocational training. However, it also needs to ensure the political empowerment necessary to fully benefit from labour rights. Not all workers have voting capabilities, especially women. Women organisations are at the helm of bringing change to informal workers by promoting the interests of less vocal female majority. The informal economy has many faces it would be difficult to organise workers under one banner. A sense of identity can help attract informal workers, encouraging them to organise according to class, gender, industry and promote their different needs.¹⁰³ Finding ways to coordinate between these small cooperatives is a governmental role which the ILO can support. This can be done by focusing the activities of its regional and field offices on educational programs on activities aimed at building up global awareness of labour

¹⁰⁰ Rina Agarwala, ‘India in Transition India’s Informal Workers and Social Protection’ (*CASI: University of Pennsylvania*, 04 November 2011) 1, 2

¹⁰¹ *Ibid*

¹⁰² *Ibid* 3

¹⁰³ *Ibid* 3

rights and more research on the different ways those in the informal economy can ensure them. There is an undeniable connection here between the promotion of civil and political human rights and securing labour rights, a relationship at the centre of this research.¹⁰⁴

The organising experiences of domestic workers in Brazil provide a good example of how informal workers are actors capable of developing their own vision, but actors require wider support to allow that vision to have meaningful impact. The birth of the National Federation of Domestic Workers, or FENETRAD, in 1997 began with small domestic workers gatherings in a church setting, but grew into a several informal workers created and led associations followed by a national movement uniting domestic workers' voices.¹⁰⁵ The growth of this movement to become something beyond a small local associations of domestic workers, limited to informal meetings and vulnerable to outside influence, was inspired by the workers' own ambitions and 'need for the association to have its own space' to voice interests and promote solutions to labour rights issues.¹⁰⁶ They substituted their own shortcomings by creating important alliances with various segments of society, from utilising the knowledge of the local university's Women's Studies department by bringing them into the movement in an advisory capacity to expanding their message into the political arena via the support of advocacy groups in parliament.¹⁰⁷

These movements often begin with individual workers, who go on to spearhead the rights movement, becoming aware of their rights and wanting to find a collective solution to ensuring their spread and enforcement. As stated before, the creation of a

¹⁰⁴ Article 25 of the ICCPR and article 21 Universal Declaration on Human Rights, please see Chapter Three for more discussion of human rights

¹⁰⁵ Andrea Cornwall with Creuze Oliveira and Terezinha Gonçalves 'If You Don't See a Light in the Darkness, You Must Light a Fire': Brazilian Domestic Workers' Struggle for Rights in Naila Kabeer, Ratna Sudarshan and Kirsty Milward, (eds), *Organizing Women Workers in the Informal Economy: Beyond the Weapons of the Weak* (Zed Books, 2013) 156

¹⁰⁶ Ibid 156

¹⁰⁷ Ibid 152

domestic workers' union out of a rights movement in Brazil came from the need for the movement to gain a space of their own to advocate their interests. Therefore, by promoting the idea of formal unions as being the place to bring a voice to informal experiences, the ILO is denying informal workers a chance at finding support through alliances which respect informal interests yet do not encroach on their interests. This simplicity prevents informal voices from occupying their rightful space on the policy making platform, denying them the chance at formalising their grassroots organisations and placing themselves on the radar of important people with political power. For example having their own space allowed FENSTRAD, in collaboration with the government and support of the ILO, to be responsible for a highly innovative Domestic Workers Citizenship Programme which offers professional qualifications, leadership training to domestic workers and puts on the agenda public policies such as finding housing opportunities for workers.¹⁰⁸

6.6. Organising informal actors: The disconnect between ILO Intentions & Execution

Although Recommendation No. 204 was adopted after two years of consultation, its unanimous vote has been in the making since 2002. The Resolution and Conclusions Concerning the Decent Work and the Informal Economy acknowledged the following:

'Inappropriate legal and administrative frameworks that do not guarantee and protect freedom of association make it difficult for workers and employers to organize. Democratic, independent, membership-based organizations of wage workers, own-account workers, selfemployed persons or employers in the informal economy are sometimes not allowed to operate under local or national legislation and are often unrecognized and excluded from or underrepresented in social dialogue institutions and processes. Without organization and representation, those in the informal economy generally do not have access to a range of other rights at work. They are not able to pursue their employment interests through collective bargaining or to lobby policymakers

¹⁰⁸ Ibid 165,152

on issues such as access to infrastructure, property rights, taxation and social security. Women and youth, who make up the bulk of workers in the informal economy, are especially without representation and voice.’¹⁰⁹

Despite this longstanding intention to address the representation concerns regarding informal workers, it is maintained that the current ILO strategy of ‘absorption’ into the struggling formal economy and imperfect trade unions as they are is not the solution. Instead the current challenges faced by the ILO is an opportunity to dispel preconceptions of informality, transform workers organisations and return legitimacy to the ILO as an organisation.

It is important to remember that alliances with international institutions such as the ILO prove vital to the successful growth of what starts as a grassroots informal workers’ rights movement. By ‘generating sufficient visibility to drive changes in legislation and policy’ informal initiatives can have reach, influence and capacity for meaningful change.¹¹⁰ The success of informal workers’ labour rights movements depend on a combination of factors, one of which is ensuring the right political environment to allow these movements to flourish. This may firstly require informal workers utilising their voting rights, mobilising support for the political candidate or party looking towards their interests. However, without the ILO’s resources and assistance, grassroots movements will continue to be far too slow at gaining national momentum and visibility.

Overall, this research argues a great many reforms are needed on all fronts, particularly around one central theme; social dialogue as a means for social justice. Some of the informal organisation activities touched upon in this chapter fit perfectly into the ILO’s global vision of encompassing all workers – and they are happening all across

¹⁰⁹ International Labour Conference, (90th session) ‘Resolution concerning decent work and the informal economy’ (ILO Geneva 2002) para 17

¹¹⁰ Cornwall (n 105) 165,173

the world. The ILO's task must be recognising these activities for what they are – powerful examples of self-mobilisation – then ensuring that some of these successful strategies are transplanted in different settings across the world.¹¹¹ It is true that domestic workers are 'notoriously difficult to reach' 'largely invisible' suffering from isolation, repression and poor literacy skills. However, it has already been demonstrated that such an organisation made a valuable contribution to the standards of work in Brazil.¹¹² In order to succeed, the workers made use of all 'capillaries of contact' ensuring their method spread through 'communications via the radio, via evening courses attended, and via networking' within the neighbourhoods, then on a national scale.¹¹³ The ILO needs to put emphasis on the regional and national activities it undertakes to facilitate such movements, but to do this it must first look inward as an organisation. It must start framing the international discourse surrounding extending labour rights to informal economy as a discourse about untapped potential and power. This involves acknowledging that the value of its tripartite structure depends on the involvement of informal voices directly, which makes it absolutely vital to organise them on the ground.

The ILO maintains its work is about more than just combating world poverty and is centred on bringing 'rights, dignity and a voice' to all workers, working towards their 'economic, social and political empowerment'.¹¹⁴ Currently, however, despite the formal sector not being fully cured of all labour violations as well as a decline in power and influence, formal workers still benefit from more involvement in labour policy setting on every level, enjoying greater recognition of their fundamental rights than do those in the informal economy. During an interview with the Committee on Freedom of association representatives, the current chair Paul van der Heijden confessed that 'the ILO doesn't have an army!' and that their methods to increase compliance with freedom association

¹¹¹ This discussion began in Chapter Four and Five

¹¹² Cornwall (n 105) 165,174

¹¹³ Ibid 165,174

¹¹⁴ International Labour Conference (91st Session) Director-General's Report: Working out of Poverty (ILO Geneva April 2003) 17

principle rely on 'dialogue' and subtle methods of persuasion – in his words 'hidden diplomacy'.¹¹⁵ These statements summarise the core problem with the organisation's vision – it is not convinced of the true potential of worker mobilisation. Of course, the organisation does not have military might, but it has a potential force capable of ensuring its vision is realised – the billions of workers these principles are supposed to empower and involved. It needs to find a way to combat the decline in formal sector influence by tapping into the unexplored potential of informal organisations.

6.7. Conclusion: Undervaluing research on informal workers as 'organizable central actors'

This chapter has shown the significance of research on the informal actors and their organising capabilities. It has advocated for this to be at the forefront of the ILO's research and policies. This does not however mean organising the informal economy with a vision to strengthen the formal organisations but as a means to address the representative failure at the core of the organisation's tripartite structure. Instead, these informal voices need to be brought into the fold by the ILO. The organisation, on an international platform, must follow in the footsteps of these workers movements by – 'situating the struggles of a particular group within broader struggle for rights and freedom'.¹¹⁶ Though this involves the support of unions and workers' organisations in the formal sector, extra steps must be taken to ensure this does not drown out the voices of informal actors. Although this chapter has only touched upon a few examples of self-determination in the informal economy, it is important to recognise that despite suffering

¹¹⁵ ILO, 'Committee on Freedom of Association: Protecting rights, saving lives', *Governing Body (ILO Press Release 26th March 2014)* <http://www.ilo.org/global/about-the-ilo/activities/all/WCMS_239682/lang--en/index.htm> accessed 10 July 2014

¹¹⁶ Cornwall (n 105) 165,175

dual discrimination as informal actors and as women, some of the most successful grassroots workers organisations in the informal economy have been the fruit of female labour movements.¹¹⁷ These female led initiatives deserve a platform to be heard, celebrated and emulated. ILO research still limits itself to defining features of the informal economy without celebrating the voices and experiences of the informal actors, which in turn has limited the organisation's capabilities and legitimacy.

¹¹⁷ Women in informal Employment: Globalising and Organising, 'Workers stories' (WIEGO 2014) <<http://wiego.org/informal-economy/worker-stories>> accessed 10 July 2014

Chapter Seven: Future Research & Significance

7.1. Review of aims & objectives

It is maintained here that the ILO still has great importance and the mission it began in 1919 is an ongoing one. Its responsibilities include an output of valuable research into informality and providing technical assistance to members states on a variety of labour issues. However, as Chapters One and Two depict there is a disconnect between 'labour' and 'labour organisations' and 'labour law' due to the modern changes in the world of work. Later chapters, specifically Chapters Four, Five and Six, show that this disconnect is not wholly the fault of external barriers to the organisation of informal workers but also an internal issue of perception which the organisation is unable to fix unless it brings informal experiences to the forefront. In order to do this, it needs to properly define and commit to principles present in its founding mandate based on social justice, inclusivity and democracy.¹

In undertaking this research, it was author's aim to shine light on the issues impeding the ILO's ability to the fulfil its mandate of creating, promoting and safeguarding international labour standards. While a number of the challenges highlighted in this thesis have been to some degree covered in different places, this work here gave a more holistic picture of the issue by addressing this wide range of research from across different disciplines. Furthermore, by tying together separate literature on, the enforcement of international labour standards; the growing concerns regarding the normative justifications for labour law; the structure and function of the ILO; the

¹ In the spirit of the ILO Constitution and the Declaration of Philadelphia.

challenges of informality and the complexity of informal-formal relationships, this research has identified potential gaps in the current literature out there.

One such gap is the limited literature focussed on the perception and framing of informality, informal actors and their experiences by the ILO's tripartite partners during the drafting and adoption of standards. This was shown through an analysis of the recently adopted Recommendation No. 204 (2015). The scope of this research may have been wide, but the central argument remained concerned with showcasing the core fault in the ILO's current approach to informality– its unrepresented tripartite structure and the problems that began with the exclusion of informal voices from workers' organisations.

7.2. Research Limitations

The size and prevalence of the informal economy and the criticism of the scope and protection of labour laws in a globalised world showcases the relevance of this research but also its limitations. Although this research aimed to showcase informal workers as actors with their own voices that must be included by ILO in the social dialogue process that sets the labour law agenda, this research did not involve any direct contact with informal workers. This is because it primarily looks at how the ILO as institution perceives these workers and assess the extent to which its mandate takes into consideration the informal organising experiences. The primary purpose of this research is to promote a refocussing of the ILO's mission, so the strengthening of its social dialogue pillar takes into consideration the negative misconceptions of the organising capabilities of those in the informal economy. The organisation needs to be concentrating on fundamental enabling rights which empower workers and technical support to educate and organise workers. The examples of grassroots organising,

alternatives to collective bargaining and engagement tactics with the formal economy by informal actors referenced in this research illustrated the significance of this point. However, this does not mean there cannot be more issue specific research in the future incorporating these views and contribute to an overall improvement of the ILO's enforcement capacity and legitimacy.

7.3. Suggested Future Research

There are different avenues for future ILO researchers to explore but while informal actors are underrepresented in social dialogue spheres, the most urgent research should aim to highlight informal concerns, experiences and interests and how the ILO standards intended to bring informal workers into the fold are perceived on the ground by said informal workers. This investigation was begun here but it is recommended the ILO continue. The research should bring together the perspectives and intentions of the ILO's approach to standard-setting; the perceived responsibility and chosen approach of national labour administrations in developing countries throughout the implementation process and finally, measure the success and understanding of the policies from the viewpoint of the workers (both informal and formal). The final step of this research would be breaking the feedback loop currently plaguing the ILO's decision-making process, one rooted in the shallow pool of workers' perspectives discussed in Chapters Five and Six. By bringing in new perspectives more reflective of the global workforce and establishing a new pattern engaging with the billions of workers not represented by the ILO's tripartite structure, the ILO can slowly adjust the way it operates and be in a better position to respond to the challenges of the modern world and challenges to its legitimacy as an organisation.

This study has touched upon some of what has been outlined here, but the suggested research is a recommendation as to what the ILO's next step could be and how it can utilise its research capacity to address the concerns raised in this thesis. This proposed research would build on the ideas of this thesis and approach the question regarding the ILO's enforcement abilities from bottom up rather than top down, beginning with the voices and experiences of informal actors. While this thesis examined the ILO's perspective and approach to standard-setting (through evaluating the process that led to the adoption of Recommendation No. 204), it drew examples of organising activities and perspectives from secondary sources from independent researchers. The suggested research would involve the ILO engaging in first hand qualitative research and data collection on the perspectives of informal workers and formal workers, labour organisations and administrations of a specific country. One suggested place to begin this research is in Somaliland, East Africa, a region with a prominent informal economy and a combination of challenges prevent the ILO from effectively fulfilling its mission there.

7.4. Somaliland: A Brief Case Study

The following sections will illustrate how the prospects of international labour law enforcement by the ILO may be improved through a narrow focus on a specific case study.

7.4.1. Somaliland: Context

In 1991, the North-Western region of Somalia unilaterally declared independence from the south of the country. Since its creation however, the 'de facto state' of Somaliland

remains largely unrecognised internationally.² The history of the region is a turbulent one of civil war, resulting in the complete disintegration of rural and urban infrastructure and the state's social, political, economic, and legal institutions. Yet today, Somaliland is a stable 'nation' steadily healing from the political and economic scars of the war through investment in renewed enterprise and development.³ However, without global recognition, the additional funding and technical support needed to effectively develop policies and their implementation and enforcement processes, economic recovery is severely limited and left to the government, citizens, and diaspora community of Somaliland. Despite lack of international recognition, Somaliland has enjoyed twenty-eight years of peace thanks to the *Guurti*, a system of clan representation which involves the coming together of elders from different clans to deal with problem of violent tribalism.⁴

7.4.2. Labour Issues in Somaliland: An Overview

Somaliland can be described as a libertarian dream with virtually no barriers to economic activity, allowing entrepreneurs and small businesses to enjoy very little government interference. Whilst this growing informal economy has been contributing to the economic recovery of the war-torn region, it has also resulted in a relaxed system of labour standards and vulnerability.⁵ The region is still underdeveloped in many ways

² A de facto state fulfils the statehood requirements under international law (including an effective government) yet is officially unrecognised as a state. See Michael Schoiswohl, *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International Law: The Case of 'Somaliland'* (Brill Nijhoff 2004)

³ Ahmed Musa and Cindy Horst, 'State formation and the economic development in post-war Somaliland: the impact of the private sector in an unrecognised state' (2019) 19 (1) *Conflict, Security and Development* 35

⁴ Interview with Amina Abdillahi Ahmed, Chairperson of SNHRC, (Hargeisa, Somaliland, 3rd February 2013)

⁵ Keith Hart 'Informal Income Opportunities and Urban Employment in Ghana' (1973) 11 (1) *The journal of Modern African Studies* 62.

with legal deficits, weak enforcement capabilities and ineffective government administrations.

A significant majority of workers in Somaliland are working outside of the ambit of labour laws with many of the arrangements associated with formal employment being absent.⁶ Those with permanent employment contracts are incredibly rare, with the best offers being teachers and lecturers who work under renewable monthly or yearly employment contracts.⁷ Even, university graduates such as those from Civil Engineering backgrounds are finding it difficult to find permanent employment, with most graduates ending up working in the service industry.⁸ In 2011, Gollis University sought funding from the ILO and four other UN agencies for a civil engineering internship program for third year students. However, the focus of such programs is for short term benefits and does not promise permanent employment contracts in the formal sectors. There is a struggle to prevent graduates with technical skills from emigrating to different countries.⁹

For the most part, the private sector in Somaliland consists of informal Micro, Small and Medium Enterprises (MSMEs), with a significant proportion in the service sector and trade.¹⁰ In Hargeisa, the capital and largest city, approximately 77 percent of employment is informal highlighting how prevalent the informal economy is in Somaliland.¹¹ Most government statistics on informality focus on own-account workers

⁶ ILO, *Decent Work Country Programme for Somaliland 2012-2015* (ILO 2012) 22
< https://www.ilo.org/wcmsp5/groups/public/---africa/---ro-addis_ababa/---sro-addis_ababa/documents/publication/wcms_234430.pdf> accessed 4 July 2014

⁷ Interview with Dr. Saeed Hassan, President of Gollis University, (Hargeisa, Somaliland, 21st January 2013)

⁸ Interview with Omar Hussein Abdi, Director of Internship Program, (Hargeisa, Somaliland, 22st January 2013).

⁹ Ibid

¹⁰ Alison Brown, Peter Mackie and Kate Dickenson 'The Informal Economy in Civil War: Hargeisa – Somaliland' ESCR Research Paper/2017 4<https://www.cardiff.ac.uk/_data/assets/pdf_file/0007/1057732/The-informal-economy-in-civil-war-Hargeisa.pdf> accessed 8 January 2018

¹¹ Ibid

and enterprises such street vendors rather than informal employment of workers such as domestic workers.¹² Domestic work is a major under researched sector in Somaliland.

The main source of Somaliland labour code is Private Sector Employees Law (Law No. 31/2004). The law is relatively new only having been drafted, signed and passed in 2004, amended in 2008 and came into force in 2010.¹³ It is a broad labour code setting out the rights and responsibilities of employees and employers, with its provision covering many areas. It fails, however, to cover casual workers or those in the informal economy. Furthermore, the Somaliland government claims to adhere to the ILO conventions signed by the Somali government before 1991 so long as it 'does not conflict with the public interest of Somaliland'.¹⁴

The main problem with the labour code in Somaliland is that is poorly drafted, particularly when looking at the practical details ensuring its enforcement. The Director of Labour has raised concerns about the implementation process and his department's capacity to do research.¹⁵ However, In 2012 the ILO stated that its Decent Work Programme 'will be implemented by the Government of Somaliland with employers and workers representative organisations in close cooperation and assisted by the ILO'.¹⁶ The entire legitimacy of the approach depends on the involvement of all stakeholders for 2013 interview with the Director of Labour in Somaliland showed a lack of awareness of the full scope of ILO activities (for example, the ILO was finalising a labour force survey which the MoLSA was completely unaware of).¹⁷ Although the ILO is adept at providing technical support there are many weaknesses in policy-making process in

¹² Ministry of Planning and National Development, 'The Somaliland Enterprise Survey' (2013) <<https://www.slministryofplanning.org/images/HHSurvey/Somaliland%20formal%20enterprise%20survey%20technical%20note%204Feb14.pdf>> accessed 14 January 2014

¹³ Wax ka Bedelka iyo Kaabista Xeerka Shaqaalaha Rayidka (Xeer Lam 31/2004) – Somali title of Somaliland's Labour Code

¹⁴ Interview with Abdikadir Daud Egeh, Director of Labour (Hargeisa, Somaliland, 28th¹ January 2013)

¹⁵ Ibid.

¹⁶ ILO, *Decent Work Country Programme* (n 6) 54

¹⁷ Abdikadir Daud Egeh (n 14)

Somaliland and issues with coordination. Both problems are a significant burden on the Ministry of Labour and Social Affairs.

Formerly under British colonial rule, Somaliland does not have the long history of industrialisation that initiated traditional workers' rights movements in the western industrialised economies. Furthermore, there was much political oppression after the birth of a labour movement in the region under the regime of Siad Bare (from 1969 to 1991).¹⁸ This is why the social dialogue pillar of the Decent Work Agenda the faces several major obstacles in Somaliland. Outside of a few professional associations such as Somaliland Lawyer's Association there are no real employee unions.¹⁹ Furthermore, there is a lack of employers' associations. Somalia and Somaliland both have a history of weak tripartite structures since the outlawing of all political parties and labour/employers' movements – except for a single government controlled one– under the regime of Siad Barre (from 1969 to 1991).²⁰ Consequently, there is now 'a lack of understanding of the benefits of trade unionism' and a distrust of unions, which are seen as potential political instruments easily manipulated.²¹

Despite the ILO's offering to support the organisation of workers' organisations, there has been resistance.²² There are only a handful of companies with a large enough number of employees' and these are mostly established telecommunication companies such as Telesom and SomTel, and money transfer business such as Dahabshil. Furthermore, with arrival of transnational corporations such as Coca-Cola, there will be a significant amount of pressure to continue the current state of relaxed labour standards in exchange for job creation.²³ Without an effective labour code and regulations, unionisation will do little to close the legal loopholes which allow these employers to

¹⁸ Wogu Ananaba, *The Trade Union Movement in Africa* (C Hurst and Company 1979) 218

¹⁹ Interview with Mohamed Abdirahim, Head of Office ILO, (Hargeisa, Somaliland, 26th January 2013).

²⁰ Wogu Ananaba, (n 18) 218

²¹ Mohamed Abdirahman (n 18)

²² Ibid

²³ David Kinley and Sarah Joseph, 'Multinational Corporations and Questions about Human Rights' (2002) 27 *Alternative LJ* 7, 9.

'adjust activity to move out of the ambit of the regulation' and reduce their number of formal employees to prevent the formation of unions.²⁴

7.4.3. Potential Research

Based on the research outlined in this thesis and a brief look at complex labour issues in the region, Somaliland is the perfect candidate to implement the suggested research approach. Any future research undertaken in Somaliland can contribute to the body of work out there by bringing to the table this overlooked perspective and analysis of the labour law situation in an under researched part of the world. The selected examples in each of the chapters of this thesis provides a piece of a larger problem facing the ILO and by taking this approach, this project has opened a door which allows the exploration of issues on the periphery of labour. The labour situation in Somaliland is such an issue.

Recently, *the Somaliland National Development Plan II* highlighted a need to formalise the informal economy, with an aim to 'formalize existing Micro, Small, Medium Enterprises activities by 50%' by 2021.²⁵ The Economic Sector Coordination Forum (ESCOM) held on 30th, September 2018 announced the establishment of Informal Trade and Economy subsector in order to realise these goals to formalise the informal market. Following the ESCOM meeting, the chairs proposals were to hold inter-ministerial conferences on the formalization of informal economy, followed up by awareness workshops attended by both representative stakeholders of the informal economy and

²⁴ Ravi Kanbur 'Conceptualizing informality: Regulation and enforcement' (2009) 52 (1) Indian Journal of Labour Economics 1 5 <<http://www.arts.cornell.edu/poverty/kanbur/ConceptualizingInformality.pdf>> accessed 29 December 2017

²⁵ Sustainable Goal 8 of the National Development Plan, Republic of Somaliland, *National Development Plan II* (2017) https://slministryofplanning.org/images/front-page/Somaliland_NDPII_Final.pdf accessed 18 August 2017

government.²⁶ However since these activities (at the end of 2018) there has been no launch of the proposed nationwide campaign.²⁷

In April 2019 the Somaliland government moved to impose a suspension of ILO's activities in Somaliland jurisdiction after dissatisfaction with the manner of engagement of the organisation with the government. A month later this issue resulted in a unilateral decision by the Somaliland government to terminate ILO operations in Somaliland.²⁸ The main grievances levied against the ILO are the lack of operational achievements in terms of employment creation and unresponsiveness of the organisation. While the ILO still has a presence in the region (its office in Somalia), this breakdown in the relationship between the Somaliland government and the ILO highlights the significance of strong grassroots organising. Based on the conclusions reached by this thesis, it is argued that if the ILO prioritised the social dialogue pillar of the Decent Work Agenda rather than the economic and development goals outlined in the Decent Work Country Programme for Somaliland, it may have had a stronger presence in the country.²⁹ It is therefore argued that these workers on the ground would have made the ILO's case for them.

Every ILO member state is at a different economic and political stage of development which means the ILO continues to customise policies to different needs. The 1998 Declaration was supposed to 'reduce the pace and improve the quality of ILO law making' and ensure the flexibility of the organisation, universality of the core standards and centralisation of enforcement and monitoring mechanisms.³⁰ However, the voluntary nature of the ILO's work, the breakdown of workers' organisations over the

²⁶ Appendix II

²⁷ Republic of Somaliland Ministry of Trade, Industry and Tourism, *Micro, Small and Medium Enterprises (MSME) Policy* (2019) <http://www.somalilandlaw.com/Somaliland_MSME_Policy_-_Final_210719.pdf> accessed 2 June 2019; World Bank, *Somaliland private sector at a cross roads: Political Economy and Policy Choices for Prosperity and Job Creation* (World Bank Group 2016) <http://documents.worldbank.org/curated/en/840741468190160823/pdf/103238-PUB-Box394858B-PUBLIC-DOI-and-ISBN-from-the-doc.pdf> accessed 2 June 2019; Ministry of Planning and National Development, 'The Somaliland Enterprise Survey (n 12)

²⁸ Appendix II

²⁹ ILO, *Decent Work Country Programme for Somaliland 2012-2015* (n 6)

³⁰ Laurence Helfer 'Understanding Change in International Organizations: Globalization and Innovation in the ILO' (2006) 59(3) Vanderbilt LR 649 707

years and increase in informalisation 'challenged the legitimacy of ILO tripartite structure'.³¹ It has also meant that in situations as the one that has arisen in Somaliland, where a state chooses to stop engaging with the ILO, the organisation's hands are tied. What needs to be restored is the ILO's strength in how it represents labour, by focusing on addressing weak administrative structures and lack of true worker representation the ILO can realistically fulfil its mandate through the grassroots support. This means sowing these seeds first, creating an environment where workers can organise and advocate for themselves.

The situation in Somaliland highlights all the ILO's issues in fulfilling its role as the primary international organisation for the safeguarding and promotion of labour standards. The ILO's task is demanding because 'international law lacks the built-in enforcement tools found in national legal systems'.³² It is difficult because as is the case in Somaliland non-compliance is often the 'result of misguided policies, inadequate information, or a lack of capacity'.³³ The Somaliland government could not see the value in the ILO's work and there was no one on the ground to advocate for the relevance of the organisation. Furthermore, the contested legality of Somaliland as a country means there needs to be a way for the ILO to function that does not rely on international enforcement of labour law.

This is where the strength of workers' organisations comes into use as a signifier of the ILO's legitimacy at the top but also a way to enforce standards on the ground through mobilisation. It is the belief here, that an examination of the ILO's work and failures in Somaliland, a 'country' not recognised as such can provide valuable lessons on how the ILO can utilise all of its tools not just its weak supervisory and complaints mechanisms, to promote labour standards.³⁴ This study cannot just point out the issues that hindered the promotion of labour standards in the region but undertake research to

³¹ Ibid 706

³² Ibid 676

³³ Ibid 678

³⁴ See the constitution of the International Labour Organisation

see if there are grassroots examples of organising with results that can be duplicated on a national scale and provide lessons that can be amplified on an international one. This future research therefore will adopt the criteria set out in the above sections and engage with informal actors and include stakeholders at all levels – governments, employers and workers, all of those who would make up the partners for tripartite social dialogue.

7.5. Proposals & recommendations

Now we have reached nearer the end of the thesis, for the purpose of simplicity, this section aims to suggest a couple of recommendations using the conclusions reached in each of the chapters of this thesis. However, it is crucial to acknowledge that due to the complexity of the situation of the informal economy, not all issues will not manifest themselves in the exact same way and therefore neither should all suggestions be presumed to fit perfectly. It must be said that this is by all means not an exhaustive list of recommendations. However, each point made below does contain elements which should be considered to ensure the realisation of labour standards for all workers in a way that achieves a stronger, more legitimate labour institutions representative of those currently marginalised. The recommendations are follows;

1. It is recommended that the ILO continue to use this centenary to reflect on the significance of its activities and take stock of its impact on the ground. Helfer rightly states that 'institutional inertia' is not the reason for the ILO's problems, and despite criticism the organisation is incredibly active – from standard setting to detailed regulatory codes.³⁵ It is far from completely ineffective as an organisation as one can see from 'even a cursory review of the organisation's

³⁵ Helfer (n 30) 653.

activities'.³⁶ However, what is also clear is that 'the ILO has not been equally active or equally effective in influencing state behaviour throughout history'.³⁷ This is because recent restatements, reaffirmations and change in directions undertaken by the ILO have focussed solely on this enforcement issue from a top-down perspective. This is why there needs to be a dual evaluative approach set up that engages with ground level perspectives and top level engagement with these perspectives.

2. The small membership of the institution's early years' made enforcement easier, the modern world of work has problems that are more complicated. The ILO has been effective in researching, understanding and defining the scope and nature of informality but failed to engage with informal workers on the grassroots level to obtain more detailed research centred on their experiences. This is why this study recommends more research on the how effectiveness of ILO policies are perceived by its intended beneficiaries in the informal economy. The ILO's constituents are not able to accurately represent this view and neither are there current statistics a reflection of the complexities of informality. A more focussed direction is therefore required that is not exclusively rooted in the formal economy.
3. The ILO's current approach has failed to answer several significant normative questions to justify its mandate and the larger insecurities of labour law play a part in this challenge. It is recommended that any future reflection exercise the ILO undertakes should incorporate aspects of Sen's Capability Approach. This flexible diagnostic approach looks into what selection of valuable functionings individuals have real access to and takes into consideration the variations of individuals. While there are many criticisms with regards to the effective application of fundamental rights such as freedom of association and collective

³⁶ Ibid 655

³⁷ Ibid 649 655

bargaining in their current form, it recommended that the ILO utilise the significance of these enabling rights better. This means focussing on the actual access to these rights for all workers.

4. Although the ILO has managed to somewhat balance conflicting interests and demands of member states through a mixture of legally binding and non-binding approaches increase its membership it has also attracted criticisms regarding 'the credibility of member states' commitment to cooperate'.³⁸ This concern regarding the commitment of states needs to be extended to include an evaluation of the ILO's own tripartite structure and specifically its workers' group. The ILO needs to be more critical as to where it draws its membership from. It is maintained in this research that there is no reality to the delegates involved in the ILO tripartite structure as being the 'most representatives of employers and of work people' there exist such a significant and invisible informal economy.³⁹ The discussions and adoption of Recommendation No. 204 on the transitioning of the informal economy to formal one shows analysis of issues are still self-reinforcing and predisposed to already established views. It is recommended that the ILO recognise these subtle internal conflicts by either raising the standards and criteria as to what qualifies as 'most representative employers' and workers' organizations' or include a permanent position in the workers' group to represent informal interests. This way the tripartite structure can represent the 'most representative employers' and workers' organizations'.
5. The ILO's Decent Work integrated strategy may appear to be wide in its coverage but ultimately is weakened by the social dialogue pillar all the other objectives depend upon. There needs to be an undertaking of research into the inclusivity of unions and the relationship between informal actors and formal economy. The ILO resources are currently being used for empirical research on the composition

³⁸ Ibid 675

³⁹ Bob Hepple, *Labour Laws and Global Trade* (Hart, 2005) 81

and nature of work in the informal economy, the conditions of work and gaps in labour standards. The organisation's expertise to remedy the lack of reliable data 'that has been and still often is a hindrance to being able to support the organizing efforts and achievements of informal worker, particularly in lobbying and negotiating with authorities.'⁴⁰ Furthermore, research on alternative routes to organising in the informal economy needs to be given the same weight as the questionnaires sent out to tripartite constituents when formulating policies specific to the informal economy. This was a central criticism of the design and adoption of Recommendation No. 204 in Chapter Six.

6. Finally, this research recommends the establishment of a committee or group of independent experts to evaluate the effectiveness of the ILO's approach to the informality. The mandate of this group should be concerned with overseeing the mainstreaming of informal issues throughout the ILO but also be dedicated to examining the work of other groups within the ILO. For example, this independent group would look into if the comments and responses of Committee of Experts on the Application of Convention and Recommendations to government reports take into consideration informal interests, or make sure that the Committee on Freedom of Association is equipped to deal with cases and complaints from informal workers.

⁴⁰ Celia Mather, 'Organizing Workers in the Informal Economy' Informal Workers' Organizing', WIEGO/SC/2012 5 <https://www.solidaritycenter.org/wp-content/uploads/2015/02/infecon_wiego_organizing_final.pdf.pdf> accessed 4 March 2016

Chapter Eight: Conclusion: Empowered Constituents & The Future of the ILO

8.1. Research Summary: The ILO – A Century of Reflection

The purpose of this chapter is to reiterate the ideas developed over the course of this thesis and, after a century since its conception, contemplate how the International Labour Organisation may seek to move forward into the next chapter of the organisation's history. It will serve as a conclusion to this thesis which began with reaffirming our understanding of the role of labour law (to mean the empowerment of workers), the role of the ILO (to empower all workers) and in general, the wider assumptions about informality which has impacted the ILO's mission. The idea behind this approach was that by looking inward can lead to the ILO recognising the need for a better representative tripartite structure with policies that are overall more inclusive and more focussed on empowering and organising workers. It is the hope of this research that this evaluative exercise will lead to an international labour organisation unafraid to put 'labour' – movements and politics and all – at its heart.

Although this thesis was critical of the ILO's as the primary institution concerned with the enforcement of international labour standards – at no point was this an endorsement of any critics who sought to question the organisation's existence or purpose of labour law in general. It was maintained throughout this thesis that the ILO's impressive hundred-year history has showcased not only its wide capabilities and the necessity of its mandate, but also testament to how vast and complex the modern issues challenging labour law's mission have become. It is, therefore the hope of the author of this thesis that by engaging in an exercise of examination of the ILO, we can amplify its

strengths and as well as cast aside the doubts about its fragilities brought about by the empirical realities.¹ As Maupain articulated; in each challenge is an ‘opportunity to give social objectives their due’.² Whilst this was said by him with regards to the impact of the 2008 Financial Crisis specifically and what this crisis would mean for the ILO, we can choose apply this optimistic approach to other consequences of globalisation and the changing landscape of employment.

Like Chapter Seven before it, this chapter will summarise how this thesis’s analysis of the ILO’s role in organising informal workers could legitimise it as an organisation and help fulfil its mandate to enforce and safeguard labour standards.

8.2. The Case Against Unsatisfactory Universality

Throughout this research, the ILO’s focus on universalising standards which have an empowerment function was welcomed, however, claims such as those by Maupain that the 1998 Declaration and Follow-up has ‘a high degree of institutional support and funding’ is inconsequential to informal workers who are still not impacted.³ The simple fact that core labour rights apply to all states by virtue of membership has certainly some value as, in theory, this removes the issue of the ‘prisoner’s dilemma’ preventing ratification and enforcement of standards. In this case, universality of core labour standards means states have to no longer worry about losing competitive advantage by ratifying conventions others have not.⁴ However, this research has argued the ILO needs to improve its supervisory mechanisms to fully convince states to comply. The emphasis

¹ Brian Langille, ‘Labour Law’s Theory of Justice’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law*. (Oxford University Press 2011) 101

² Francis Maupain, *The Future of the International Labour Organization* (Hart, 2013)

³ Francis Maupain, ‘Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights’ (2005) 16 *Eur J Intl L* 439, 444

⁴ Laurence Helfer ‘Monitoring compliance with unratified treaties: The ILO Experience’ 71 *Law and Contemporary Problems* 193

should be on improving the functioning of Article 24 of the ILO Constitution and ensuring an effective complaints procedure. Even six years after the adoption of the 1998 Declaration on the fundamental principles and rights at work, still less than a third of states sending to the ILO's General Body comments and complaints from employers' and workers' organisations regarding labour standards.⁵ This is not taking into consideration those outside the ambit of labour law – unorganised, unrepresented informal workers.

One often cited argument is the Declaration facilitates a way of 'incorporating core labour standards into host of public and private binding documents to those with more enforcement and remedies than the ILO'.⁶ For example, Weiss argues the move towards privatisation of labour regulations through codes of conducts by transnational corporations does not have to be looked at as weakening of labour standards but an opportunity for the ILO to show its 'reach and influence'.⁷ The issue however remains who the ILO aims to reach and influence and whether the organisation's efforts are more impactful elsewhere.

The reach and influence of ILO has been at the centre of this thesis where we have been debating the efficacy and legitimacy of the organisation, drawing particular attention to how it engages with the informal economy. While there are those who argue the lack of meaningful sanctions is what prevents the ILO from fulfilling its role, this research concurs with critics that insist forming trade-labour link is like opening an unnecessary can of political worms.⁸ With no instant consensus amongst states, it can be argued that it is out of necessity that the ILO is engaged in a 'game of moral persuasion' to encourage adherence to labour standards.⁹ What is instead being

⁵ Bob Hepple, *Labour Laws and Global Trade* (Hart, 2005) 48

⁶ Marley S. Weiss 'International Labor and Employment Law: From Periphery to Core' (2009-2010) 25 A.B.A. J. Lab. & Emp. L. 487 496

⁷ Ibid 500

⁸ Brian A. Langille 'What is International Labor Law For?' (2009) 3(1) Law & Ethics of Human Rights 61

⁹ Brian A Langille 'Core labour rights – the true story (Reply to Alston) (2005) 16(3) Eur J. Intl L 409, 414

proposed here is a little more assertive than engaging in a game of moral persuasion but utilisation of other tools in the ILO's toolbox to promote international labour standards – a key one being the potential power of social dialogue and its tripartite structure. This research has argued that addressing the gaps and strengthening the ILO's mandate relies on a better functioning better representative tripartite structures at national and international level that draws from experience and voices from the informal economy.

Although it has been argued that the core standards elevated to fundamental status are arguably cheaper to implement than other labour standards, they require technical support for labour administrations to work. The investment and commitment to actualise these fundamental principles can only come if there is political will on a national level. This requires pressure on states to accept the ILO's assistance, pressure which can only come from the ground in the form of effective workers organisations. Unfortunately, the universalisation of core labour standards aimed at addressing those outside the ambit of labour law and combat the voluntarism of international labour law system are insufficient because the ILO has downplayed its history and the significant role of workers' pressure played in the adoption of the first international labour convention.

None of the ILO's current approaches are the magic pill needed, they are instead individual steps meant to nudge states towards universal consensus. Most can agree that states act to promote their national interests however different international relations theories argue about degree of influence international law has on state policies. Rational instrumentalism suggests interests are formed wholly outside direct influence of international organisation and are instead based on a rational assessment of how policy will best serve them.¹⁰ Therefore, it is argued effective governance relies on sanctions or economic incentives and 'reducing the value of short term gains' non-compliance can

¹⁰ Harold H. Koh 'Why Do Nations Obey International Law?'(1997) 106 Yale L.J. 2599 76

offer states.¹¹ Constructivists however take the view that states interests are partly constructed and influenced by international norms therefore proactive attempts at influencing state policy are important. The focus should instead be on increasing legitimacy of international norms.¹² Both theories recognise that there needs to be an incentive, a deterrent or a change in culture and it is argued in this thesis that these things require a consistent level of pressure on states that has to come from the ground in the form of effective, strong and independent workers' organisations.

Despite the continuation of labour standard violations, there is a fragile global consensus in the form of accepting certain labour standards as fundamental. This has to be a positive development signalling that state motivations are a combination of influence and self-interest.¹³ The aim, however, is to gain more than just superficial commitment and place the right amount of pressure on states to solidify support. This involves dispelling the myth of labour standards hurting economic growths and combating the temptation of short-term economic gains. Technical support on the Decent Work Agenda and reforms to national labour administrations need to 'alter the economic payoffs of labour standards compliance in order to be effective'.¹⁴

8.2.1 Rethinking the ILO's Normative Function

Pahuja argues that 'economic orthodoxies' of a time will limit international law, allowing only those rights compatible with said orthodoxies to prevail.¹⁵ This perspective goes

¹¹ Ibid 76

¹² Ibid 78

¹³ Ibid 82

¹⁴ Ibid 136

¹⁵ Sundhya Pahuja, *Decolonising international law: development, economic growth and the politics of universality* (Cambridge University Press 2011) 250

further than simply placing the effectiveness of laws at the mercy of economic liberalisation policies, but in effect claims these rights are made with a function to support them.¹⁶ This inability for international labour rights law to shake such criticism requires it to find a new normative foundation.¹⁷

The truth is a complete overhaul of the dominant economic positions of many states is a task that falls outside the ability of the ILO (an agency less well-known to the public than its younger siblings within the United Nations) and would require not just years of mainstreaming its ideas but a radical shift in political culture. It is for this reason that Langille's approach of reframing the conversation around economic and labour policies, around decency and economic efficiency and the need for reconciliation is significant.¹⁸ This research has argued for such a reconciliation to better tackle the issue of informality and the ILO has shown a similar change in direction.¹⁹ Developing countries have higher incidences of informality, a greater reliance on the job creation aspect of globalisation and incidentally, a greater need for more effective enforcement of labour standards. However, Langille's claim that labour law is 'no longer best conceived as law aimed at protecting employees against superior employer bargaining power in negotiation of contracts of employment' does not mean to suggest inequality no longer plays a role in labour law.²⁰

McDougall accuses Langille's discussion of being one 'that is very much indebted to neoliberalism'.²¹ However, this is an oversimplification of the position as this

¹⁶ Wendy Brown, 'The Most We Can Hope For...': Human Rights and the Politics of Fatalism' (2004) 103 (1-2) *The South Atlantic Quarterly* 451, 461

¹⁷ For example, those who prescribe to the Law & Economics perspectives view labour laws as constraints, viewing acts such as workers organising or collective bargaining as actions that drive up business costs and betray short sighted self interest on the part of workers acting to 'cartelize the labor market' see Richard Posner, 'Some Economics of Labor Law' (1984) 51 *University of Chicago Law Review* 988.

¹⁸ Brian Langille, 'Imagining Post Geneva Consensus Labour Law for Post Washington Consensus' (2010) 31 *Comparative Labour Law and Policy Journal* 523 532

¹⁹ With their adoption of the Decent work agenda – which has great intention but great shortcomings

²⁰ Langille (n 18) 540

²¹ McDougall Pascal McDougall 'Keynes, Sen, and Hayek: Competing Approaches to International Labor Law in the ILO and the WTO, 1994–2008' (2017) 15(1) *Northwestern Journal of Human Rights* 31 57

research has chosen to apply Langille and Sen's ideas to advocate for a more malleable understanding of the purpose of labour law. This was not intended to weaken the moral truths at the core of labour law, but to allow it to be better transposed onto other goals. This requires accepting the ineffectiveness of the traditional paradigm of conventions of ratifications and working with the empirical realities of today's world of work; which means productivity, efficiency and other economic goals cannot become divorced from labour law. However, this research has argued that through Sen's notion of human freedom, the ILO can recapture the political character of labour – focusing on the element of democratic deliberation, inclusive representative and pluralism of interests, voices and capabilities of workers. Sen's Capability Approach focusses on the individuals' freedom to achieve well-being and their capabilities to achieve this. Simply put the approach is about 'what people can do and be'.²² It evaluates and assesses social arrangements based on how much real freedom it can give, concerning itself not just with an individual's beings and doings but the opportunities to realise both. There is an absence of this type of analysis from the ILO's approach to informal workers and their situations. The Capability Approach is not limited to human capital but argues wellbeing can be measured in different ways beyond material means including access such as education and ability to enter the job market. This approach requires addressing the vagueness of terms such as 'decency' as well as holding the function of enabling rights such as freedom of association and the right to collective bargaining to a higher standard. If applied in this manner, the Capability approach is concerned with the opportunity of informal workers to realise lives that have value to them and acknowledges the shortcomings of any structures that fail to represent their voices and needs.

²² Amartya Sen, *Inequality Re-examined* (Clarendon Press 1992) 48; for more on operationalising Sen's Approach please see Sakiko Fukuda-Parr, 'The Human Development Paradigm: Operationalizing Sen's Ideas on Capabilities' (2003) 9(2/3) *Feminist Economics* 301; Mozaffar Qizilbash, 'Amartya Sen's capability view: insightful sketch or distorted picture?', in Flavio Comim, Mozaffar Qizilbash and Sabina Alkire (eds) *The Capability Approach. Concepts, Measures and Applications* (Cambridge University Press 2008) 54

8.2.2. Rethinking Social Justice – a more effective commitment

The Capability Approach can be a natural fit for the ILO as it has already attempted to engage in this type of evaluation exercise with the Decent Work Agenda – its policy design based around achieving and measuring decent work. The Decent Work Agenda took a multifaceted approach, examining not just work in terms of wages, but the realities and factors surrounding; the conditions of work, the relationship between workers and employers, the function of labour administrations, the role of states and so on. Furthermore, the organisation developed its policies with a view to establish the conditions essential to bringing about decent work not just in the context of the world of work and those participating in it but also beyond that, in terms of job creation, employment policy and poverty reduction.

The problem is that human development is a huge agenda, including, health, trade, environment, economics and other policies. It is the fact that labour is more interrelated to other policy areas that states expect this holistic approach to multifaceted issues such as informality. However, overlapping concerns should not come at the expense of the 'labour' element in labour law which needs to remain at the centre of it. This is the downfall of the Decent Work Agenda – an overambitious framework, going beyond holistic overview and going so far into other territories of development policies without a compass.

Human freedom language has more positive and grounded connotations than the 'decency' in the Decent work agenda, and it can also be argued, is less paternalistic in its execution. The current approach to transitioning informal workers out of the informal economy and into the formal one disempowers informal workers. It portrays these actors as in need of rescue and fails to consider their agency. The concept of

human freedom is 'not confined to preventing unfairness in negotiation of contracts' but 'covers all productive activity and places labour law, conceived as the law which regulates the deployment of human capital, at the centre of our policy agenda and central to achieving both our instrumental and intrinsic values'.²³

Human capital and human freedom may be related ideas but are also separate since 'human beings are not merely the means of production, also the end of the exercise'.²⁴ On its own, Sen argues human capital cannot be a satisfactory measure of well-being, an idea that is expressed by the ILO in terms of 'decent work' as well as the maxim 'labour is not a commodity'. Langille states if we adopt this thinking, then labour law then becomes a subject which 'structures the mobilisation and deployment of human capital' and its 'motivation is both the instrumental and intermediate end of productivity and the intrinsic and ultimate ends of maximizing of human freedom'.²⁵

The problem with Langille and Sen's idea of human freedom is that labour lawyers resist it because the term freedom is associated with the what labour law aims to remedy – too much freedom of contract. That is why the term empowerment or emancipation as preferred by Adelle Blackett may be more beneficial.²⁶ This signifies more than simply taking power away from employers (remedying the inequality of bargaining power by placing limits on their power) but about empowering workers (through the promotion of enabling rights). It is important that a clear theory and normative narrative is present in the camp opposite to economic liberalism. Langille is right in saying that we need something beyond being critical of how things are, we need what will guide us on how things should be.²⁷

²³ Brian Langille, 'Human Freedom and Human Capital: Re-imaging Labour Law for Development in Tonia Novitz and David Mangan (eds) *The Role of Labour Standards In Development: From Theory To Sustainable Practice?* (Oxford University Press 2011) 114

²⁴ Amartya Sen, *Development as Freedom* (Knopf 1999)

²⁵ Langille (n 23) 114

²⁶ Adelle Blackett 'Regulating Decent Work for Domestic Workers' (2011) 23 Can. J. Women & L. 1

²⁷ Langille (n 23) 104

The traditional Kahn-Freund and Sinzheimer account of labour law tried to formulate an idea in terms of justice, which has opened labour law up to the complex question of – what kind of justice are we after? This has complicated the debate where labour lawyers are forced to look for the answer in different places such as the human rights framework. What we need is moral ammunition as Langille suggested however Alkire has rightly stated that ‘theories that are not user-friendly do not spread’.²⁸ This was in reference to the often answers focussed approach of international organisations such as World Bank and the ILO during the 1970’s, where the definition of ‘basic needs’ was misinterpreted and commodities overemphasised.²⁹ In the process of this, the originator of the approach, Streeten, found what he just identified as simple questions to consider, was answered by institutions in a way that met their own goals rather than as intended.³⁰ However, the truth there is simply not enough patience for purely speculative theories in a field like development or labour law.

Human freedom is helpful because it can make sense of concepts like Decent Work, human dignity and social justice in the context of labour law. It also addresses the issue of informal and formal workers as it considers diversity and does not ‘lump’ all workers together as being the same. By allowing for this formal - informal economy distinction, it can address the competition between the two and difficult in organisation and inequalities. If we are brave enough to stray beyond our normative box, to use another ‘normative yardstick’ one given to us by Langille and Sen, then we can redefine a few aspects of labour law to be stronger. We can ask how do we achieve this human freedom in the context of work and start to focus less on the theoretical application but finally commit to a practical one.

²⁸ Sabina Alkire, ‘Why the Capability Approach?’ *Journal of Human Development* (2005) 6(1) 116

²⁹ *Ibid*

³⁰ Paul Streeten (‘Basic needs: some unsettled questions’ (1984) 12 (9) *World Development* 973

8.2.3. Re-invigorating the function of the ILO's Tripartite Structure

Director-General Guy Ryder, in an address on Social Justice Day 2013, reiterated the common social justice ideal Albert Thomas spoke of in 1919; expressing the ILO's 'commitment to building a culture of social dialogue', which will help 'generate just, balanced and inclusive policies'.³¹ However, despite recognising social dialogue's importance, it cannot be claimed the ILO is effectively utilising its social dialogue pillar as the tool best suited to truly address global inequality and injustice in an age where the world of work is once more 'at the centre of discontent'.³² This research's assessment of the informal worker shaped hole in the ILO's tripartite structure illustrates the existence of an adverse perception of informal workers as being incapable of self-organising and a naïve understanding of tensions between the formal and the informal sector.

Workers voices are important in balancing out the powerful voices and interests of governments and other non-state actors and bring them in line with the priorities of the labour force on the ground. Worker participation alongside that of employers 'adds a connection to economic reality that cannot be reproduced in an organization where governments are the only spokespersons'.³³ The reality of the modern world of work shown here is a large, lasting informal economy excluded from the tripartite discussions and a formal sector in decline in terms of power and influence. The vision for the organisation upon its founding, one of 'universal social and industrial democracy', remains. However, while there continues to be an unequal application of the fundamental rights of formal and informal workers and evidence of limits to freedom of

³¹ Guy Ryder, 'Message by Guy Ryder, Director-General International Labour Organization on World day of Social Justice ' (20 February 2013) <http://www.youtube.com/watch?feature=player_embedded&v=GSAqxN5-Ggo> accessed 15 May 2014

³² Ibid

³³ Gerry Rodgers, Eddy Lee, Lee Swepston,, *The International Labour Organization and the Quest for Social Justice, 1919-2009* (ILO, 2009) 15

association and civil political rights of workers worldwide a reassessment of the situation will be required.³⁴

Despite this concern, writers such as Blackett and Sheppard do not dismiss the value of collective bargaining as it rooted in the notions of 'social justice, egalitarianism, democratic participation and freedom, holds great potential to enhance equality'.³⁵ Neither does this thesis. However, in order to 'fulfil the equality mandate, collective bargaining must be grounded in a demonstrable commitment on the part of social partners to promote equality, a commitment evident not only provisions of agreements but also in how 'representation' itself is constructed, and how bargaining takes place'.³⁶ This is why this research focussed on the significance of these enabling rights but was critical of the way they are being expressed and promoted, further exacerbating inequality.

8.2.4. Representation & Re-Legitimation of the ILO's Mandate

The ILO's once saw itself as being on the 'same plane as the United Nations as the economic counterpart of that world political body' yet today despite its work it is nowhere near as recognised nor is its important mandate 'everyday on the news'.³⁷ According to

³⁴ Norman F. Duffy, 'Organizational Growth and Goal Structure: The Case of the ILO' (1972) 26 (3) International Organization 479, 482; Also see recent comments by Sharan Burrow, ITUC General Secretary, that the employers group have been '*holding the ILO system to ransom, trying to discard more than 50 years of one of the most fundamental human rights*' aiming to remove '*any real meaning*' from the ILO's standards (ITUC, 'Employers Attack on ILO System and the Rule of Law' (10th June 2014) < <http://www.ituc-csi.org/employers-attack-on-ilo-system-and>> <http://www.ituc-csi.org/new-legal-report-right-to-strike> accessed 01 July 2014)

³⁵ Adelle Blackett and Colleen Sheppard, 'Collective Bargaining and Equality: Making Connections' (2003) 142 *Int'l Labour Rev* 419 420

³⁶ Ibid

³⁷ ILO, 'Committee on Freedom of Association: Protecting rights, saving lives', *Governing Body (ILO Press Release 26th March 2014)* <http://www.ilo.org/global/about-the-ilo/activities/all/WCMS_239682/lang--en/index.htm> accessed 10 July 2014

the organisation, the single most important principle defining the ILO's work is 'labour is not a commodity', expressing the necessity of human dignity and respect in the world of work, not viewing labour just in terms of its economic value but as an extension of the human being.³⁸ This view requires a commitment to the idea of all workers' and their agency, who through the expression of the wider principles of inclusion than just a limited right to freedom of association are capable of promoting and protecting their interests. Yet, there is a continuing failure to properly investigate the political power of informal workers and to put in place a system that effectively encourages their participation in standard setting, locally, nationally and internationally.³⁹

Concerning social justice, there is a need to ask the ILO the same questions it has been asking international financial institutions - 'is the reference ultimately an essentially symbolic, decorative feature of the Preamble'?⁴⁰ The ILO is constantly struggling with the belief that out of a well-run economy comes social justice, a view which relegates social justice to a happy consequence of economic policies instead of the result of 'free and organised confrontation of the interests held by various stakeholders'.⁴¹ As mentioned earlier, Banks argues that 'complex visions of social justice' need more than one approach to gain global support successfully.⁴² The ILO's approach has unfortunately been rooted in an understanding of a world that fails to identify and promote the agency of informal actors. The inability to ensure effective organisation and involvement of workers globally, indicates that the ILO's vision of social justice, present in its constitutional foundations, has somewhere along the way lost its meaning.

³⁸ The Declaration of Philadelphia 1944 Preamble

³⁹ Ilda Lindell, *Africa's Informal Workers: Collective Agency, Alliances and Transnational Organizing in Urban Africa* (Africa Now) (Zed books 2010) 1

⁴⁰ Francis Maupain, *The Future of the International Labour Organization* (Hart, 2013) 253

⁴¹ Ibid 254

⁴² Kevin Banks 'Trade, Labor and International Governance: An Inquiry into the Potential Effectiveness of the New International Labor Law' (2011) 32 Berkeley J. Emp. & Lab. L. 45 51

The effort it took to conceptualise, measure and understand the informal economy may explain why the ILO believes the Decent Work Agenda must be so wide in scope in order to address these complexities. However, as Burchell and Sehnbruch argue, - in the process of attempting to capture all aspects of work and work relationships using this framework, the Decent Work Agenda was 'born out of conceptual vacuum'.⁴³ Furthermore, without 'a theoretical anchor' this approach has been failing to 'challenge established theoretical labour market models that form the basis of economic and development thinking on employment issues'.⁴⁴ These models are not necessarily supportive of labour organisations in general and view tripartism as a conspiracy against good decision-making, with views on economic and social policies the organisation's constitution aims to dispel.⁴⁵ This is why this research aims to get back down to the basics of labour movements, organisations and laws – the pillars which gave the ILO its mandate and legitimacy and can allow it succeed.

8.3. 'Labour': Movements, Organisations & Laws – Working towards A More Inclusive Future

The urgency of the informal economy is growing and as is the resistance to workers' organisations aimed to represent and protect the interests of workers.⁴⁶ The ILO has taken action to tackle the issue informalisation by adopting Recommendation No. 204

⁴³ Brendan Burchell, Kirsten Sehnbruch, Nurjk Agloni and Agnieszka Piasna 'Human Development and Decent Work: Why Some Concepts Succeed and Others Fail to Impact the Development Agenda' Centre for Development Thinking: Development out of the Box, Working papers No.5/2013 1, 12 < http://www.dev-out.cl/sites/default/files/Working%20Paper%20DEV-OUT_%20HDI.pdf> accessed 20 June 2014

⁴⁴ Ibid 12

⁴⁵ For more details on the discussion regarding the conflict between labour standards and economic theories on efficiency see Guy Davidov, 'The (Changing?) Idea of Labour Law' (2007) 146(3-4) International Labour Review 311

⁴⁶ Richard B. Freeman and Morris Kleiner, 'Do Unions Make Enterprises Insolvent?' (1999) 52 (4) Industrial and Labor Relations Review 510

on the transition from the informal economy to the formal economy. The ILO boasts the universal consensus of Recommendation No. 204, however, the move to adopt an arguably weaker recommendation rather than a convention indicates a lack of true commitment on the part of the tripartite constituents to address the issue of informality. Despite this, Paragraph 34 of the Recommendation is of particular significance and states the following;

‘members should consult with and promote active participation of the most representative employers’ and workers’ organizations, which should include in their rank, according to national practice, representatives of membership-based representative organizations of workers and economic units in the informal economy” when “designing, implementing and evaluating policies and programmes of relevance to the informal economy’.⁴⁷

It is the ideas held within this paragraph that this research hopes to hold the ILO to account to, outlining ways to ensure a stronger commitment than ‘members should’. The ILO recognises that effective social dialogue improves the quality and impact of policy, it prevents adversarial attitudes and self-interest through active empowerment and representation.⁴⁸ However, this research has shown why consultation and active participation of informal actors is crucial and why without their inclusion, all policies designed, implemented and evaluated are set out to be less effective and fail to address underlying tensions between informal actors and both the employers and workers organisations in formal sectors. Overall, it is recommended the ILO return to focussing on the word ‘labour’ and all that it entails; for despite its critique, this thesis has shown great belief in the ILO, a faith it hopes the organisation can in turn find in the capabilities of its many overlooked constituents currently residing in the informal economy.

⁴⁷ ILO Recommendation R204: Transition from the Informal to the Formal Economy Recommendation (Recommendation concerning the transition from the informal to the formal economy) (104th ILC Session Geneva 12 June 2015)

⁴⁸ ILO, *National Tripartite Social Dialogue: An ILO guide for improved governance* (ILO 2013)

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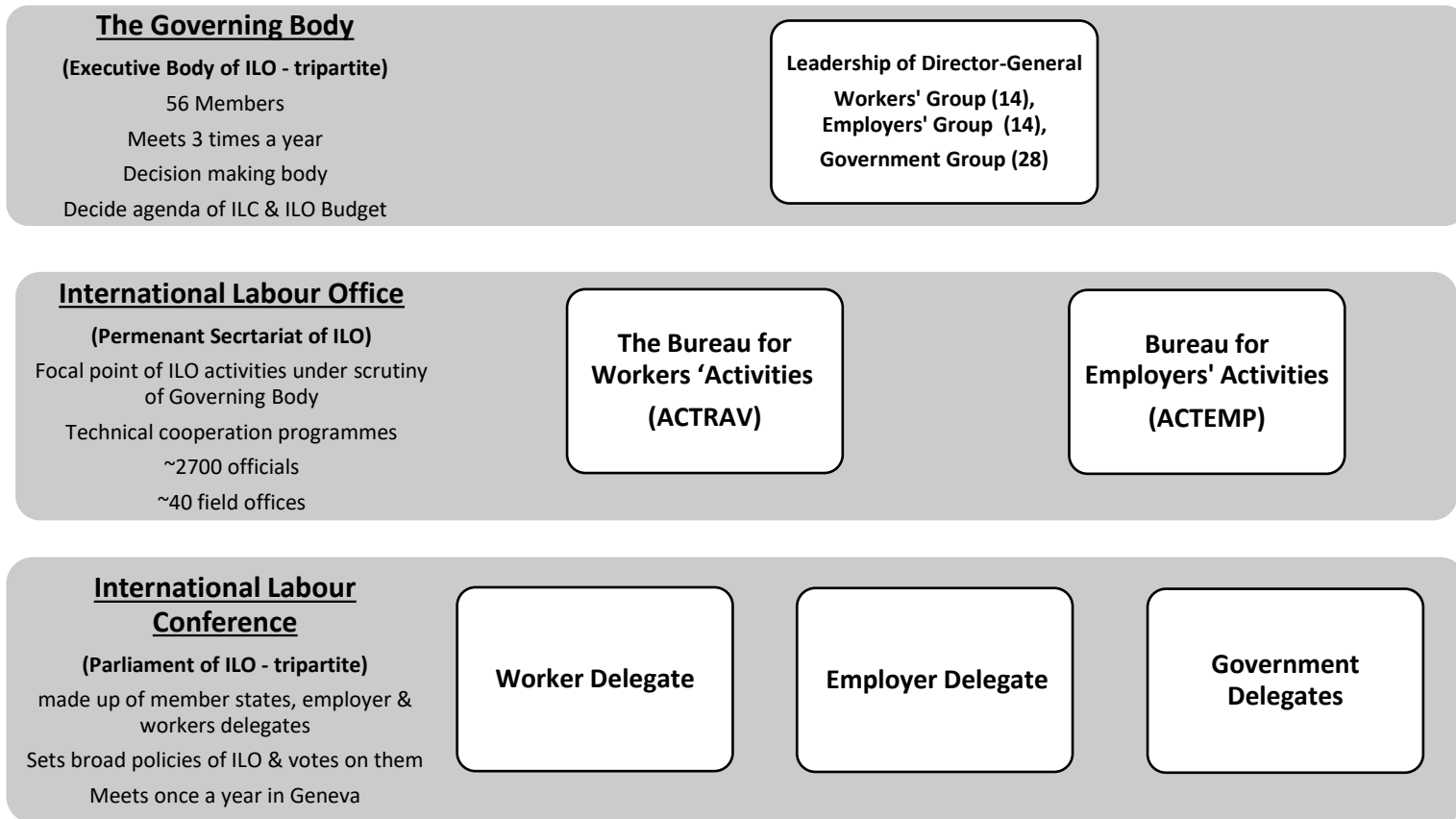
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Appendices

APPENDIX 1: Diagram showing the International Labour Organisation's Tripartite Structure



APPENDIX 2: Letter from Somaliland Government to the ILO



SOMALILAND GOVERNMENT

Date: 10th May 2019

To: [REDACTED]

ILO Country Director

Addis Ababa, Ethiopia

CC: President of the Republic of Somaliland

[REDACTED]

United Nations Development Programme (UNDP)

United Nations Mission in Somaliland (UNSOM)

Donors- EU, DANIDA, DFID, SIDA, NORWAY, SWITZERLAND

Re: permanent termination of International Labour Office (ILO) operations in Somaliland

Reference is made to the letter sent to you on **13th April 2019** by government of Somaliland which you acknowledged its receipt on **16th April 2019** and consultations with your office during the last one year, with respect to the suspension of ILO's activities in Somaliland jurisdiction and terms and conditions of engagement with government, the Somaliland government has unilaterally and unequivocally decided to terminate ILO's activities, contracts and partnership with all institutions in Somaliland.

The outcome of this decision is based on complete disregard of government decisions and correspondences by ILO which include inability to respond government concerns in time, lack of cooperation with relevant line ministries, lack of operational achievements in terms of employment creation as per the '**AID FLOW Report**' generated by the Somaliland ministry of Planning, breach of conditions and provisions set out in the government joint declaration and previous suspension of your operations in Somaliland by opening of your office in Hargeisa and

staffing against the advice of government and conduct of ILO staff to extensively lobby within government institutions beyond the boundaries of UN privileges and protocols.

The termination will be in effect on the date signed by the line ministries. Somaliland regrets that ILO has been unresponsive and lacks the minimum responsibilities to overcome poor decision and judgement within its internal circles.

We look forward your office should comply the termination requirements, failure to comply with this decision may result the government to take any other appropriate action that the judicial system may deem necessary.

Yours Sincerely

Hon. Hinda Jama Hersi
Minister of Employment

Hon. Moham
Minister of Interior Affairs and Security

Hon. Abdirashid Duale Qambi
Minister of Public Works

Hon. Abdilahi Abokor Osman
Minister of Transportation and Roads Development